TAKING CARE OF FEDERAL LAW

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INTRODUCTION

ARTICLE II of the Constitution vests the "executive power" in the President[1] and directs the President to "take Care that the Laws be

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[1] U.S. Const. art. II, § 3.

faithfully executed."[2] But do these provisions mean that *only* the President may execute federal law? Two lines of Supreme Court precedent suggest conflicting answers to that question. In several prominent separation-of-powers cases, the Court has suggested that only the President may execute federal law: "The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."[3] Therefore, the Court has reasoned, Congress may not create private rights of action that allow nonexecutive actors to sue and attempt to vindicate the "public interest in . . . compliance with the law."[4]

Yet in another set of cases, the Court has suggested that the enforcement of federal law should be a shared enterprise not exclusive to the President. Specifically, the Court has gone out of its way to preserve the states' ability to enforce federal law, repeatedly invoking the presumption "that Congress does not cavalierly pre-empt state-law causes of action."[5] Indeed, the Court occasionally reasons that state law is not preempted *because* "state law . . . simply seeks to enforce" federal law.[6] What is striking about these cases is that they do not engage with the potentially troubling separation-of-powers implications that the Court raises in other contexts where Congress permits nonexecutive actors to enforce federal law. More than that, the preemption cases rest on a fundamentally different understanding of what the execution of federal law should look like. The preemption cases are driven by the intuition that the enforcement of federal law should occasionally be a shared enterprise, and that it is sometimes desirable to limit the President's enforcement discretion. Indeed, the Court has championed the states' ability to challenge the President's assessment of what constitutes the "effective enforcement" of federal law.[7]

In light of the disconnect between these two lines of precedent, this Article questions whether Article II should be understood to require the President alone to execute federal law. Specifically, it argues that Article II does not require the President alone to vindicate the public's shared interest in the enforcement of federal statutes. Many of the cases ad-

[2] Id. § 1.
[3] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010).
[4] Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992).
[5] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).
[6] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1985 (2011).
[7] See id. at 1984 (finding that a state law designed to ensure effective enforcement of federal law was not preempted).

dressing this issue are concerned with questions of standing, specifically with whether there are limits on Congress's power to authorize private citizens to sue to enforce federal law. Standing doctrine requires a litigant to show she has suffered an "injury in fact" before a federal court will hear her claim, and while many scholars have analyzed when a statutory violation constitutes an injury in fact for purposes of standing,[8] the relevant literature has failed to appreciate how standing doctrine is derived in part from the Take Care Clause and Article II.[9] This omission has led the existing critiques to overlook cases and statutes where nonexecutive actors routinely execute federal law.[10]

By highlighting the Article II origins of standing doctrine, this Article calls attention to a different set of sources not considered in the literature on standing. And these sources illustrate that one major premise of standing doctrine—that only the President vindicates the public's shared interest in the enforcement of federal law—is false. In particular, recent preemption cases and several different federal statutes show that nonexecutive actors routinely execute federal law. These sources therefore provide a new and powerful reason to question both the Court's premise that the President alone must oversee the public's shared interest in the enforcement of federal statutes, and its subsequent conclusion that a litigant may not have standing to raise a claim for violation of a federal statute based on a congressionally created private right of action. It is

[8] These criticisms focus on several aspects of standing doctrine, such as the normativity of the injury-in-fact requirement, as well as the Court's reading of its prior standing cases, which addressed whether individuals had standing to raise constitutional, rather than statutory, claims. See, e.g., Cass R. Sunstein, What's Standing after *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 235–36 (1992) (developing these criticisms and noting others); see also Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 463–64 (2008); Gene R. Nichol, Jr., Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1141, 1154–55 (1993); Edward Sherman, "No Injury" Plaintiffs and Standing, 82 Geo. Wash. L. Rev. 834, 836–37 (2014).

[9] Tara Grove has argued that the Article II origins of standing doctrine explain various standing rules, including that Congress lacks standing to represent the United States in federal court. See Tara Leigh Grove, Standing Outside of Article III, 162 U. Pa. L. Rev. 1311, 1314–15 (2014). She does not, however, use the Article II origins of the doctrine to critique the part of standing doctrine discussed in this Article.

[10] See, e.g., Ann Woolhandler & Michael G. Collins, State Standing, 81 Va. L. Rev. 387, 392 (1995) ("When [the State] prosecutes criminal and civil actions under its own laws in its own courts, no issue ordinarily arises as to its standing. But when a state litigates in the courts of another state or in the courts of the federal government, the litigating state's role becomes problematic.").

not generally a virtue for a constitutional interpretation to stray so far from actual practice.[11] Now is also an ideal time to reexamine whether Article II limits Congress's power to create private rights of action because the Court has recently shown a renewed interest in the question,[12] and some of the best insights into how that question should be resolved come from recently decided cases.

Unpacking the basis of standing doctrine also reveals curious and thus-far unexplored similarities with the common law doctrine of desuetude, which allowed courts to abrogate outdated statutes. Understanding the similarities between these two doctrines provides both new justifications and new critiques of some aspects of standing doctrine and, more generally, of executive enforcement discretion.

Finally, viewing preemption cases through the lens of when federal law enforcement may be a shared enterprise offers a new perspective on the meaning of these cases. Most writing about the Court's recent preemption decisions, such as *Arizona v. United States*,[13] has addressed what the decisions mean for federalism. Scholars have emphasized that *Arizona* is the exception from the perspective of federalism—the President's enforcement decisions do not typically preclude states from enforcing overlapping or related state laws in ways that differ from how the President enforces federal law.[14] Yet little attention has been paid to

[11] See Richard H. Fallon, Jr., Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence, 86 N.C. L. Rev. 1107, 1112 (2008) [hereinafter Fallon, Constitutional Precedent]; Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Calif. L. Rev. 535, 540 (1999) [hereinafter Fallon, How to Choose] ("Few, if any, constitutional theories are purely normative. Most, if not all, claim to fit or explain what they characterize as the most fundamental features of the constitutional order."); Richard A. Primus, When Should Original Meanings Matter?, 107 Mich. L. Rev. 165, 211–13 (2008).

[12] See Edwards v. First Am. Corp., 610 F.3d 514, 517 (9th Cir. 2010), cert. granted sub nom. First Am. Fin. Corp. v. Edwards, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536, 2537 (2012); U.S. Supreme Court Order List, 575 U.S. 2 (Apr. 27, 2015), available at http://www.supremecourt.gov/orders/courtorders/042715zor_9o6b.pdf (granting certiorari in *Spokeo, Inc. v. Robins*); infra text accompanying notes 51–65.

[13] 132 S. Ct. 2492, 2497–98 (2012).

[14] See, e.g., Daniel Abebe & Aziz Z. Huq, Foreign Affairs Federalism: A Revisionist Approach, 66 Vand. L. Rev. 723, 736 (2013); Adam B. Cox, Enforcement Redundancy and the Future of Immigration Law, 2012 Sup. Ct. Rev. 31, 31–32; Stella Burch Elias, The New Immigration Federalism, 74 Ohio St. L.J. 703, 705–07 (2013); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, Immigration Federalism: A Reappraisal, 88 N.Y.U. L. Rev. 2074, 2076–77 (2013); Roderick M. Hills, Jr., *Arizona v. United States*: The Unitary Executive's Enforcement Discretion as a Limit on Federalism, 2012 Cato Sup. Ct. Rev. 189, 190; Catherine Y. Kim, Immigration Separation of Powers and the President's Power to Preempt, 90

what this understanding of federalism means for separation of powers—to the extent scholars have analyzed *Arizona*'s separation-of-powers implications, their analyses have only concerned whether the President has the power to decline to enforce federal statutes.[15] The fact that scholars view decisions like *Arizona* as aberrational suggests the general rule is that nonexecutive actors may enforce federal law and that the execution of federal law is more of a shared enterprise than the Court's separation-of-powers cases suggest. The preemption cases show that the President does not, and sometimes should not, have unfettered discretion to decide when the public has a shared interest in the enforcement of federal law.[16]

The Article proceeds in four parts. Part I will introduce the principle animating several of the Court's separation-of-powers cases—namely, that Article II requires the President alone to execute federal law. It will focus on the Court's claim that because executing federal law includes overseeing the public's shared interest in federal law enforcement, the President must be the one to initiate suits designed to vindicate that interest. Part II will then highlight how several preemption cases suggest that nonexecutive actors may likewise vindicate the public interest in seeing federal law enforced. In particular, the Court has championed the

Notre Dame L. Rev. 691, 695 (2014); Nancy Morawetz & Natasha Fernandez-Silber, Immigration Law and the Myth of Comprehensive Registration, 48 U.C. Davis L. Rev. 141, 144–45 (2014).

[15] See, e.g., Robert J. Delahunty & John C. Yoo, Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause, 91 Tex. L. Rev. 781, 794 (2013); Jeffrey A. Love & Arpit K. Garg, Presidential Inaction and the Separation of Powers, 112 Mich. L. Rev. 1195, 1216 (2014); Saikrishna Bangalore Prakash, Response, The Statutory Nonenforcement Power, 91 Tex. L. Rev. See Also 115, 115–16 (2013); Zachary S. Price, Enforcement Discretion and Executive Duty, 67 Vand. L. Rev. 671, 684–85 (2014); Shoba Sivaprasad Wadhia, Response, In Defense of DACA, Deferred Action, and the DREAM Act, 91 Tex. L. Rev. See Also 59, 64–65 (2013).

[16] The preemption cases also reveal a more complicated variant on traditional depictions of federalism. The Court has typically invoked the presumption against preemption in cases where states seek to enact laws that differ from federal law or to adopt laws sanctioning conduct that is permissible under federal law. More recent cases, however, have applied the presumption against preemption in cases where states seek to enact the same law as the federal government but choose to enforce the law in a different way than the federal government. These cases suggest that the traditional benefits of federalism, such as greater regulatory diversity and more local decision making, may be captured even where there is no conceptual space between what state and federal law proscribe. Margaret Lemos has argued that federal statutes permitting state attorneys general to enforce federal laws in federal court yield many of the traditional federalism benefits. Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 764–65 (2011). These benefits, however, also occur where states adopt laws that are coextensive with federal law in order to enforce federal law.

states' ability to vindicate this interest, and several statutory schemes expressly permit states to enforce federal law. These cases underscore the benefits that sound in federalism in having the states enforce federal laws in ways that differ from those of the President. Yet the preemption cases make no mention of any troubling separation-of-powers implications, even though the cases simultaneously celebrate the states' ability to limit the President's enforcement discretion.

Part III will consider whether states might be permitted to execute federal law even when private litigants are not. The text of Article II does not suggest Congress can authorize this distinction, since both state and private execution of federal law might limit the President's discretion. Part III will also reject the notion that principles of federalism would justify a bright-line distinction between states and private litigants. Federalism describes the virtues of limiting the ability of the federal government to decide an issue—here, how federal law should be executed—for the entire polity. The very idea that federalism has value in the context of vindicating the public's shared interest in the enforcement of federal law is at odds with the separation-of-powers cases, which assert that something important is lost when someone other than the President executes federal law. Moreover, once a constitutional principle such as federalism provides a justification for Congress to authorize nonexecutive actors to enforce federal law, other constitutional principles, such as the rule of law, should similarly suffice as a justification for Congress to authorize other nonexecutive actors to enforce federal law.

Finally, Part IV will argue that the Constitution permits Congress to authorize private rights of action allowing private individuals to enforce federal civil statutes. The Court's rigid interpretation of Article II in separation-of-powers cases has thin constitutional foundations and would undermine myriad arrangements where nonexecutive actors execute federal law. It is also motivated by questionable assumptions about the legislative process and whether the President is actually accountable for enforcement decisions, and it runs counter to commonly held views about how and when presidents may decline to enforce federal statutes. For these reasons, Article II should not be understood to limit Congress's ability to authorize private individuals to enforce federal civil statutes; independent constitutional provisions, however, may limit whether nonexecutive actors may enforce criminal laws.

I. THE EXECUTION OF FEDERAL LAW

A. The Take Care Clause as a Limit on Congress's Power

The Constitution provides that the President "shall take Care that the Laws be faithfully executed."[17] This provision raises a host of challenging doctrinal questions: Must the President enforce statutes he believes are constitutionally suspect?[18] May a President decline to enforce a statute on policy grounds?[19] Does the Clause require the President alone to enforce federal law?[20] This last question has played a significant role in several prominent separation-of-powers cases, including *Lujan v. Defenders of Wildlife*.[21] *Lujan* involved a challenge to a regulation interpreting several Endangered Species Act ("ESA") procedural requirements to apply only to actions within the United States. Various organizations dedicated to environmental causes sought a declaratory judgment that the regulation was contrary to the ESA.[22]

The Court held that the plaintiffs lacked standing to pursue this claim. Before a federal court would hear a claim on its merits, a litigant must have established, among other things, an "injury in fact" fairly traceable to the violation she alleged.[23] In concluding the environmental plaintiffs did not have standing, *Lujan* addresses the relevance of the ESA's citizen-suit provision, which states that "any person may commence a civil

[17] U.S. Const. art. II, § 3.

[18] E.g., Daniel J. Meltzer, Executive Defense of Congressional Acts, 61 Duke L.J. 1183, 1193–96 & nn.42–59 (2012).

[19] E.g., Price, supra note 15, at 674–75.

[20] I use the term "President" or "executive" to refer collectively to agencies and actors under the President's control. See Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47, 49 (2006) ("Presidential control is a 'they,' not an 'it.'" (footnote omitted)). The President is an "institutional actor" composed of the President, White House officials, agency officials, policy advisors, and staff in the Executive Office of the President. See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2338 (2001).

[21] 504 U.S. 555, 577–78 (1992). *Allen v. Wright* earlier mentioned the Take Care Clause in passing, but did not tie it to a specific doctrinal rule. 468 U.S. 737, 761 (1984) (stating that separation of powers and equitable principles "counsel[] against recognizing standing" in a suit requesting broad injunctive relief against a federal agency, because "[t]he Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed'").

[22] *Lujan*, 504 U.S. at 558–59 (citing Interagency Cooperation—Endangered Species Act of 1973 Rule, 51 Fed. Reg. 19926 (June 3, 1986) (codified at 50 C.F.R. § 402.01 (2012)).

[23] Id. at 560.

suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."[24] The Court concluded that the citizen-suit provision did not provide the litigants with standing.[25] The citizen-suit provision, the Court explained, purported to authorize suits that aired a "generally available grievance about government," specifically the "citizen's interest in [the] proper application of the Constitution and laws."[26] And Congress could not, *Lujan* reasoned, allow individuals to raise those general claims in federal court.

The reasoning behind this conclusion turns on the relationship between Article II and Article III. "[U]nder Article III," *Lujan* wrote, courts "adjudicate cases and controversies as to claims of infringement of individual rights."[27] By contrast, "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[28] *Lujan* suggested that Article III's grant of jurisdiction to the federal courts should be read in light of Article II's grant of power to the executive, and that the Take Care Clause specifies that only the President may safeguard the public's shared interest in the enforcement of federal law:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[29]

Lujan did not alter the rule that private plaintiffs with Article III standing can initiate a civil suit to enforce federal law,[30] but it did hold that there is some limit on Congress's ability to confer such standing on private individuals. *Lujan* identified one such limit in the relationship between Article II and Article III: Because the Take Care Clause requires the President to vindicate the "undifferentiated public interest" in com-

[24] Id. at 572 (quoting 16 U.S.C. § 1540(g) (2012)).
[25] Id. at 573–74.
[26] Id.
[27] Id. at 577 (quoting Stark v. Wickard, 321 U.S. 288, 310 (1944)).
[28] Id. at 576.
[29] Id. at 577 (quoting U.S. Const. art. II, § 3).
[30] Id. at 578.

pliance with the law, Congress may not authorize a nonexecutive actor to advance that interest in federal court.[31]

Other cases have echoed *Lujan*'s understanding that the Take Care Clause requires the President alone to execute federal law. For example, *Printz v. United States* invalidated a provision of the Brady Act that required state officers to conduct background checks on prospective firearms purchasers.[32] The Court held this provision unconstitutional for two reasons. The first, not relevant here, was that Congress does not have power under Article I to require state officers to administer a federal program,[33] That is, the Court held that principles of federalism prohibit Congress from impressing state executive officers into enforcing federal law. The second, based more on the separation of powers, was that "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints . . . , Art. II, § 2."[34] The Brady Act was unconstitutional, the Court reasoned, because it "effectively transfers this responsibility to thousands of [state officers] in the 50 States, who are left to implement the program without meaningful Presidential control."[35] Although it is unclear whether the separation-of-powers reasoning by itself would have invalidated the Act[36]—the separation-of-powers reasoning takes up less than one tenth of the pages in the U.S. Reports devoted to the federalism reasoning—the separation-of-powers discussion had the support of five Justices.[37]

Subsequent cases have undermined, to some degree, several of *Lujan*'s statements about standing doctrine, specifically those regarding whether and when generalized grievances may constitute an injury in fact.[38] For example, *Vermont Agency of Natural Resources v. United*

[31] Id. at 577.
[32] 521 U.S. 898, 933 (1997).
[33] Id. at 925, 933.
[34] Id. at 922.
[35] Id.
[36] See, e.g., Evan H. Caminker, Printz, State Sovereignty, and the Limits of Formalism, 1997 Sup. Ct. Rev. 199, 201.
[37] *Printz*, 521 U.S. at 922.
[38] See, e.g., Richard H. Fallon, Jr., The Fragmentation of Standing, 93 Tex. L. Rev. 1061, 1088–89 (2015) ("*Massachusetts* thus appears to ratify an otherwise largely opaque doctrinal state of affairs in which the demands for injury in fact . . . mean one thing when Congress purported to confer standing and something different when Congress has not.").

States ex rel. Stevens held that a plaintiff bringing suit under the qui tam provision of the False Claims Acts ("FCA") had Article III standing.[39] The qui tam provision permits private parties otherwise unconnected to a case to enforce the FCA's prohibition on providing false or fraudulent information in connection with a government claim,[40] and rewards victorious plaintiffs with a monetary award from the offending party.[41] Similarly, *FEC v. Akins* held that a group of private plaintiffs had standing to challenge the decision by the Federal Election Commission ("FEC") that the American Israel Public Affairs Committee was not subject to various election-spending reporting and disclosure requirements under the Federal Election Campaign Act.[42] The plaintiffs maintained that the FEC's determination deprived them of information relevant to how they cast their votes, and the Court held these allegations sufficient to establish an injury for purposes of standing.[43] *Akins* relied in part on Congress's decision to authorize suits by "[a]ny party aggrieved by an order of the [FEC]."[44] Finally, *Massachusetts v. EPA* held that Massachusetts had standing to challenge EPA's failure to regulate greenhouse gasses.[45] Although "climate-change risks are 'widely shared,'" that "[did] not minimize Massachusetts' interest"[46]—"Congress ha[d] . . . authorized this type of challenge to EPA action."[47]

Notwithstanding these developments in standing doctrine, it is still important to understand the Court's interpretation of the Take Care Clause in *Lujan*. To begin with, the current state of standing doctrine and the meaning of *Lujan* are still less than clear. The subsequent cases discussed above did not clearly curtail *Lujan*'s suggestion that the Take Care Clause limits Congress's ability to confer standing on private parties. *Akins*, for example, purported to distinguish the plaintiffs' claim from those that seek to generally execute federal law: *Akins* acknowledged *Lujan* while noting that the *Akins*' plaintiffs' injury was not the

[39] 529 U.S. 765, 787–88 (2000).
[40] 31 U.S.C. § 3730(b)(1) (2012).
[41] Id. § 3730(d)(1)–(2).
[42] 524 U.S. 11, 13–14 (1998).
[43] Id. at 19–21.
[44] 52 U.S.C.A. § 30109(a)(8)(A) (West 2014).
[45] 549 U.S. 497 (2007).
[46] Id. at 522.
[47] Id. at 516 (citing 42 U.S.C. § 7607(b)(1)).

"common concern for obedience to law."[48] *Massachusetts v. EPA*, on the other hand, did not even mention *Lujan*'s interpretation of Article II.[49]

Other developments suggest the arc of the case law is not entirely against a broad reading of *Lujan*.[50] In 2011, the Court granted certiorari in *First American Corp. v. Edwards*, to decide whether a litigant had standing to sue for a violation of the Real Estate Settlement Procedures Act ("RESPA").[51] RESPA prohibits title insurers from receiving kickbacks, authorizing their clients to sue for three times the amount of any violation.[52] The U.S. Court of Appeals for the Ninth Circuit concluded that the "injury [in fact] required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates stand-

[48] 524 U.S. at 23.

[49] See 549 U.S. 497. *Massachusetts*, which purported to announce a set of principles for when states have standing to sue other states, could be an "example of a case in which the idiosyncratic views of a single Justice may have determined the stated basis for the Court's decision." Fallon, supra note 38, at 1103–04.

[50] The Court has relied on *Lujan* to hold that plaintiffs did not have standing in two cases, one of which postdates *Massachusetts*, *Akins*, and *Laidlaw*. See Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); Raines v. Byrd, 521 U.S. 811 (1997). *Hollingsworth* may be different because it involved the question of whether a state may (or did) confer standing on individuals, rather than Congress, and *Raines* involved a statute purporting to confer standing on members of Congress. *Hollingsworth* was also unique because the state purported to assign the right to defend a law, not sue for violation of a statute; the assignment also occurred on appeal, rather than at filing. See Fallon, supra note 38, at 1083 (discussing this aspect of *Hollingsworth*).

Lexmark International, Inc. v. Static Control Components, Inc. recently recharacterized the question of whether a plaintiff falls within the zone of interests a statute protects—a question previously designated as part of "prudential standing" doctrine—as a question of statutory construction. 134 S. Ct. 1377, 1387 (2014). *Lexmark* could be read to support the idea that a cause of action is relevant to the standing question, or it might be read to suggest it is not relevant. On the one hand *Lexmark* said, "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." Id. at 1387 n.4 (internal quotation marks omitted) (quoting Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 642–43 (2002)). On the other hand, "*Lexmark* confirms that whether injuries that would be cognizable in some contexts are actionable in others can also turn on the protections and authorizations to sue that particular statutes confer." Fallon, supra note 38, at 1108. Either way, *Lexmark* does not speak to what, if any, limits there are on Congress's power to create causes of action for civil statutory violations.

[51] Edwards v. First Am. Corp., 610 F.3d 514, 515 (9th Cir. 2010), cert. granted sub nom. First Am. Fin. Corp. v. Edwards, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536, 2537 (2012).

[52] 12 U.S.C. § 2607(a), (d)(2) (2012).

ing.'"[53] Commentators initially viewed the Court's grant of certiorari in *First American* as an indication of the Court's renewed interest in limiting Congress's power to confer standing on private litigants, in part because all three circuits which had addressed the question had held that litigants had standing to raise a RESPA kickback claim, and therefore there appeared to be little reason to take the case unless the Court was inclined to reverse those decisions.[54] Although the Court dismissed *First American* as improvidently granted, it did so more than six months after the case was argued, which is unusual and further suggests it is still "too soon to tell" how broadly or narrowly the Court will read *Lujan*.[55] Consistent with this assessment, the Court recently granted the petition for certiorari in *Spokeo, Inc. v. Robins*,[56] a case presenting the question whether Congress may confer standing simply "by authorizing a private right of action based on a bare violation of a federal statute."[57] The Court granted the petition against the recommendation of the Solicitor

[53] *Edwards*, 610 F.3d at 516–17.

[54] In addition to the U.S. Court of Appeals for the Ninth Circuit, the Third and Sixth Circuits concluded that RESPA litigants had standing to challenge kickbacks. Alston v. Countrywide Fin. Corp., 585 F.3d 753, 755 (3d Cir. 2009); Carter v. Welles-Bowen Realty, Inc. (In re Carter), 553 F.3d 979, 989 (6th Cir. 2009). Several commentators viewed the Court's grant of certiorari as an indication that the Court was inclined to conclude the plaintiffs did not have standing. Pamela S. Karlan, The Supreme Court, 2011 Term, Foreword: Democracy and Disdain, 126 Harv. L. Rev. 1, 61 (2012); Kevin Russell, *First American Financial v. Edwards*: Surprising End to a Potentially Important Case, SCOTUSblog (June 28, 2012, 7:00 PM), http://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case; Christopher Wright, Argument Preview: Standing to Challenge Kickbacks That Do Not Directly Affect Price, SCOTUSblog (Nov. 18, 2011, 2:28 PM), http://www.scotusblog.com/2011/11/argument-preview-standing-to-challenge-kickbacks-that-do-not-directly-affect-price ("In the absence of a clear conflict, a grant of certiorari in a case seeking review of a Ninth Circuit decision usually means that reversal is certain."). Litigants have picked up on the Court's renewed interest in congressionally conferred standing, and several petitions for certiorari seek the Court's review of the validity of statutes purporting to authorize individuals to sue. See, e.g., Petition for Writ of Certiorari at 10, Spokeo, Inc. v. Robins, No. 13-1339 (May 4, 2014), 2014 WL 1802228, at *10–11 ("The court below took precisely that approach to its own (diametrically opposite) precedent, applying in the FCRA context its prior holding in *Edwards* v. *First American Corp.* . . . .").

[55] *First American*, 132 S. Ct. at 2537; Karlan, supra note 54, at 63; id. at 58 ("The modal DIG—the colloquial term for dismissing the writ as improvidently granted—happens relatively soon after oral argument, when the Court realizes that there might be a problem in reaching the issue on which certiorari was granted.").

[56] See U.S. Supreme Court Order List, 575 U.S. 2 (Apr. 27, 2015), available at http://www.supremecourt.gov/orders/courtorders/042715zor_9o6b.pdf (granting petition for certiorari in *Spokeo, Inc. v. Robins*).

[57] Petition for Writ of Certiorari, supra note 54, at i.

General,[58] whose views the Court had previously requested.[59] The case will be heard in the October 2015 Term.

Moreover, even if the Court has stepped back from prior statements about the contours of standing doctrine, it has simultaneously hinted that whether a litigant has standing is a separate question from whether a statute purporting to confer standing is unconstitutional under Article II. The Court has implied that, although a statute may confer standing on a litigant, the statute may subsequently be invalidated on the grounds that it unconstitutionally infringes on the President's Article II powers.[60] For example, in a curious footnote, a six-Justice majority in *Stevens* stated that the Court "express[ed] no view on the question whether *qui tam* suits violate Article II, in particular . . . the 'take Care' Clause of § 3."[61] Similarly, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the Court held that a litigant had standing to sue the defendant corporation for violations of the Clean Water Act ("CWA").[62] The CWA authorized suits initiated by "a person or persons having an interest which is or may be adversely affected."[63] Although Justice Kennedy joined the Court's opinion finding that the litigant had standing, he wrote separately to note that the case raised difficult questions about "the delegation of Executive power" and specifically whether that delegation was "permissible in view of the responsibilities committed to the Executive by Article II," although he noted that particular question was not before the Court.[64] In dissent, Justice Scalia and Justice Thomas made similar observations, but likewise refrained from addressing the issue.[65]

[58] See Brief for the United States as Amicus Curiae at 1, Spokeo, Inc. v. Robins, No. 13-1339 (2015), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/13-1339-Spokeo-US-Invitation-Br.pdf.

[59] See U.S. Supreme Court Order List, 574 U.S. 5 (Oct. 6, 2014), available at http://www.supremecourt.gov/orders/courtorders/100614zor.pdf (inviting the Solicitor General to express the views of the United States in *Spokeo, Inc. v. Robins*).

[60] E.g., *Stevens*, 529 U.S. at 778 n.8; Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 n.4, 109–10 (1998) ("[S]tanding jurisprudence, . . . though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.").

[61] *Stevens*, 529 U.S. at 778 n.8.

[62] 528 U.S. 167 (2000).

[63] 33 U.S.C. § 1365(a), (g) (2012).

[64] 528 U.S. at 197 (Kennedy, J., concurring). However, he noted, the parties had not briefed the issue and the court of appeals had not addressed it. Id.

[65] 528 U.S. at 209 (Scalia, J., dissenting).

To be sure, the Court has not invalidated a provision authorizing civil suits on the ground that the provision violates Article II, as opposed to finding that the plaintiffs authorized to sue by such a provision lack standing under Article III.[66] And there might not be much conceptual space between the Court holding that a congressionally created right of action is constitutionally invalid under Article II—because it authorizes a private individual to execute federal law—versus holding that a plaintiff authorized to sue under such a provision lacks standing under Article III—because she is seeking to vindicate the public interest in seeing federal law enforced and has suffered no injury in fact.[67] Either way, the suit would not be permitted to proceed. But the Court has raised the possibility of invalidating a congressionally created right of action on Article II grounds on several occasions over the last twenty years, and no case has clearly resolved the idea that the Take Care Clause requires the President alone to initiate certain kinds of civil enforcement proceed-

[66] The Court has relied on the Take Care Clause (in addition to the Vesting Clause of Article II) to invalidate removal statutes purporting to insulate agency heads from presidential removal. But those cases did not turn on whether the agencies were performing executive functions; everyone understood that they were. Free Enter. Fund v. PCAOB, 561 U.S. 477 (2010). My claim is not that there are no categories of functions that must be performed by the President or his delegates. See infra Section IV.C. Rather, my claim is that vindicating the public's shared interest in the enforcement of federal law is not one of those tasks.

My analysis does not necessarily suggest that the Court *will* rely on Article II to invalidate a statute authorizing a species of civil enforcement suits. But the possibility remains. Consider, by way of (an ominous) analogy, the Court's spending-power jurisprudence before *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). Prior to *NFIB*, no decision of any court had ever invalidated a federal spending program on the ground that it was "coercive" to the states. Id. at 2634 (Ginsburg, J., dissenting). Indeed, the only mentions of coercion were passing references in *South Dakota v. Dole* and *Steward Machine Company v. Davis*, two cases where the Court had upheld spending programs but noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" South Dakota v. Dole, 483 U.S. 203, 211 (1986) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). *NFIB* seized on this line to invalidate the Medicaid expansion on the ground that it was unconstitutionally coercive. 132 S. Ct. at 2661–62.

[67] One difference would be the implications for waiver and forfeiture rules in future cases. The argument that a congressionally created right of action unconstitutionally allows private individuals to execute federal law could be waived or forfeited by the parties; the argument that a congressionally created right of action authorizes individuals without constitutional standing to sue could not. A plaintiff's standing goes to the Court's jurisdiction, and so challenges to standing cannot be waived by the parties. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88–89, 93–95 (1998).

ings. And even if the Court does not specifically use the Take Care Clause to invalidate a congressionally created private right of action, various Justices' views about the Take Care Clause may inform their perceptions of standing doctrine—including whether the violation of a congressionally conferred substantive right may constitute an injury in fact.[68]

B. Defining the Execution of Federal Law

The notion that Article II requires the President to execute federal law raises another question—what does it mean to execute federal law? Answering this question is challenging because the judicial treatment of this issue is exceptionally brief and overlaps in significant part with more general discussions on separation of powers. Although several cases state that only the President may execute federal law, most of the decisions make no effort to define what that actually entails.[69]

In this respect, *Lujan* is the exception. *Lujan* claims that "[v]indicating the *public* interest" in enforcing statutes constitutes the execution of federal law, but vindicating "the rights of individuals" does not.[70] But what does it mean to "vindicat[e] the *public* interest" in a federal statute?[71] It cannot mean the act of enforcing federal law generally, because *Lujan* did not alter the rule that private plaintiffs with Article III standing can initiate a civil suit.[72] Nor does the opinion call into question the principle that Congress can create private rights of action that allow (at least some) aggrieved individuals to sue to enforce a federal law.[73]

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[68] See, e.g., John G. Roberts, Jr., Comment, Article III Limits on Statutory Standing, 42 Duke L.J. 1219, 1230 (1993) ("The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact, however, ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed."); Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 881–84 (1983) ("The sea-change that has occurred in the judicial attitude towards the doctrine of standing—particularly as it affects judicial intrusion into the operations of the other two branches—is evident from comparing recent opinions with the very first case in which the Supreme Court contemplated interference with high-level executive activities, and avoided such interference only by interfering with a congressional enactment.").

[69] See, e.g., *Free Enter. Fund*, 561 U.S. at 492–93; *Printz*, 521 U.S. at 922–23.

[70] *Lujan*, 504 U.S. at 576.

[71] Id.

[72] Id. at 578.

[73] Id.

Alternatively, *Lujan* could mean that the executive must initiate enforcement proceedings when a federal statute authorizes a suit to proceed against the executive branch. In several places, *Lujan* suggests this aspect of the statute—that it authorized the plaintiffs to sue the federal executive—was problematic: The opinion notes that "[v]indicating the . . . interest *in Government observance of the . . . laws*" is an executive function.[74] However, this reading of the opinion is also too broad. If the *Lujan* plaintiffs had purchased a plane ticket evidencing concrete plans to travel abroad, the suit would have likely proceeded and the plaintiffs could have enforced an ESA provision regulating the executive branch.[75] The Administrative Procedure Act ("APA") also broadly waives the federal government's immunity from suit (and specifically executive agencies' immunity from suit),[76] and *Lujan* does not suggest that all APA suits against executive agencies are constitutionally problematic.[77]

A more limited reading of *Lujan* is that the executive power includes the power to vindicate the "public interest" embodied in a particular statute.[78] In other words, the fact that the *Lujan* plaintiffs asserted the *general public interest* in a particular law was problematic. *Lujan* mentions this fact four times in the paragraph concerning executive power.[79] Under this reading of *Lujan*, a suit brought by hypothetical plane-ticket-holding plaintiffs would be permissible as vindicating the plaintiffs' *private* interest in the government's sound implementation of federal law. Without the plane tickets, however, only the general public interest in federal law enforcement was at stake. This, however, is only the first step toward understanding what *Lujan* says is an executive function committed to the President. How are we to know when a suit authorized

[74] Id. at 576 (emphasis added).

[75] See id. at 563–64 (stating that plaintiffs need concrete plans or specific dates to show the requisite imminent injury); id. at 579 (Kennedy, J., concurring) (intimating that the purchase of a plane ticket would have been sufficient to show injury in fact and establish standing); id. at 592 (Blackmun, J., dissenting) (same).

[76] 5 U.S.C. § 702 (2012) ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.").

[77] See 504 U.S. at 578.

[78] See Harold J. Krent & Ethan G. Shenkman, Of Citizen Suits & Citizen Sunstein, 91 Mich. L. Rev. 1793, 1794, 1801 (1993).

[79] See *Lujan*, 504 U.S. at 576–77.

by a particular statute attempts to vindicate public as opposed to private interests?

Lujan suggests that a suit attempts to vindicate public interests where it seeks to vindicate the interest in living under law—that is, in having people, private citizens, and government respect the law simply because it is the law. Several passages of *Lujan* point in this direction. For example, the opinion describes "[v]indicating the . . . interest . . . in Government *observance of the . . . laws*"[80] and endeavoring to vindicate "the . . . interest in executive officers' *compliance with the law*"[81] as executive responsibilities. The Court also disapprovingly described the citizen-suit provision as embodying the "citizen's interest in [the] proper application of the Constitution and laws."[82] Defining the public interest in a law as the general interest in living under the law coheres with other accounts of what are or should be exclusively executive functions. Other cases have referred to the "public interest in the due observance of [the law]."[83] Other scholars in other contexts have defined "public rights" as "less tangible rights to compliance with the laws established by public authority 'for the . . . tranquility of the whole.'"[84] The law-is-law interest does not depend on the substantive norms underlying a given statute. Rather, the ethic of respecting law because it is law is one species of the rule of law—the idea "that people should be ruled by the law and obey it."[85]

[80] Id. at 576 (emphasis added).

[81] Id. at 577 (emphasis added).

[82] Id. at 572–74.

[83] United States v. Raines, 362 U.S. 17, 27 (1960); see Raines v. Byrd, 521 U.S. 811, 831–32 (1997) (Souter, J., concurring) ("[A]ppellees are not simply claiming harm to their interest in having government abide by the Constitution . . . .").

[84] Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 566 (2007) (emphasis omitted) (quoting 4 William Blackstone, Commentaries *7); see also Grove, supra note 9, at 1324–28 (discussing the executive's standing to enforce federal law).

[85] Joseph Raz, The Rule of Law and its Virtue, *in* The Authority of Law: Essays on Law and Morality 210, 213 (1979); Geoffrey de Q. Walker, The Rule of Law: Foundation of Constitutional Democracy 41 (1988) ("[U]nless the law can command obedience, there is no legal system . . . ."). This norm has value because it expresses a particular view about the law and because it may form part of a society's political identity. E.g., Andrew Koppelman, Commentary, On the Moral Foundations of Legal Expressivism, 60 Md. L. Rev. 777, 778–79 (2001). The law-is-law norm may have consequentialist benefits as well. See, e.g., Randy J. Kozel, Settled Versus Right: Constitutional Method and the Path of Precedent, 91 Tex. L. Rev. 1843, 1857 (2013).

Lujan's claim that only the President may vindicate the general public interest embodied in a federal statute presupposes that the President has a degree of policymaking discretion inherent in making enforcement decisions.[86] If vindicating the public interest in federal law merely entailed the mechanical enforcement of a statute in every possible situation, why would it matter if the President enforces the statute as opposed to someone else? Everyone would enforce the statute in the same manner according to its terms, so having the President, rather than any other individual, enforce the statute would offer few advantages.

But the calculus changes if the enforcement of federal law involves a measure of policy-making discretion. Consider *Chevron v. Natural Resources Defense Council*, which reasoned that because interpreting statutes involves "policymaking responsibilities," federal statutes implementing federal agencies should be interpreted by "the Chief Executive" because he is "accountable to the people."[87] Where a task involves some discretionary policymaking there are reasons to have the President perform that task (at least relative to some other actors, such as federal courts). In these situations, *Lujan*'s insistence on presidential control makes more sense. *Lujan* therefore appears to assume that the President has some policy-making discretion over how to vindicate the public interest in seeing federal law enforced, including discretion to decline enforcement altogether.

While Part IV will elaborate on the proper role of executive enforcement discretion, the point here is that, by insisting on presidential exclusivity, *Lujan* assumes the President has some discretion not to enforce federal statutes in some circumstances. *Lujan* suggests that this discretion lies in assessing whether the public has a shared interest in the enforcement of a federal law, and not merely in determining whether a law

[86] E.g., Clinton v. Jones, 520 U.S. 681, 699 n.29 (1997) ("This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of *utmost discretion* and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to 'take Care that the Laws be faithfully executed' . . . ." (emphasis added) (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749–50 (1982)); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 695 (1952) (Vinson, C.J., dissenting) ("For the faithful execution of such laws the President has back of him not only each general law-enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws.").

[87] 467 U.S. 837, 865–66 (1984).

applies in particular circumstances. *Lujan* envisions that the President has some enforcement discretion over federal statutes that is not tied to the interpretation of those statutes. Otherwise, the President's power to interpret a statute under *Chevron* (through proper administrative channels) would substantially, if not entirely, eliminate any differences between executive and nonexecutive enforcement. That is, *Lujan*'s concern is not that private litigants will attempt to bring suits where federal law has not been violated, or where the President does not think that federal law has been violated; these suits would not proceed beyond the early stages of litigation if the President has issued a definitive interpretation of a statute through the proper administrative channels stating that the statute does not apply to those circumstances. Rather, *Lujan*'s concern is that private litigants will attempt to bring suits where a federal statute has been violated but the President believes it should nonetheless not be enforced; the President could not pretermit these suits by issuing an interpretation of the federal statute.[88]

II. STATES AND THE EXECUTION OF FEDERAL LAW

Important aspects of the Court's separation-of-powers jurisprudence are rooted in the notion that it is up to the President—and *only* the President—to determine how best to advance the public interest in enforcing federal statutes. This Part shows that this intuition is absent from other doctrines where it could seemingly also apply. Specifically, numerous federal statutes authorize state officials to play a role in enforcing federal law, and the Court's preemption jurisprudence ratifies these schemes as a matter of federalism without noting the separation-of-powers implications inherent in Congress dividing federal law-enforcement authority between the federal executive and the states.[89]

[88] Kate Andrias recently argued that the President should publicly announce any enforcement policy and provide a "reasonable statutory basis" for the policy. See Kate Andrias, The President's Enforcement Power, 88 N.Y.U. L. Rev. 1031, 1039 (2013). To the extent such an enforcement policy would be an interpretation of the underlying statute, this may minimize the gap between private and executive enforcement.

[89] Others have noted how *Massachusetts v. EPA* appears to create special rules for standing when states are plaintiffs. See, e.g., Fallon, supra note 38, at 1103–04; Kathryn A. Watts & Amy J. Wildermuth, Essay, *Massachusetts v. EPA*: Breaking New Ground on Issues Other Than Global Warming, 102 Nw. U. L. Rev. 1029, 1046 (2008). But with respect to the kind of execution of federal law *Lujan* focused on—the public's interest in the proper administra-

A. State Execution of Federal Law

Congress has the power to preclude state regulation in a given field. Preemption doctrine maintains that state law must give way to federal law under three circumstances: (1) Congress expressly preempts state law;[90] (2) Congress establishes a field of regulation so pervasive that Congress has, by implication, precluded the states from regulating in the field at all;[91] and (3) state law conflicts with, or undermines the purposes and objectives of, federal law.[92] The Court has generally stated that congressional intent is the "ultimate touchstone" of preemption.[93] In other words, whether a state law is preempted turns on whether Congress intended to displace the state law.[94]

Rather than precluding state law in areas also regulated by the federal government, Congress may instead decide to carve out a role for the states in implementing a federal scheme. Occasionally, Congress permits states to enact state laws that attach consequences to violations of federal law, and states may use that power to vindicate the public's shared interest in living under the law. For example, *Chamber of Commerce of the United States v. Whiting* addressed an Arizona law that permitted state officials to revoke state-issued business licenses where an entity had violated federal law.[95] The Immigration Reform and Control Act ("IRCA") makes it "unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien."[96] The IRCA expressly precludes "any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens," but further

tion and enforcement of federal law—the disparities run deeper than an analysis of only standing cases can show.

[90] See, e.g., Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1974–75 (2011) (discussing the interaction between federal immigration law and state laws).

[91] See, e.g., Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261, 1265–66 (2012) (holding that state-law tort claims arising from defective locomotive design are preempted by the Federal Locomotive Inspection Act and its predecessor).

[92] See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

[93] See, e.g., Wyeth v. Levine, 555 U.S. 555, 565 (2009); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994).

[94] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996).

[95] 131 S. Ct. at 1970.

[96] 8 U.S.C. § 1324a(a)(1)(A) (2012).

provides that "licensing and similar laws" are not preempted.[97] Taking heed of this exception, Arizona enacted a statute that permitted the State to suspend or revoke an employer's license that was necessary to do business in the state if the employer knowingly or intentionally employed an "unauthorized alien."[98] Arizona defined an "unauthorized alien" to mean "an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code § 1324a(h)(3)."[99] Under the Arizona law, individuals file complaints, which the attorney general or county attorney will then investigate.[100] The statute requires the state officer to confer with the federal government and stipulates that a state officer may not "independently make a final determination on whether an alien is authorized to work in the United States."[101] In other words, the federal government's determination that a person is "unauthorized" is binding on state officials.[102] Once the federal government determines that a worker is unauthorized, the county attorney, sometimes at the behest of the state attorney general, can initiate an enforcement proceeding in state court to suspend or revoke the employer's business license.[103]

Whiting concluded that Arizona's law was not preempted.[104] The Court reasoned that although the IRCA expressly preempted "any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens," Congress specifically authorized states to enforce the IRCA's prohibitions through "licensing and similar laws."[105] Congress therefore intended to "preserve[] the ability of the States to impose their own sanctions through licensing" for violations of

[97] Id. § 1324a(h)(2); see also *Whiting*, 131 S. Ct. at 1977. I use the phrase "unauthorized alien" and others as they are used in the pertinent statutes.

[98] See Ariz. Rev. Stat. Ann. § 23-211, -212, -212.01 (2007).

[99] Id. § 23-211(11).

[100] Id. § 23-212(B).

[101] Id.

[102] Id. § 23-212(H) (providing that the state court "shall consider only the federal government's determination pursuant to" federal law in "determining whether an employee is an unauthorized alien").

[103] Id. § 23-212(C)(1)–(3), (D).

[104] *Whiting*, 131 S. Ct. at 1970. In dissent, Justice Breyer maintained that the Arizona law did not qualify as a "licensing law" for purposes of the IRCA. Id. at 1987 (Breyer, J., dissenting). Justice Sotomayor also dissented, but on the grounds that states could not impose penalties for violations of the IRCA unless there was a prior federal adjudication that an employer was in violation of the law. Id. at 1998 (Sotomayor, J., dissenting).

[105] 8 U.S.C. § 1324a(h)(2); see also *Whiting*, 131 S. Ct. at 1977.

federal law.[106] *Whiting* noted approvingly that Arizona had adopted the federal definition for unauthorized persons and relied on the federal government's determination of who qualifies as an unauthorized person, thereby eliminating the possibility of "conflict . . . either at the investigatory or adjudicatory stage."[107] The Court explained, "Congress . . . . in IRCA . . . ban[ned] [the] hiring [of] unauthorized aliens, and the state law here simply seeks to enforce that ban."[108]

Arizona v. United States addressed a similarly structured state law (S.B. 1070) that purported to incorporate and enforce several federal statutes.[109] Four provisions of S.B. 1070 were at issue: (1) Section 2, which required state officers to take actions to verify the immigration status of persons stopped, detained, or arrested;[110] (2) Section 3, which made it a state crime to violate federal alien-registration requirements;[111] (3) Section 5, which made it a state crime for an unauthorized immigrant to seek or engage in work in the state;[112] and (4) Section 6, which authorized officers to arrest—without a warrant—persons suspected of being removable by virtue of having committed a crime.[113] Every participating Justice agreed that Section 2 of S.B. 1070 was not preempted,[114] and a majority concluded that Section 3, Section 5, and Section 6 were all preempted by federal law.[115]

[106] *Whiting*, 131 S. Ct. at 1979–80.

[107] Id. at 1981.

[108] Id. at 1985. The IRCA also imposes a graduated set of civil and criminal sanctions on employers who violate its provisions. 8 U.S.C. § 1324a(e)(4)(A), 1324a(f)(1). Federal law authorizes the Department of Labor to remove an employer's registration certificate for farm labor if the employer has knowingly hired a person unauthorized to be in the United States. 29 U.S.C. § 1813(a)(6).

[109] 132 S. Ct. 2492, 2497–98 (2012).

[110] Ariz. Rev. Stat. Ann. § 11-1051(B) (2012); see *Arizona*, 132 S. Ct. at 2497–98.

[111] Ariz. Rev. Stat. Ann. § 13-1509 (2014); see *Arizona*, 132 S. Ct. at 2497.

[112] Ariz. Rev. Stat. Ann. § 13-2928(C) (2014); see *Arizona*, 132 S. Ct. at 2497–98.

[113] Ariz. Rev. Stat. Ann. § 13-3883(A)(5) (2014); see *Arizona*, 132 S. Ct. at 2498.

[114] *Arizona*, 132 S. Ct. at 2510; id at 2511 (Scalia, J., concurring in part and dissenting in part); id. at 2522 (Thomas, J., concurring in part and dissenting in part). Justice Kagan took no part in the consideration of the case. Id. at 2511. Arizona Revised Statutes Annotated Section 11-1051(B), which corresponds to Section 2 of S.B. 1070, provides that "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made . . . to determine the immigration status of the person."

[115] *Arizona*, 132 S. Ct. at 2501–07; see also id. at 2529–30 (Alito, J., concurring in part and dissenting in part) (agreeing section 3 is preempted). The federal alien-registration requirements, the Court reasoned, precluded the State from enforcing the registration requirement

The three partial dissents would have left several other provisions intact. Justice Alito would have concluded that, in addition to Section 2, Section 5 and Section 6 were not preempted,[116] while both Justice Scalia and Justice Thomas would not have found any of the provisions preempted.[117] Of particular interest here, Justice Scalia embraced Arizona's ability to enforce federal law in ways that departed from the President's chosen enforcement policy. In characteristically clear and strident terms, Justice Scalia proclaimed that "Arizona is *entitled* to have 'its own immigration policy'—including a more rigorous enforcement policy—so long as that does not conflict with federal law,"[118] and that "[t]he Executive's policy choice of lax federal enforcement does not constitute such" federal law.[119] And, more succinctly, he wrote "[t]o say . . . that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind."[120] Justice Scalia even repeated the latter statement as he read portions of his dissent from the bench.[121]

In many ways *Arizona* is the exception.[122] Congress frequently authorizes state officials to play an important role in the enforcement of federal law.[123] Numerous statutes authorize state attorneys general to sue to enforce federal law in federal courts. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act provides that "the attorney general . . . of any State may bring a civil action . . . to enforce

(Section 3). Id. at 2501–03; see also id. at 2529–30 (Alito, J., concurring in part and dissenting in part) (agreeing Section 3 is preempted for the same reason). Congress's comprehensive regulation of the employment of unauthorized workers preempted the provision purporting to criminalize unauthorized workers from seeking or engaging in work (Section 5). Id. at 2503–05. Finally, the Court found that state-initiated arrests of persons unauthorized to be in the United States (Section 6) undermined the removal scheme Congress had created, which identified limited circumstances for state officers to participate in the removal process. Id. at 2505–07.

[116] Id. at 2524–25 (Alito, J., concurring in part and dissenting in part).

[117] Id. at 2511 (Scalia, J., concurring in part and dissenting in part); id. at 2522 (Thomas, J., concurring in part and dissenting in part).

[118] Id. at 2516–17 (Scalia, J., concurring in part and dissenting in part).

[119] Id. at 2517.

[120] Id. at 2521.

[121] Bench Statement at 5, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

[122] See generally sources cited supra note 14.

[123] See Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1601 (2015) ("[The Natural Gas Act] 'was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.' States have a 'long history of' providing 'common-law and statutory remedies against monopolies and unfair business practices.'" (citations omitted)).

provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title."[124] The Dodd-Frank Act purports to allow states to initiate civil enforcement proceedings without requiring the States to make a showing of particularized harm to the state or its residents.[125] Several other federal statutes do the same.[126] Congress also often authorizes states to initiate civil enforcement proceedings after some minimal showing of possible harm to their residents. For example, some provisions permit a state attorney general to bring an action when "a violation . . . *may* affect [the] State or its residents."[127] Some provisions even allow the State to bring a civil action where "the attorney general of a State *has reason to believe* that an interest of the residents of that State has been or is threatened."[128] Similarly, other provisions allow a state to sue "[*w*]*henever it shall appear to the attorney general* . . . that the interests of the residents of that State have been, are being, or *may be threatened*" by a violation of a statute or regulation.[129]

[124] Consumer Financial Protection Act of 2010, 12 U.S.C. § 5552(a)(1) (2012). See generally Margaret H. Lemos, Aggregate Litigation Goes Public: Representative Suits by State Attorneys General, 126 Harv. L. Rev. 486, 489–90, 548–49 (2012) [hereinafter Lemos, Aggregate Litigation] (noting scholarly acceptance of state attorneys general bringing lawsuits predicated on aggregate harms); Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 700–01 (2011) [hereinafter Lemos, State Enforcement] (noting trend in statutes authorizing state attorneys general to bring lawsuits predicated on aggregated harms).

[125] The Dodd-Frank Act even permits states to sue federal savings associations and a national bank. 12 U.S.C. § 5552(a)(2)(B) (2012).

[126] See, e.g., 11 U.S.C. § 526(c)(3)(A) (2012) (authorizing injunctions without showing of particularized harm); 15 U.S.C. § 1679h(c)(1)(A) (2012) (same); id. § 1681s(c)(1)(A) (same); 33 U.S.C. §§ 1402(e), 1415(g) (2012) (same); 42 U.S.C. §§ 300f(12), 300j-8(a) (2012) (same); id. §§ 9601(21), 9659(a) (same); id. §§ 11046(a)(2), 11049(7) (2012); 47 U.S.C. § 227(g)(1) (2012) (same).

[127] See, e.g., 15 U.S.C. § 1264(d) (2012) (emphasis added); id. § 1477 (same); id. § 2073(b)(1) (same).

[128] See, e.g., 15 U.S.C. § 7804(a)(1) (2012) (emphasis added); see also id. § 6103(a) (applying "[w]henever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened"); id. § 7706(f)(1) (applying "[i]n any case in which the attorney general of a State, or an official or agency of a State, has reason to believe that an interest of the residents of that State has been or is threatened"); 42 U.S.C. § 1320d-5(d)(1) (2012) (applying "in any case in which the attorney general of a State has reason to believe that an interest of one or more of the residents of that State has been or is threatened").

[129] See, e.g., 7 U.S.C. § 13a-2(1) (2012) (emphasis added); see also 18 U.S.C. § 248(c)(3) (2012) (applying "[i]f the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section").

B. Differing Conceptions of the Execution of Federal Law

There are two points of disconnect between the separation-of-powers cases and the preemption cases. The first is that the preemption cases do not engage with the notion that states are executing federal law in ways that remove some discretion from the President. The cases do recognize that states are seeking to enforce *federal* law. As *Whiting* explained, Arizona's "law . . . simply seeks to enforce" the "IRCA . . . ban on hiring unauthorized aliens."[130] Arizona's law "is based exclusively on the federal prohibition,"[131] and "adopt[s] the federal definition of who qualifies as an 'unauthorized alien.'"[132] Arizona relies on the federal government's determination whether an employee is unauthorized[133]—the only question for the state and federal government to decide is whether to enforce the IRCA's prohibition. Several provisions of S.B. 1070, including Section 3 and Section 5, would have done the same.[134] As Justice Scalia noted in dissent, Section 3 would have enabled states to "enforce[] applications of the Immigration Act."[135]

Although various opinions proclaimed this overlap between state and federal law meant "there [would] . . . be no conflict . . . either at the investigatory or adjudicatory stage,"[136] there still could be a conflict at the *enforcement* stage, allowing states to determine whether and how to advance the public interest in enforcement of federal law for its own sake. Consider an example analogous to *Whiting*—a federal statute requires widget manufacturers to include with their products a particular warning, and the statute permits states to enforce this requirement through licensing laws. Nothing prevents a state from enforcing (or not enforcing) the requirement based on its own assessment of the public interest in enforcement. That is, in the first case, a state may choose not to withdraw a business license where an entity has failed to comply with the federal warning requirement because the state believes the public no longer has a shared interest in the enforcement of the warning requirement. A state

[130] *Whiting*, 131 S. Ct. at 1985.
[131] Id. at 1980.
[132] Id. at 1981.
[133] Id.
[134] See, e.g., Ariz. Rev. Stat. Ann. § 13-1509(B) (2014).
[135] *Arizona*, 132 S. Ct. at 2521 (Scalia, J., dissenting). Justice Scalia also echoed these sentiments in questions at oral argument. Transcript of Oral Argument at 16–17, 38–39, 51–52, 59–60, 63, *Arizona*, 132 S. Ct. 2492 (No. 11–182).
[136] See, e.g., *Whiting*, 131 S. Ct. at 1981.

official may believe the requirement is outdated, or is likely to change. In the second case, a state may decide to withdraw a license to enforce the federal warning requirement on the ground that the federal warning requirement is the law and should be enforced. The state may reason that law is law, and a violation is a violation, and the warning requirement should be enforced for that reason alone, regardless of whether anyone has been or could be injured by a violation of the warning requirement.

The states' arguments in both *Whiting* and *Arizona* confirm that states use state laws to vindicate the public interest in the execution of federal law. Arizona argued in *Whiting*, for example, that the state law was designed to enforce pieces of federal law.[137] Indeed, the codified purpose of S.B. 1070, at issue in *Arizona*, was to further the public's interest "in the cooperative enforcement of federal immigration law[]."[138] The narratives behind the states' arguments made a similar claim—the briefs in both *Whiting* and *Arizona* repeatedly suggest the states merely sought to enforce what was already the law, and that the states were vindicating the public interest in seeing federal law enforced.[139]

The second, and related, point of tension is how the muscular conception of state autonomy driving the Court's federalism principles leads the Court to celebrate the states' ability to diverge from how the President chooses to execute of federal law, whereas the separation-of-powers cases view it as unqualifiedly desirable for the President to have unfettered and exclusive discretion over the execution of federal law. The tension between unitary-executive separation-of-powers principles and federalism principles was especially apparent in *Printz*. In *Printz*,

[137] See Brief for the Respondents at 1–2, *Whiting*, 131 S. Ct. 1968 (No. 09–115).

[138] S.B. 1070, 49th S., 2d Reg. Sess. (Ariz. 2010); see also *Arizona*, 132 S. Ct. at 2497. In codifying the statute, the Arizona legislature wrote that it found "that there is a compelling interest in the . . . enforcement of federal immigration laws." S.B. 1070.

[139] Brief for the Petitioners at 14, *Arizona*, 132 S. Ct. 2492 (No. 11–182) ("S.B. 1070 encourages the cooperative enforcement of federal immigration laws throughout all of Arizona." (citation omitted) (internal quotation marks omitted)); id. ("In attempting to supplement the federal government's inadequate immigration enforcement, Arizona was acutely aware of the need to respect federal authority to set the substantive rules governing immigration . . . ."); Brief for the Respondents at 30, *Whiting*, 131 S. Ct. 1968 (No. 09–115) ("The Arizona law is a permissible complement to federal enforcement efforts . . . ."); id. at 45 ("Moreover, Arizona's law authorizes State sanctions for conduct that is already illegal under federal law . . . ."); id. at 55 ("Permitting States to take actions against licensees who are knowingly employing unauthorized aliens supports the Congressional interest in vigorous[] . . . enforcement . . . ." (alteration in original) (internal quotation marks omitted)).

the federal government argued that, from the perspective of federalism, it was preferable for the federal government to require state executive officers to enforce federal law than to require state legislatures to enact federal directives. Requiring state executive officers to enforce federal law, the federal government maintained, did not result in those officers having to exercise any "policymaking discretion," which minimized the imposition on their time and resources. *Printz*, however, reasoned the lack of policy-making discretion exacerbated the Brady Act's federalism costs: "Even assuming, moreover, that the Brady Act leaves no 'policy-making' discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty."[140] But the separation-of-powers reasoning in *Printz* maintained that the Brady Act was defective because the President lacked "meaningful Presidential control" over how the states executed the law; the Brady Act violated separation-of-powers principles, in other words, because states had some latitude to diverge from the President in how they executed federal law.[141] That is, federalism principles required the states to have *more* latitude in how they executed federal law, whereas separation-of-powers principles required the states to have *less*.

A similar tension between federalism and separation-of-powers principles is apparent in the preemption cases. In preemption cases, the Court often invokes the presumption "that Congress does not cavalierly pre-empt state-law causes of action."[142] Rather, "all pre-emption cases . . . start with the assumption that the historic police powers of the States were not to be superseded."[143] This presumption is rooted in a concern for state autonomy and the idea that states have some constitutional right or entitlement to make law. When applied to the enforcement of federal law, the presumption is rooted in a similar idea that states have a right to enforce the law, and, in doing so, to diverge from how the President enforces the law. Justice Scalia echoed this view in his *Arizona* dissent, proclaiming that "Arizona is *entitled* to have 'its own immigration policy'—including a more rigorous enforcement policy."[144]

[140] 521 U.S. 898, 928 (1997).
[141] Id. at 922.
[142] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).
[143] Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).
[144] 132 S. Ct. at 2516 (Scalia, J., dissenting).

When the presumption against preemption is applied to the cases discussed in Section II.A, the implication is that the Constitution gives states some right to execute or enforce federal law. But this idea is at odds with the separation-of-powers cases, which repeatedly assert that the Constitution gives the President alone the power to execute federal law.

The Court's focus on state autonomy in the preemption cases also assumes there is value to having the states, rather than the federal government, make enforcement policy.[145] The presumption against preemption is rooted in principles of federalism and guided by the notion that benefits flow from states acting autonomously from the federal government; making policies that better cohere with the views of local state citizens; experimenting with policies that differ from federal policy; and challenging the exercise of federal authority constructively.[146] Where the Court applies the presumption against preemption to allow states to prohibit conduct that is permissible under federal law, the Court is ensuring that states may regulate in ways that differ from those of the federal government. Where the federal government requires one warning, the state may require two,[147] or where the federal government permits a regulated entity to choose between two safety precautions, the state may narrow that choice to one.[148]

But as *Whiting* illustrates, the Court also believes that state autonomy—meaning a state's ability to choose different policies from the federal government's—has value where states diverge in how they *enforce* laws (and federal law specifically).[149] This belief is also rooted in principles of federalism. By executing federal law in ways that differ from the those of the President, states may adopt enforcement policies that are preferred by a minority at the national level but a majority at the state

[145] *Printz*, 521 U.S. at 928 ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."); see also Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court, 2011 Sup. Ct. Rev. 253, 275, 298–302.

[146] Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex. L. Rev. 1, 50–62 (2004).

[147] See Wyeth v. Levine, 555 U.S. 555, 558–60 (2009).

[148] Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1134 (2011).

[149] See Lemos, State Enforcement, supra note 124, at 702 ("[E]nforcement authority can serve as a potent means of state influence by enabling states to adjust the intensity of enforcement and to press their own interpretations of federal law.").

level.[150] This enforcement diversity may satisfy the preferences of more citizens than uniform enforcement can achieve, because like-minded citizens can aggregate and select their preferred enforcement policy. Enforcement diversity may also provide useful information to decide which enforcement policy results in optimal outcomes, or act as a tool to challenge the exercise of federal enforcement discretion. *Whiting*, for example, embraced the state's desire to challenge the President's execution of federal law, explaining that "[o]f course Arizona hopes that its [state] law will result in more effective enforcement" of federal law.[151] Statements like this are based on the intuition that, just as state autonomy has value where states enact laws that differ from federal laws, state autonomy also has value where states execute federal law in ways that differ from how the President executes federal law.[152]

The idea that there are benefits that sound in federalism when states execute federal law differently from the President is where preemption cases differ from separation-of-powers cases. The separation-of-powers cases believe that unitary execution is unqualifiedly preferable to any arrangement that allows entities other than the President to execute federal law. By contrast, the preemption cases believe that responsibility for the execution of federal law may be shared, and—more importantly—that shared execution is occasionally superior.

III. EXPLANATIONS

What is particularly striking about the Court's preemption cases is that the decisions celebrate the states' ability to vindicate the public interest in seeing federal law enforced, but fail to even mention the concern expressed in cases like *Lujan*[153] that there are troubling separation-of-powers implications. This Part considers several ways to explain this omission: (1) that states are enforcing state law in the preemption cases; (2) that the Take Care Clause and Article II are not implicated when states enforce federal law; and (3) that state enforcement of federal law

[150] Id. at 701.

[151] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1984 (2011); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 495 (1996) (explaining that a state may authorize a damages remedy for violations of federal law to "provide[] another reason for manufacturers to comply with identical existing 'requirements' under federal law").

[152] See, e.g., Lemos, State Enforcement, supra note 124, at 719–21.

[153] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

should be permitted even though other forms of nonexecutive enforcement are not. Part III ultimately concludes that none of these explanations offer a persuasive way to understand Article II.

A. Executing Federal or State Law

One possibility is that, in the preemption cases, states are enforcing state laws, whereas in the separation-of-powers cases, Congress authorizes nonexecutive actors to enforce federal law. Yet the reality is more complicated than this firm dichotomy—whether states are allegedly enforcing state or federal law in any given case depends on the specific context and facts of the situation. Furthermore, the state laws at issue in the preemption cases discussed in Part II were, for several reasons, enforcing federal law.[154] The codified purpose of S.B. 1070 was to effectu-

[154] I do not mean to suggest that *Lujan* requires the Court to invalidate state laws that seek to execute federal law. If the Court were faced with the question whether its separation-of-powers precedents prohibit states from enforcing state laws designed to enforce federal laws, I believe the Court would and should answer "no." Cf. Evan Caminker, The Unitary Executive and State Administration of Federal Law, 45 U. Kan. L. Rev. 1075, 1078–79 (1997) (arguing that state administration of cooperative federalism programs does not offend Article II because states are administering state laws). But the reason for doing so would be largely pragmatic—finding *Lujan* inapplicable to these cases would limit the consequences of the Court's interpretation of Article II. See sources cited supra note 11.

What I hope to show here is that there is no functional account that explains *why* Article II is implicated only where states execute what are formally federal laws. The reasons for interpreting Article II to prevent Congress from allowing private litigants to execute federal law—including preserving the President's ability to decide whether the public has an interest in the enforcement of federal law—ring hollow and are somewhat overstated if private execution of federal law would not limit the President's enforcement discretion in ways that are not already true under the status quo. Permitting private litigants to execute federal law would be a nonunique imposition on the President's power if states may freely use state laws to execute federal laws in ways that undermine the President's assessment of whether the public has a shared interest in the enforcement of federal law. Therefore, a rule permitting states to execute federal law through state laws while prohibiting private litigants from executing federal law could not be persuasively justified by any of the traditional reasons invoked to justify presidential exclusivity. See infra Sections III.B–III.C.

NFIB v. Sebelius may also cast some doubt on whether states are truly enforcing "state" law where state laws are enacted to further a congressional policy. 132 S. Ct. 2566 (2012). *NFIB* held that the Medicaid expansion under the Affordable Care Act ("ACA"), which conditioned a state's receipt of federal money on the state administering a health-insurance program satisfying the ACA's conditions, effectively coerced the state into administering a federal program. Id. at 2602, 2606–07. The reasoning in *NFIB*, which relied on anti-commandeering cases that prohibited Congress from requiring the states to legislate or enforce federal law, strongly suggested that some members of the Court view state laws enacted under cooperative federalism programs as federal law, at least for some purposes. Id.

ate the public's interest in the enforcement of *federal* law.[155] Statements from the Court underscore that state laws may be designed to allow the state to enforce *federal* law. *Chamber of Commerce of the United States v. Whiting* recognized that Arizona's "law . . . simply seeks to enforce" the "IRCA . . . ban on hiring unauthorized aliens."[156] Arizona's law "is based exclusively on the federal prohibition,"[157] and "[t]he Arizona law . . . adopt[s] the federal definition of who qualifies as an unauthorized alien."[158] As Justice Scalia noted in his *Arizona* dissent, Section 3 of S.B. 1070 would have enabled the State to "enforce[] applications of the Immigration Act."[159]

Indeed, the point of the state laws at issue in these cases was to enforce federal law. The narrative of the preemption arguments in the cases confirms this point—states defended their laws on the ground that they furthered the congressional interest in the "vigorous[] and uniform[]" enforcement of *federal* law,[160] and on the ground that the federal executive was "inadequately enforcing" *federal* law and the state therefore "attempt[ed] to supplement the federal government's inadequate immigration enforcement."[161] State law was merely the tool used by states to ensure that federal law was being enforced or to directly challenge the President's determination as to whether federal law should be enforced.

Other doctrines recognize how state laws can give states substantial power over federal law. Consider, for example, the doctrine governing federal question jurisdiction in federal courts. Article III, Section 2 permits federal courts to hear cases "arising under . . . the Laws of the United States," and Title 28 of the U.S. Code, Section 1331 similarly grants federal courts jurisdiction over cases "arising under the . . . laws . . . of the United States." These provisions, which refer to federal law, allow federal courts to hear state law claims even though the laws of a given state are not the "laws of the United States." As *Grable & Sons Metal*

[155] In codifying the statute, the Arizona legislature wrote that it found "that there is a compelling interest in the . . . enforcement of federal immigration laws." S.B. 1070, 49th S., 2d Reg. Sess. (Ariz. 2010).

[156] Chamber of Commerce of the U. S.. v. Whiting, 131 S. Ct. 1968, 1985 (2011).

[157] Id. at 1980.

[158] Id. at 1981 (internal quotation marks omitted).

[159] Arizona v. United States, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting).

[160] Brief for the Petitioners at 2, *Arizona*, 132 S. Ct. 2492 (No. 11–182).

[161] Id. at 14.

Products, Inc. v. Darue Engineering & Manufacturing explained, this statute conferring jurisdiction over federal questions allows federal courts to hear state law claims where (1) a state law claim necessarily raises a federal question; (2) the federal question is disputed; (3) the federal question is substantial; and (4) hearing the state law claim would not substantially alter the balance between the jurisdiction of the state and federal courts.[162] The reasons animating this part of federal question jurisdiction are well established—state laws raising questions about the meaning and import of federal law allow state courts to indirectly determine the scope of federal law, thus limiting or extending its reach.[163] One can quibble about whether the state laws at issue in the preemption cases would meet the *Grable* test for federal jurisdiction.[164] But the analogy between the two is illuminating because the *Grable*-like cases confirm that state laws can give states substantial powers over federal law.[165] The *Grable* line of cases may be concerned with states' power to

[162] 545 U.S. 308, 314 (2005). The "adequate and independent state ground" doctrine confirms that state law may interact with federal law in ways that give states substantial powers over the interpretation of federal law. The Supreme Court's jurisdiction over cases arising under federal law generally precludes the Court from hearing cases that were disposed of on state law grounds, even if the cases involve federal claims. See Michigan v. Long, 463 U.S. 1032, 1040–41 (1983). Where a case raises both federal and state law claims, the Supreme Court will not review the state court's determination of federal law where the state court's resolution of the state law question is sufficient to support the judgment. Id. at 1041. However, where the state law is not *independent* from federal law, then the Supreme Court can hear these cases, even though they were resolved on formally state law grounds. A state law is not independent from federal law—therefore permitting Supreme Court review of the "state" law question—when the interpretation of state law is tied to the interpretation of federal law. In other words, where a state court uses federal precedents to determine whether there has been a violation of state law, or where a state court construes a state provision to mean the same as a federal provision, the Supreme Court's jurisdiction over *federal* law allows it to hear a case that may have been formally disposed of on state law grounds. See, e.g., Florida v. Powell, 559 U.S. 50, 56–57 (2010). The motivations behind this doctrine are similar to the ones motivating federal question jurisdiction.

[163] *Grable*, 545 U.S. at 312.

[164] See, e.g., Gil Seinfeld, The S&P Litigation and Access to Federal Court: A Case Study in the Limits of Our Removal Model, 113 Colum. L. Rev. Sidebar 123, 127 (2013).

[165] The analogy to *Grable* is also helpful to dispense with a textual argument. Article II refers to the President's duty to take care that "the Laws" are faithfully executed—a phrase that can reasonably be understood to refer to federal law. U.S. Const. art. II, § 3. Even though Article III explicitly refers to the "Laws of the United States," id. art. III, § 2, as the kinds of cases within the jurisdiction of the federal courts, that does not, as several cases recognize, preclude federal jurisdiction over state law claims that raise federal issues, see, e.g., Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 819–823 (1824).

interpret federal law, but as Section II.A explained, some state laws give states similar power to *execute* federal law. States may decide whether the public has an interest in the enforcement of federal law where state laws incorporate federal law or defer to the federal government's determination of whether there has been a federal violation.

To be sure, there are many different ways in which state and federal law may overlap. State and federal law often proscribe the same conduct, and occasionally state courts consider federal precedents in construing a state law. But these kinds of state laws do not as clearly permit states to make claims about where the public interest in federal law lies. For one thing, these state laws do not explicitly incorporate a federal standard, nor do they cede the determination of whether there has been a federal violation to a federal actor. That leaves conceptual space between what the state and federal laws proscribe, and the state is not necessarily using the state law to make a claim about the appropriate level of federal law enforcement or about where the public interest in such enforcement lies. Where a state explicitly adopts a provision of federal law and relies on the federal determination of whether there has been a violation of the federal law, the state may decide whether the enforcement of federal law is in the public interest.[166] This type of state law may not be the only kind that allows a state to vindicate the public interest in seeing federal law enforced, but the Court's preemption cases permit even these kinds of state laws without so much as a mention of the Take Care Clause.

B. Relevance of the Take Care Clause to Federalism

Another possibility is that the Take Care Clause is not implicated when states enforce federal law because the Clause speaks to the horizontal distribution of powers between the three branches of federal government, and not to the vertical distribution of powers between the federal government and the states. In other words, the Take Care Clause may constrain the federal legislature and judiciary but impose no limits on state power.

[166] Because determining whether there is a public interest in seeing federal law enforced differs from determining whether federal law has been violated, see supra text accompanying notes 87–89, the federal determination of whether there has been a violation would not always encompass a federal determination of whether there is a public interest in enforcing the law.

This theory is unsatisfying because when states enforce federal law, they do so with either the explicit or implicit permission of Congress. Several state laws designed to enforce federal law were enacted with the explicit permission of Congress. Recall the law in *Whiting*, where Congress specifically carved out a savings clause that permitted states to enact licensing laws that enforced the federal prohibition.[167] It is not clear why, if the Take Care Clause constrains Congress, the Clause would not be implicated when states enforce federal law pursuant to indirect congressional invitation. Even in cases where Congress does not explicitly permit state enforcement of federal law, the structure of preemption doctrine suggests that state laws enforcing federal law are enacted and enforced, in some sense, with Congress's blessing. Preemption doctrine permits states to enforce federal laws only where Congress has not intended to displace those forms of state regulation, and therefore states have power to execute federal law only with implicit congressional acquiescence.[168] If Congress did not want states to be executing federal law, it would preempt them from doing so. If separation-of-powers concerns arise where Congress delegates the execution of federal law to nonexecutive actors, it is unclear why explicit delegation is problematic but implicit delegation is not.

The idea that the Take Care Clause prohibits Congress from delegating to some nonexecutive actors but not others is unsatisfying in another respect as well. It fails to explain why it is less of an imposition on the President's authority for states to vindicate the public interest in the enforcement of federal law than it is for private litigants to do so. State enforcement of state laws can clearly impose meaningful limits on the President's discretion in enforcing federal law.[169] A hypothetical application of the laws in *Whiting* illustrates the point—the President may determine that an IRCA violation should result in no sanction, but the state could use that same violation to withdraw an employer's business license. Indeed, sometimes states intentionally adopt laws for the purpose of limiting the President's exercise of enforcement discretion.[170]

[167] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1980 (2011).

[168] See, e.g., Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) ("Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." (alteration in original)).

[169] See supra text accompanying notes 136–37.

[170] See supra text accompanying notes 137–39.

The idea that Article II is not implicated where states enforce federal law also fails to explain the case law. *Printz v. United States* invoked the Take Care Clause to invalidate a federal law requiring state officers to conduct background checks on gun purchasers.[171] The Court explained that the law would have transferred the President's executive responsibilities "to thousands of [state officers] in the 50 States, who are left to implement the program without meaningful presidential control (if indeed meaningful presidential control is possible without the power to appoint and remove)."[172] While *Printz* suggested, in a footnote, that state enforcement is problematic only where Congress *requires* states to enforce federal law,[173] it is unclear why this would be the case.[174] Whether states are required, permitted, or encouraged to enforce federal law, state officers may still choose enforcement policies that differ from those of the President. It is not clear why requiring states to enforce federal law interferes with the President's powers more than permitting them to do so. By way of analogy, when Congress creates a private right of action allowing private litigants to enforce federal law, Congress does not *require* private litigants to enforce federal law, it merely permits them to do so. But the Court has nonetheless found that permitting private litigants to enforce federal law may interfere with the President's enforcement powers. There may be federalism differences between forcing states to execute federal law versus permitting them to do so,[175] but from a separation-of-powers perspective, whether States are required or permitted to execute federal law does not alter the fact that they may do so in ways that differ from those of the President.

There are other problems with the claim that Article II has no relevance to the distribution of power between the federal government and the states. Both case law and legal scholarship think about grants of power to the branches of the federal government in terms of the distribution of power between the federal government and the states. Indeed, most of the modern cases establishing limits on Congress's Article I

[171] 521 U.S. 898, 902, 922–23 (1997).
[172] Id. at 922.
[173] Id. at 923 n.12.
[174] See Caminker, supra note 154, at 231–32.
[175] See, e.g., Adam B. Cox, Expressivism in Federalism: A New Defense Of The Anti-Commandeering Rule?, 33 Loy. L.A. L. Rev. 1309, 1311–21 (2000) (exploring the application of expressivism to structural rights, including how it affects both sides of the anti-commandeering debate).

powers consider this distribution and its effect the states' police powers.[176] The same is true for doctrines concerning the jurisdiction of the federal courts.[177] The scope of Congress's power under Article I and the scope of federal courts' power under Article III do not concern only the division of power between the legislative, executive, and judicial branches, so why should the scope of the President's powers under Article II concern only the distribution of power between the President, Congress, and the courts, rather than between the President and the states?[178]

C. States Are Unique

Another possibility is that there are unique justifications why Congress should be allowed to permit states but not private litigants to execute federal law. Initially, this idea is in tension with the Court's focus on text in interpreting Article II, which provides no distinction between states and other nonexecutive actors. It is also in tension with the absolutist nature of the Court's interpretation of Article II. If Article II requires the President to execute federal law, the probability that states would execute federal law more similarly to the President than would private litigants should not matter.

But there may be various functional considerations that could explain why states, though not other nonexecutive actors, may execute federal law, and these considerations sound primarily in federalism. For example, it may be that prohibiting the states from executing federal law would be too costly to state autonomy; states may be better positioned than private litigants to represent the public interest; or there may be a

[176] See, e.g., United States v. Lopez, 514 U.S. 549, 564–67 (1995).

[177] See Gunn v. Minton, 133 S. Ct. 1059, 1065, 1068 (2013).

[178] There is at least one circumstance where the scope of the federal executive power has implications for federalism: executive or foreign affairs preemption. The question in both *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 413–14 (2003), and *Medellin v. Texas*, 552 U.S. 491, 528–530 (2008), was whether some kind of presidential action—in *Garamendi* an executive agreement and in *Medellin* an informal memorandum—preempted contrary state laws. The answer to that question turned in part on whether the President's action fell within the core of the President's Article II powers. That is, where a presidential action is considered a "core" Article II power, state laws contrary to that action are more likely to be preempted. Compare *Garamendi*, 539 U.S. at 415 (noting the "longstanding practice" of executive agreements regarding foreign relations), with id. at 438–39 (Ginsburg, J., dissenting) (disagreeing that the law in question violates implicit foreign policy objectives), and *Medellin*, 552 U.S at 529–30 (discussing presidential initiatives).

historical practice of states enforcing federal law.[179] Subsections III.C.1–III.C.3 address these arguments respectively.

1. Costs to State Autonomy

The preemption cases may be driven by attention to the imposition on presidential exclusivity and the costs to presidential exclusivity. That is, the Justices may believe that the President's discretion is limited less when states seek to execute federal law than when private litigants endeavor to do so, or that the costs of presidential exclusivity to state autonomy in context of preemption are simply too high.

It is conceivable that state enforcement decisions are more likely to coincide with a President's enforcement decisions. As elected government officials, state officers may make more selective and responsible enforcement decisions that align more closely with those of an elected President.[180] Even if that is true, however, there is a substantial risk that states, like private litigants, will diverge from the President's determination about how federal law should be executed. *Arizona v. United States*[181] is one of numerous examples that illustrate the point. In several areas where states have overlapping regulatory jurisdiction with the federal government, state attorneys general have pursued innovative and rigorous enforcement policies relative to their federal counterparts.[182]

[179] If these kinds of functional considerations are the basis for the distinction between state and private enforcement of federal law, then the nonuniqueness argument—that private enforcement does not uniquely impose on presidential execution given the extent to which states already execute federal law—which also focuses on functional considerations merits more serious consideration. See supra note 154 (explaining this claim).

Seth Davis has argued that differences between government standing and private standing mean that governments have to litigate certain kinds of interests—and specifically the government's interest in enforcing the laws. See Seth Davis, Standing Doctrine's State Action Problem, 91 Notre Dame L. Rev. (forthcoming 2015) (manuscript at 8–9, available at http://ssrn.com/abstract=2589635). But the federal government's interest in seeing federal laws enforced does not explain why states necessarily have an interest in or a claim to enforcement of the public's interest in federal law. And, as Davis recognizes, it is not clear why Article III (or Article II) would prevent a government from delegating its interest in seeing particular laws enforced. Id. at 22–27.

[180] See Lemos, State Enforcement, supra note 124, at 759–61.

[181] 132 S. Ct. 2492 (2012).

[182] Hanoch Dagan & James J. White, Governments, Citizens, and Injurious Industries, 75 N.Y.U. L. Rev. 354, 363–64 (2000) (lawsuits against tobacco manufacturers); Donald G. Gifford, Impersonating the Legislature: State Attorneys General and Parens Patriae Product

Nothing ensures that states will execute federal law in precisely the same way that the President does, and even small differences in ideology or politics may lead state officials to adopt a different view as to where the public's interest in the enforcement of federal law lies.

There may, however, be substantial costs to state autonomy if states could not execute federal law. Several scholars have explained how states currently have considerable power in implementing and enforcing federal law.[183] States may fill in gaps left by federal statutes; states may experiment within the domain of a federal program; and states have leverage as administrators of federal law to effectuate a change in federal policy.[184] Safeguarding these instantiations of state autonomy may be especially important given the increasingly expansive scope of Congress's Article I powers. An across-the-board prohibition against states enforcing federal law may infringe too much on state autonomy.[185]

But the concern for undermining state autonomy may be slightly overstated. This is especially true if *Lujan* prevents states only from using state law to increase the level of federal enforcement in order to advance the public interest in seeing federal law enforced. Prohibiting states from executing federal law would not necessarily prevent states from implementing federal law in other ways that empower states. For example, it is not clear that states are executing federal law—meaning vindicating the public interest in seeing federal law enforced—by accepting money to implement a federal program such as Medicaid;[186] or by experimenting with and developing a regulatory standard that may later be adopted by a federal agency.[187]

Moreover, a state's ability to implement federal law is still contingent on congressional permission. Article I authorizes Congress to decide

Litigation, 49 B.C. L. Rev. 913, 925–29 (2008) (lawsuits against lead-based paint manufacturers).

[183] See Abbe R. Gluck, Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble, 81 Fordham L. Rev. 1749, 1749–50, 1756 (2013) [hereinafter Gluck, Federalism]; Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534, 578–79 (2011).

[184] See, Gluck, Federalism, 81 Fordham L. Rev. at 1749–50.

[185] See Young, supra note 145, at 256–59 (arguing for presumption against preemption to protect state autonomy); Young, supra note 146, 51–53 (same).

[186] NFIB v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

[187] See Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L.J. 1256, 1277–78 (2009).

how federal law is administered, and Congress may decide that states should not play any role in either the implementation or the execution of federal law. Federalism therefore does not require the states to have any particular role in the implementation of federal law, so it is not clear why the President's power to execute the federal laws could not limit the states' role in the execution of federal law, given that states need not have any role in the first place.[188]

The argument for state autonomy faces yet another difficulty—the balance of power between the states and the federal government has continually changed over time. It is not clear why we should preserve the balance of power that exists at any particular moment in time, including the present.[189] More important, even if there is a proper balance of power between the states and the federal government, state execution of federal law may not be a necessary component of that balance. The ways in which states exercise autonomy have evolved and are likely to

[188] This is especially true given the trend toward choosing an effective federal power over state autonomy. The Court has not been especially willing to enforce or establish limits on Congress's powers, and commenters generally believe that Congress's commerce power allows Congress to regulate virtually any activity. See Gil Seinfeld, Article I, Article III, and the Limits of Enumeration, 108 Mich. L. Rev. 1389, 1391 (2010); Steven D. Smith, The Writing of the Constitution and the Writing on the Wall, 19 Harv. J.L. & Pub. Pol'y 391, 396 (1996). Although *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), struck down federal statutes on the ground that the statutes exceeded the scope of Congress's power to regulate interstate commerce, *Gonzales v. Raich* subsequently upheld federal regulation of small amounts of locally grown marijuana. 545 U.S. 1, 25–26 (2005); cf. Kathleen M. Sullivan, From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court, 75 Fordham L. Rev. 799, 806 (2006) (arguing *Lopez* and *Morrison* do not meaningfully limit Congress's ability to regulate under the commerce power). *NFIB v. Sebelius* casts some doubt on broad readings of the commerce power. 132 S. Ct. at 2590. But the Court ultimately upheld the minimum-coverage requirement as a valid exercise of the taxing power, and the Chief Justice's vote that the mandate was not a valid exercise of the commerce power is dictum and unlikely to control the outcome of a future case. Id. at 2598; id. at 2629 n.12 (Ginsburg, J., concurring). Generally speaking, there is no question that the doctrine has tolerated an increasing amount of federal power. If we accept the expansion of Congress's legislative powers because they are necessary to having an effective federal legislature, it is unclear why there would or should not be a similar movement toward choosing an effective executive power over state autonomy. The question is whether an effective executive requires exclusivity in the execution of federal law.

[189] See, e.g., Richard Primus, The Limits of Enumeration, 124 Yale L.J. 576, 596–602, 609–10 (2014) (describing how the scope of Congress's commerce power has expanded); Andrew Coan, Implementing Enumeration, 125 Yale L.J. (forthcoming 2016) (manuscript at 34–36, available at http://ssrn.com/abstract=2622238) (similarly noting this development).

continue to do so. For example, earlier scholarship on federalism viewed limits on Congress's Article I powers as necessary to ensure states' independence, whereas more-modern federalism scholarship has explained how federal statutes can actually be powerful sources of state autonomy.[190] The literature has also described how several processes have evolved to function as structural safeguards for state autonomy, including the party system, which incentivizes the opposing party to resist federal intrusions in the name of state autonomy and, failing that, to find ways to empower states within a federal scheme.[191] The sources and forms of federalism change, and the fact that state autonomy has value does not mean that any particular mechanism of effectuating state autonomy, such as state execution of federal law, is a necessary component of a healthy federal system.

Even assuming that the preemption cases are attempting to balance state autonomy with executive power, this only underscores the tension with the separation-of-powers cases. The emphasis on state autonomy in preemption cases boils down to the notion that there are benefits in having the states limit the President's discretion over the execution of federal law. The standard benefits to federalism are well rehearsed: Federalism offers the advantages of local decision making[192] and the promise of regulatory diversity[193] and experimentation.[194] And this assumes that the states are empowered to pursue policies that differ from the policies of the federal government. In the preemption cases discussed in Part II, state autonomy limits the President's discretion over the execution of federal law, and it enables states to develop competing accounts of where the public interest in the execution of federal law lies. If the preemption cases value state autonomy, therefore, it is because there is

[190] See Bulman-Pozen & Gerken, supra note 187, at 1258; Gluck, Federalism, supra note 183, at 1749.

[191] See Larry D. Kramer, Putting the Politics Back into the Political Safeguards, 100 Colum. L. Rev. 215, 268–69 (2000).

[192] See, e.g., Richard Briffault, What About The 'Ism'?, Normative And Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303, 1327–29 (1994).

[193] Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1485, 1493–94 (reviewing Raoul Berger, Federalism: The Founders' Design (1987)).

[194] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

value in having some limit on the President's unfettered discretion over the execution of federal law as well.[195]

Finally, this line of reasoning maintains there should be an exception, based on principles of federalism, to the rule that the President alone may execute federal law. But why is there an exception only for principles of federalism rather than for other constitutional values? There are other constitutional values, such as the rule of law, that may be undermined were the President alone to enforce (or not enforce) federal law. Part IV discusses these in more detail below,[196] but here I only wish to note that if Congress is justified in permitting nonexecutive actors to enforce federal law to accommodate one constitutional value, such as federalism, it is unclear why accommodating other constitutional values does not suffice as a justification for Congress to permit other nonexecutive actors to enforce federal law.

2. States and the Take Care Clause

One other possibility is that States are different than private litigants in ways that matter to the Take Care Clause. That is, while the preemption cases appear to admit there is value to limiting the President's discretion in executing federal law, it may be that the Justices believe the states are uniquely situated to do so. The execution of federal law requires an assessment of the public interest, and states are structured to represent the public in ways that private litigants are not. Most obviously, state officials are elected and accountable to the public. Harold Krent has argued that, for this reason, delegations to states are permissible, but delegations to private citizens are not.[197] State officials may take into ac-

[195] Rick Hills has noted that Justice Scalia's statements in *Arizona* expressing concern about whether the President is enforcing law consistent with public opinion are inconsistent with his conviction in *Morrison* that presidential enforcement is the best way of ensuring accountable enforcement. Hills, supra note 14, at 217–18.

[196] See infra Section IV.B.

[197] Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations Outside the Federal Government, 85 Nw. U. L. Rev. 62, 111 (1990).

Tara Leigh Grove has also argued that standing functions as a kind of nondelegation doctrine, prohibiting Congress from creating large swaths of "private prosecutorial discretion" to litigate the United States' administrative interests. Tara Leigh Grove, Standing as an Article II Nondelegation Doctrine, 11 U. Pa. J. Const. L. 781, 790–91 (2009). Grove focuses primarily on prosecutorial duties that implicate private liberty interests. Id. I agree that criminal cases present a different case. See infra Section IV.C. And there may be some individual-rights limitations in any discrete enforcement proceeding. But at least in the context of civil

count the cost of enforcement more so than private litigants, especially because limited resources constrain state officials and cause them to more carefully scrutinize the public interest before making decisions. State officials also have the benefit of being repeat players—they investigate and enforce a range of state and federal laws, which may give them a sense of the "bigger picture" and position them to make more responsible and selective enforcement decisions.

States may be unique, but *Lujan*'s articulation of the constitutional rule does not really suggest those differences should matter. As *Lujan* framed the analysis, the question is not a comparative or relative one, that is, whether an enforcement scheme accommodates the same benefits presidential enforcement offers, including some measure of accountability to the public. Rather, *Lujan* framed the rule as absolute: The Constitution requires the President alone to execute federal law.[198] No matter the advantages, state execution of federal law offends *Lujan*'s understanding of Article II. Subsequent cases confirm this reading of *Lujan* and further dispense with the idea that a state's "accountability" permits it to execute federal law. *Printz* invoked *Lujan*'s understanding of the Take Care Clause to invalidate a congressional act purporting to require state officers to conduct background checks required by federal law.[199] The Court explained that the act at issue would have transferred the President's executive responsibilities "to thousands of [state officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove)."[200]

Aside from the absolute nature of *Lujan*'s interpretation of Article II, state enforcement is different from federal enforcement in several significant respects. Although states are structured to be responsive to the public, this public differs from the public to whom the President is accountable. Presidents are positioned to represent the national interest and resist the pressures of local factions[201]—the exact local factions to which

enforcement proceedings, states have the power to enforce federal laws against persons to whom they are not formally accountable (out-of-state residents). Their ability to do so is serious evidence against a strong rule against delegating any kind of enforcement functions.

[198] 504 U.S. at 577.

[199] 521 U.S. at 922–23.

[200] Id. at 922.

[201] See Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 38 (1994) ("This fact means that a foreign or domestic faction (or interest

states are accountable. State enforcement is therefore likely to respond to interests and concerns that are unique to the state yet may be overlooked by the federal government as a discrete subset of the national population or interest. In the antitrust context, for example, state enforcers report that they "typically focus on enforcement cases that have significant specific local or regional impact upon their states, their consumers, and their public institutions."[202] A recent study by economist Eric Zitzewitz confirms these self-reported findings. Zitzewitz examined settlements between the SEC and large New York trading firms and found that settlements varied according to whether state officials were involved—the ratio of restitution to harm was up to ten-fold higher in settlements in which the New York Attorney General had participated.[203] Zitzewitz concluded the difference was attributable in part to the New York Attorney General adopting a broader view of the harms to markets and industries that are concentrated in New York.[204]

Zitzewitz's findings reveal another way in which a state's appraisal of the public interest differs from that of the federal government—states may place greater importance on in-state enforcement benefits at the expense of out-of-state enforcement costs, just as private litigants may overvalue the benefits they reap personally from the enforcement of federal law relative to the enforcement costs placed upon the greater public. Indeed, Rick Hills characterizes state officials as policy entrepreneurs because they "can frequently externalize the costs of policymaking on to nonresidents."[205]

Admittedly, states represent a wider array of interests than private litigants do, and that may position the states to better represent the public interest. However, one of the values furthered by state autonomy is empowering a group that constitutes a minority at the national political level to pursue its preferred policy at the state political level. Federalism

group) will find it far more costly to 'purchase' the President and his national constituency than it would be for such a faction (or interest group) to purchase some much smaller, more regional constituency.").

[202] Roundtable Conference with Enforcement Officials, 73 Antitrust L.J. 269, 296 (2005) (statement of Patricia Connors, Chair of NAAG's Multistate Antitrust Task Force).

[203] Eric Zitzewitz, An Eliot Effect? Prosecutorial Discretion in Mutual Fund Settlement Negotiations 2003–7, at 3–5 (Jan. 2008) (unpublished manuscript, available at http://ssrn.com/abstract=1091035).

[204] Id. at 30.

[205] Roderick M. Hills, Against Preemption: How Federalism Can Improve the Legislative Process, 82 N.Y.U. L. Rev. 1, 22 (2007).

literature celebrates citizens' ability to "vote with their feet" and to self-select into groups of relatively like-minded individuals.[206] An individual state therefore may reflect a discrete subset of the public interest in the execution of federal law to the same extent as an organization of like-minded individuals or a private litigant. The value of state autonomy, moreover, lies in the fact that states are positioned to make a *different* assessment from the President about where the public interest in the execution of federal law lies. If a state's assessment of the public interest were a mere approximation of the executive's assessment, there would be little reason and little value in permitting the states to execute federal law. The arguments in favor of federalism, and specifically in favor of empowering states to execute federal law, assume that different states can and will adopt different policies from each other and from the federal government.[207]

Furthermore, whether states do in fact execute federal law based on assessments of their citizens' overall interests in the execution of federal law is debatable. The literature has criticized state attorneys general for enforcing laws for political gain rather than as a coherent assessment of the public good.[208] Zitzewitz, for example, suggested the disparity in SEC settlements could partially be attributable to the fact that the New York Attorney General, Eliot Spitzer, harbored political ambitions and sought to use the high settlement amounts to advance his political career.[209] Rick Hills makes the same claim, but on a grander scale—state officials may experiment with policies because state officials "are sufficiently ambitious for higher office that they will undertake the risks of

[206] See Heather K. Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 64–65 (2009); Douglas Laycock, Voting with Your Feet Is No Substitute for Constitutional Rights, 32 Harv. J.L. & Pub. Pol'y 29, 30 (2009).

[207] See Young, supra note 146, at 54. Heather Gerken has also argued that "federalism," properly understood, is a way of empowering political minorities to operate within the system. Gerken, supra note 206, at 7. That is, she suggests federalism describes "a complex amalgam of state and local actors who administer national policy" and further their own agendas within a federal program. Id. As examples of federalism, she describes the powers exercised by citizens on juries and school boards. If that is the value of federalism, empowering private individuals to execute federal law furthers that agenda—it empowers what may be a minority voice to shape national policy. Id. at 64–65.

[208] See, e.g., Richard A. Posner, Federalism and the Enforcement of Antitrust Laws by State Attorneys General, *in* Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 252, 257–60 (Richard A. Epstein & Michael S. Greve eds., 2004).

[209] Zitzewitz, supra note 203, at 30–31.

enacting new policies."[210] The literature has also suggested that several features of state politics—such as the smaller size of a state constituency relative to the national constituency and the relative power of interested groups in state politics versus national politics—mean that states are more likely to bend to motivated interested parties than is the federal executive.[211] This does not mean states are more vulnerable to capture by powerful regulated interests, but it does mean that states may respond to a different set of interests than the national government does. Sometimes the interests a state is responding to may have idiosyncratic—or at least unrepresentative—views about the public interest in the execution of federal law.[212]

States also are not unitary actors, and state laws may authorize attorneys that are relatively less accountable to initiate enforcement proceedings. For example, the laws at issue in both *Whiting* and *Arizona* authorized county attorneys to bring enforcement proceedings.[213] This limits the force of the accountability argument for state execution of federal law in several respects. First, local attorneys may not be elected.[214] Some city and county attorneys are state civil servants, and state civil service protections may limit the ability of an elected official to remove them.[215] Second, local officials that are elected are accountable to even narrower subsets of the public than state attorneys, and local constituencies may be less ideologically or socioeconomically diverse than their state counterparts.[216] Third, local elections are at best a blunt tool for holding these individuals accountable for their decisions about how to execute federal law because the proper level of federal law enforcement may be unlikely to dominate a local election. Considering these factors,

[210] Hills, supra note 205, at 22–23.

[211] Hills, supra note 205, at 22–23 (surveying this literature); Zitzewitz, supra note 203, at 30–31 (same).

[212] Hills, supra note 205, at 22–24.

[213] Ariz. Rev. Stat. Ann. § 23-212(B) (2012).

[214] See, e.g., Marc L. Miller & Samantha Caplinger, Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions, 41 Crime & Just. 265, 283–84 (2012) (noting how attorneys representing different levels of state government are selected in different ways).

[215] See, e.g., Donald G. Featherstun, D. Whitney Thornton II & J. Gregory Correnti, State and Local Privatization: An Evolving Process, 30 Pub. Cont. L.J. 643, 654 (2001) (discussing constitutionalized civil service protection in California and Colorado).

[216] See Gerken, supra note 206, at 22–23.

it is far from clear that states are uniquely situated to enforce federal law.

3. State Enforcement and History

One final word about states' power to execute federal law: It could be that state-initiated enforcement of federal law does not offend Article II based on an historical tradition of states enforcing federal law in, for example, *parens patriae* suits.[217] Whether this explanation is persuasive may depend on the extent to which one finds historical practice to be dispositive in constitutional interpretation, especially because this theory lacks a functional account of why state enforcement of federal law should be permitted.[218]

This explanation also depends on the historical contours of the *parens patriae* doctrine, and specifically on whether state enforcement of federal law falls within the bounds of a state's *parens patriae* powers. But there is no universally accepted formulation or consistent historical practice of *parens patriae* litigation. At its inception, the *parens patriae* power authorized suits "on behalf of 'infants, idiots, and lunatics'—that is, those who could not represent themselves."[219] More recently, the Court has suggested that *parens patriae* suits require a state to "articulate an interest apart from the interests of particular private parties" and to express "a quasi-sovereign interest."[220] Quasi-sovereign interests come in one of two forms: the state's interest in "not being discriminato-

[217] See Richard P. Ieyoub & Theodore Eisenberg, State Attorney General Actions, the Tobacco Litigation, and the Doctrine of *Parens Patriae*, 74 Tul. L. Rev. 1859, 1863–71 (2000); Jack Ratliff, *Parens Patriae*: An Overview, 74 Tul. L. Rev. 1847, 1850–51 (2000).

[218] See, e.g., Primus, supra note 11, at 221. Sai Prakash, one of the principal proponents of the argument that Article II requires the President to meaningfully control the execution of federal law, has suggested there is some historical evidence that states administered federal programs. Prakash nonetheless maintains that Article II requires presidents to exercise meaningful control over states' execution of federal law, ideally through a power to remove state officers from their role in executing a federal scheme. E.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 639–43 (1994); Saikrishna B. Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 1990–91 (1993).

[219] Gifford, supra note 182, at 919–21 (arguing many modern suits are not really *parens patriae* suits as traditionally understood and providing examples); Lemos, Aggregate Litigation, supra note 124, at 493 n.22.

[220] Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982). Ann Woolhandler and Michael Collins have argued this is an unjustified expansion and should be carefully limited. See Woolhandler & Collins, supra note 10, at 510–11.

rily denied its rightful status" in the union and the state's interest in the "physical and economic" well-being of the state's residents.[221]

An interest in seeing federal law enforced does not fit neatly into either one of these categories. To begin, the interest in seeing federal law enforced is not tied to the physical or economic well-being of a state's residents. For example, the Telephone Consumer Protection Act ("TCPA") authorizes state attorneys general to enforce statutory provisions that prohibit certain kinds of telemarketing calls. It might be the case that those telemarketing calls injure citizens' physical or economic well-being, but that will not always be true. More important, statutes like the TCPA do not condition state enforcement of federal law on a state's ability to show that the statutory violation injures the economic and physical well-being of its residents. Nor is it clear how suing to enforce federal law remedies any discrimination directed at a state's role in the union. While a state's "role in the union" is an admittedly amorphous concept, thus far the Court has only used it to describe a state's physical existence, not a general interest in seeing federal law enforced.[222]

Additionally, relying on an analogy to *parens patriae* suits assumes there is a historical tradition of *parens patriae* litigation but no similar historical analog to citizen suits or private enforcement of federal statutes. History is less than clear on this point. Ann Woolhandler and Michael Collins have argued that expansive conceptions of state standing are recent nineteenth-century developments.[223] Although they maintain that states may pass state laws and enforce those laws in state courts, they suggest that there is no historical tradition allowing states to assert general interests in seeing federal law enforced, especially in federal courts.[224] Moreover, Cass Sunstein and Steven Winter have documented extensive evidence from English common law and early American traditions demonstrating that citizens were able to sue to enforce laws even where they had no private interests in the suit.[225] Sunstein explained that

[221] *Snapp*, 458 U.S. at 607.

[222] Massschusetts v. EPA, 549 U.S. 497, 518–19 (2007) (finding that the state had a quasi-sovereign interest in protecting "its sovereign territory" from global-warming harms).

[223] Woolhandler & Collins, supra note 10, at 517–18.

[224] Id.

[225] Sunstein, supra note 8, at 168–79; Steven L. Winter, The Metaphor of Standing Doctrine and Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1419 (1988). But see Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689, 689–91 (2004).

"the English practice was to allow strangers to have standing in the many cases involving the ancient prerogative writs."[226] He specifically noted the tradition of informers actions where "cash bounties were awarded to strangers who successfully prosecuted illegal conduct,"[227] and relators actions, in which "suits would be brought formally in the name of the Attorney General, but at the instance of a private person, often a stranger. '[A]ny persons, though the most remote in the contemplation of the charity, may be relators . . . .'" Sunstein surmised that there is "no reason to think that the American practice was more restrictive than that in England,"[228] and documented examples of writs initiated at the behest of strangers, qui tam actions, and informers actions in the United States.[229] From these sources, Sunstein concluded that "[t]here is no basis for the view that the English and early American conception of adjudication forbade suits by strangers or citizens."[230]

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There is no easy explanation for the Court's failure to engage the separation-of-powers implications of states executing federal law. Even if one of these explanations ultimately suffices as a justification for why states but not private litigants may execute federal law, we might at least expect the Court to address the point.[231] Although it is intuitive to invoke federalism as an explanation for why states may execute federal law, this only highlights the dueling notions of executive power in the two sets of cases.[232] The value of federalism in the preemption cases is that states

[226] Sunstein, supra note 8, at 171.

[227] Id. at 172.

[228] Id. at 172–73 (quoting Attorney Gen. v. Bucknall, (1741) 26 Eng. Rep. 600 (Ch.); 26 Atk. 600).

[229] Id. at 174–76; see also Harold J. Krent, Executive Control over Criminal Law Enforcement: Some Lessons from History, 38 Am. U. L. Rev. 275, 290–302 (1989).

[230] Sunstein, supra note 8, at 171, 177–79.

[231] *Massschusetts v. EPA*, 549 U.S. 497 (2007), is not to the contrary, suggesting that "[s]tates are not normal litigants for the purposes of invoking federal jurisdiction." Id. at 518. But in that case the state sought to vindicate "its sovereign territory," that is, the physical lands within its boundaries. Id. at 519. And to the extent that case allowed the states to assert public interests in a federal lawsuit, id. at 514–16, Part III attempted to show that no sensible understanding of the Take Care Clause would permit states but not private citizens to do so.

[232] The frequency with which states execute federal law indicates that private litigants may also do so. But both states' and private litigants' ability to execute federal law is a question of legislative choice; whether either can sue to vindicate the public interest in enforcement

may pursue views different from those of the President about where the public interest in the execution of federal law lies, and, in doing so, limit the President's enforcement discretion. This rationale illuminates the difference between the preemption cases and the separation-of-powers principle animating *Lujan*.

IV. TAKING CARE OF FEDERAL LAW

The tension between the separation-of-powers and the preemption cases provides a strong reason why Article II should not be understood to permit Congress to authorize states but not private litigants to execute federal law. This Part further develops the case for rejecting the absolute interpretation of Article II inherent in separation-of-powers cases and instead embracing the idea that Congress may limit the executive's discretion over the execution of federal law by dividing up the authority to enforce federal civil laws. The Court's interpretation of Article II is too inconsistent with too many established practices to be a viable constitutional interpretation, and it rests on questionable assumptions about both the legislative process and the accountability of the executive.

A. Rule of Law Considerations

One of the most compelling reasons to question *Lujan*'s reading of Article II is the substantial gap it creates between interpretation and existing practice. *Lujan*'s absolute interpretation of Article II maintains that only the President may execute federal law, but this is inconsistent with myriad circumstances where nonexecutive actors exercise enforcement capability. As Part II detailed, states routinely execute federal law. Congress has repeatedly authorized state attorneys general to initiate federal law-enforcement proceedings in federal court, or incorporated qui tam provisions that allow individuals otherwise unconnected with a case to initiate a suit when federal law is violated.[233] And the U.S.

depends on whether Congress has authorized such suits. Congress may have to speak clearly to preclude state execution of federal law, whereas it may have to speak clearly to authorize private execution of federal law. Compare, e.g., Riegel v. Medtronic, Inc., 552 U.S. 312, 334 (2008) (noting that courts presume Congress does not preempt state law causes of action), with Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) (recognizing that federal courts will not imply private rights of action authorizing individuals to sue to enforce federal law).

[233] E.g., 31 U.S.C. §§ 3729–3731 (2012).

Code contains numerous citizen-suit provisions analogous to the one at issue in *Lujan*.[234]

Taken together, these examples should raise serious questions about whether *Lujan*'s interpretation of Article II is correct. It is not generally a virtue for a constitutional interpretation to stray so far from settled practice. Most constitutional theorists agree that "a *theory* of constitutional interpretation . . . must explain most of the actual *practice* of constitutional interpretation."[235] That is, "[a]ny acceptable theory of constitutional adjudication should . . . be able to account for most (though not necessarily every last bit) of the current constitutional order."[236] A large metric of the legitimacy of any constitutional theory is "descriptive, because [a theory] cannot call for a wholesale departure from existing practices."[237]

While extensive congressional practice may not always be enough to make a practice constitutional,[238] there are several reasons why constitutional practice informs constitutional interpretation, especially in matters related to the separation of powers."[E]veryone recognizes that constitutional interpretation has never been the exclusive province of the judiciary."[239] And federal legislation in particular may represent Congress's views about what the Constitution means.[240] That is, every congressional statute authorizing nonexecutive actors to execute federal law, and every state law attempting to enforce federal law, arguably represents the

[234] E.g., 33 U.S.C. § 1365 (2012); Richard M. Re, Relative Standing, 102 Geo. L.J. 1191, 1232 (2014).

[235] Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 450 (1995); see also Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1203, 1233 (1987) (explaining that a large measure of legitimacy is "descriptive accuracy"); Fallon, How to Choose, supra note 11, at 540–41 ("Few, if any, constitutional theories are purely normative. Most, if not all, claim to fit or explain what they characterize as the most fundamental features of the constitutional order." (citations omitted)).

[236] Henry Paul Monaghan, Supremacy Clause Textualism, 110 Colum. L. Rev. 731, 790 (2010).

[237] David A. Strauss, What Is Constitutional Theory?, 87 Calif. L. Rev. 581, 582 (1999).

[238] See, e.g., INS v. Chadha, 462 U.S. 919, 944–45 (1983) (holding congressional veto provisions to be unconstitutional despite long and pervasive use).

[239] Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 434 (2012).

[240] See Lee Epstein, "Who Shall Interpret the Constitution?", 84 Tex. L. Rev. 1307, 1313–14 (2006); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Powers: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943, 2021–22 (2003).

views of public officials that the Constitution permits nonexecutive actors to execute federal law.[241] If many different Congresses, many different times, have adhered to a particular understanding of Article II and the Constitution's separation of powers, that is a reason to give the understanding serious consideration. A degree of modesty suggests courts should indulge that interpretation before casting it aside as wrong.[242] Chief Justice Marshall explained how congressional practice informs constitutional meaning as follows:

> [A] doubtful question . . . in the decision of which . . . the respective powers of those who are equally representatives of the people, are to be adjusted; if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.[243]

Congressional practice may be especially relevant to separation-of-powers questions.[244] There is no "separation of powers" clause in the Constitution, and congressional practice is a way of giving more concrete content to the concept and contours of the separation of powers.

There are other reasons to favor unity between constitutional interpretation and constitutional practice. An interpretation that respects existing practices furthers the rule of law, meaning both the stability of the law (doctrines that are resistant to sharp, unpredictable change), and the ability of the law to deliver stability (no sudden or substantial changes in settled practice). A constitutional rule that calls into question a multitude of federal and state statutes is destructive to these rule-of-law values because it undercuts settled expectations and requires a substantial over-

[241] See, e.g., Curtis A. Bradley & Niel Siegel, After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession, 2015 Sup. Ct. Rev. (forthcoming 2016) (manuscript at 17–18, 20–22) (available at http://ssrn.com/abstract=2547962 (explaining interpretive theories that account for congressional practice).

[242] See Michael J. Gerhardt, Lecture, Constitutional Humility, 76 U. Cin. L. Rev. 23, 23–32 (2007) (noting one account of judicial modesty is judges deferring to the decisions of other constitutional actors).

[243] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819); see also John F. Manning, Foreword: The Means Of Constitutional Power, 128 Harv. L. Rev. 1, 43–66 (2014) (defending the view that the Necessary and Proper Clause delegates considerable latitude to Congress to decide how to structure the executive branch).

[244] Bradley & Morrison, supra note 239, at 417–18.

haul of how things work.[245] Other reasons sound more in constitutional legitimacy. Some scholars have suggested that the Constitution "owes its status as supreme law to contemporary practices of acceptance."[246] Under this view, the Constitution is legitimate because individuals implicitly consent to it. And because people only implicitly consent to existing practice, the Constitution must conform to existing practices to be legitimate.[247] Finally, the validity of a constitutional rule may also depend in part on whether a rule tracks public opinion, and this too can partially be measured by existing practice.[248] If the validity of a particular interpretation is measured in part by its relation to existing practice, *Lujan*'s interpretation of Article II falls short.

Of course, there is and there should be some disconnect between constitutional interpretation and existing practice.[249] A practice is not legitimate solely because it has happened, or even because it has happened for a very long time. Whether the Court should adopt an interpretation that eschews existing practice depends in part on other considerations, including how the interpretation coheres with other constitutional values. The subsequent Sections assess the normative account of the Court's interpretation of Article II.

B. Reassessing the Take Care Clause

This Section examines the normative reasons that may be animating the rule that the President must oversee the public's interest in enforcing federal statutes. Subsection IV.B.1 first unpacks *Lujan*'s reasoning, which appears to assume that presidents should have an unreviewable power not to enforce statutes that no longer have popular support. Subsection IV.B.2 then argues *Lujan*'s reasoning rests on questionable assumptions about the legislative process and an over-simplified understanding of presidential accountability.

[245] See id. at 211–13, 217–21.

[246] Fallon, Constitutional Precedent, supra note 11, at 1117.

[247] See Primus, supra note 11, at 190.

[248] Fallon, Constitutional Precedent, supra note 11, at 1112; Richard Primus, Public Consensus as Constitutional Authority, 78 Geo. Wash. L. Rev. 1207, 1209–10 (2010).

[249] See Stephen Sachs, The "Constitution in Exile" as a Problem for Legal Theory, 89 Notre Dame L. Rev. 2253, 2255–56 (2014).

1. Lujan*'s Undercurrent of Deseutude*

As Part I explained, it is difficult to derive a full account of the relevant separation-of-powers principles from *Lujan*. To better understand better the reasoning behind *Lujan*, it is helpful to consider other sources that argue for a similar interpretation of Article II. One such source is then-Judge Scalia's lecture, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, which more fully explains some of the reasoning behind *Lujan*.[250] Several scholars have relied on the lecture to more fully understand *Lujan*'s reasoning,[251] as have some courts.[252]

While *Lujan* does not cite the lecture itself, *Lujan* invoked the same separation-of-powers arguments. For example, like *Lujan*, the lecture maintains that cases involving a plaintiff who is one among a minority of injured persons are fit for resolution in federal courts, while cases in which a plaintiff is one of many equally injured persons are not.[253] A widely shared injury makes a claim ill-suited for federal court, the lecture reasoned, because federal courts are "removed from all accountability to the electorate."[254] The lecture explained that the "halls of Congress," the "federal bureaucracy," and the executive branch depend on the electorate's support and will therefore carry out the will of the majority.[255] This accountability check may mean the executive opts *not* to enforce a particular statute or provision. The lecture framed the issue as follows:

> Does what I have said mean that, so long as no minority interests are affected, "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of *course* it does—and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question,

[250] Scalia, supra note 68, at 881–82 (1983).

[251] Heather Elliot, The Functions of Standing, 61 Stan. L. Rev. 459, 463 (2008); Sunstein, supra note 8, at 164.

[252] WildEarth Guardians v. Salazar, 834 F. Supp. 2d 1220, 1223 (D. Colo. 2011).

[253] *Lujan*, 504 U.S. at 577 (quoting Stark v. Wickard, 321 U.S. 288, 309–10 (1944)); Scalia, supra note 68, at 894–95.

[254] Scalia, supra note 68, at 896. Cases relying on *Lujan* have echoed this reasoning and suggested that presidential execution of federal law "ensure[s] . . . accountability." Printz v. United States, 521 U.S. 898, 922 (1997).

[255] Scalia, supra note 68, at 897.

> lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday's herald is today's bore—although we judges, in the seclusion of chambers, may not be *au courant* enough to realize it.[256]

Under this view, where a law goes unenforced, it is because the majority wants it to be unenforced.[257]

In addition to this descriptive account of executive accountability, the lecture also makes a normative claim. Specifically, it embraces the President's enforcement discretion—"[t]he ability to lose or misdirect laws"—as "one of the prime engines of social change."[258] The lecture observed that "Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred."[259] Although the lecture recognized that executive nonenforcement *may* encourage the legislature to repeal a statute, the lecture embraced nonenforcement itself as a mechanism for change—it is a way to move away from the laws on the books, or in the lecture's words, to "lose or misdirect" them.[260]

The idea that nonenforcement is a mechanism to effect legal change underpins other theories of legislation. The intuitions animating the Court's interpretation of the Take Care Clause share a curious similarity with the doctrine of desuetude, a common law doctrine that authorizes courts to abrogate long-unenforced criminal statutes.[261] Desuetude maintains that courts may abrogate—that is, repeal—criminal statutes if those statutes have lain dormant for a sufficient period of time.[262] Although the doctrine is invoked rarely (it is recognized only in West Virginia courts),[263] some scholars have called for its reinvigoration,[264] in part

[256] Id.
[257] Id. at 895–97; Elliot, supra note 251, at 489.
[258] Scalia, supra note 68, at 897.
[259] Id.
[260] Id.
[261] William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 591–92 (2001).
[262] Id.
[263] Note, Desuetude, 119 Harv. L. Rev. 2209, 2209 (2006); see, e.g., State v. Donley, 607 S.E.2d 474, 479–80 (W. Va. 2004) (recognizing the doctrine of desuetude).
[264] See, e.g., Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 148–49 (2d ed. 1986); Note, supra note 263, at 2209.

from concerns unique to criminal law, such as principles of fair notice.[265]

Other defenses of desuetude sound in principles of legislation. Alexander Bickel, for example, argued that desuetude was one of several "device[s] to turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature."[266] By abrogating a statute, courts force the legislature to take another look at the law. This is a good thing, Bickel argued, because laws do not retain their authority over time.[267] Not only may old statutes no longer reflect current political will,[268] but outdated, unenforced statutes may lack the visibility to mobilize enough people to repeal the statute.[269] Bickel explained that a court's decision to abrogate a statute forces the legislature to reexamine a law by "set[ting] in motion the process of legislative decision. It does not hold that the legislature may not do whatever it is that is complained of but, rather, asks that the *legislature* do it, if it is to be done at all."[270] Judge Calabresi similarly argued that desuetude combats the risk of the "statutorification"—ossification through statutes—of American law.[271]

These claims share several key intuitions with *Lujan*'s interpretation of the Take Care Clause. Specifically, desuetude and the reasoning animating *Lujan* are attuned to the possibility that a law may remain on the books even though it no longer enjoys popular support. *Lujan* and desuetude recognize that some combination of forces—the sheer difficulty of enacting federal law, the inertia of the status quo, and so on—results in a disconnect between the law on the books and the preference of the political majority. Recall the statement, "Yesterday's herald is today's bore."[272] Both doctrines respond to that disconnect by empowering one branch of the federal government to mitigate the effects of such laws.

[265] Bickel, supra note 264, at 154; Corey R. Chivers, Desuetude, Due Process, and the Scarlet Letter Revisited, 1992 Utah L. Rev. 449, 449. Strands of this reasoning have appeared in equal protection and Eighth Amendment doctrine, where the Court has viewed laws as constitutionally suspect if the laws have not been enforced with any regularity. See Graham v. Florida, 560 U.S. 48, 62–64 (2010); Lawrence v. Texas, 539 U.S. 558, 572–73 (2003).

[266] Bickel, supra note 264, at 148.

[267] Id. at 151–52.

[268] Id. at 152.

[269] Id.

[270] Id.

[271] Guido Calabresi, A Common Law for the Age of Statutes 17–24 (1982).

[272] Scalia, supra note 68, at 897.

Lujan allows the President not to enforce a law when it ceases to enjoy popular support, while desuetude authorizes judges to do the same. ("[L]ots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere."[273]) The theories also share an end goal. Both *Lujan* and desuetude hope to have the political process reassess a statute and decide whether the statute should remain in force. Desuetude "set[s] in motion the process of legislative decision,"[274] and nonenforcement is a tool that may lead to legislative repeals.[275]

To be sure, there are important differences between desuetude and *Lujan*'s vision for how the Take Care Clause will operate. Unlike desuetude, *Lujan* does not allow the President to formally take a law off the books. *Lujan*, however, does permit the President to functionally do so by "los[ing]" a law.[276] Moreover, *Lujan* allows presidents to "lose" laws for the same reasons desuetude permits judges to formally repeal a statute—that the legislature may not repeal laws that lack popular support, and that laws should not be enforced when they lack popular support.

2. Evaluating the Theory

This Subsection analyzes several claims that appear to motivate the Court's interpretation of the Take Care Clause: (1) that laws should be enforced only where they enjoy popular support; (2) that the executive will choose to enforce laws based on whether the laws enjoy popular support; and (3) that nonenforcement of federal laws will generate legislative change.

a. Legislative Authority

One sentiment animating *Lujan* is the idea that laws should be enforced only when they enjoy popular support. This principle has intuitive appeal, but operationalizing it is difficult because it is not clear how the President can reliably make this determination. One way would be to have the majority that prevailed in the legislature engage in some kind of campaign to demonstrate that a law continues to enjoy popular support.

[273] Id.
[274] Bickel, supra note 264, at 152.
[275] Scalia, supra note 68, at 897.
[276] Id. at 897; see supra text accompanying notes 80–83 (describing executive enforcement discretion *Lujan* entails); infra text accompanying notes 258–265, 272–280 (same).

But this makes a legislative victory somewhat pyrrhic—the majority has not actually prevailed in a meaningful sense because, in order to effectuate their preferred program, they must continually demonstrate that public sentiment remains in their favor.[277] At some point, it seems, a legislative victory should be enough to secure a law's enforcement. Indeed, scholars have underscored how the legislative process has become prohibitively difficult for passing laws.[278] Brad Clark and John Manning have both described how various features of the legislative process create several potential veto points where minorities, meaning those opposed to a federal statute, have power to reject federal statutes.[279] Parliamentary procedure, presidential vetoes, Senate filibusters, and committee processes all allow groups far smaller than the majority to block legislation, effectively creating a supermajority requirement for statutes.[280]

The idea that the executive has the ability to "lose or misdirect laws"[281] also creates a potential rule-of-law problem. The notion that a duly enacted law can fall by the wayside because the executive has determined that it lacks support or no longer reflects the public interest is arguably inconsistent with the directive of the Take Care Clause, which requires the President to "faithfully" execute statutes.[282] In other contexts, the Court has cautioned that the President does not have the power "to dispense with the law."[283] As *Kendall v. United States* explained,

[277] Some features of administrative law necessarily force the majority to win beyond the legislative process. For example, the majority may have a preferred interpretation of a statute that requires them to lobby the administrative agency interpreting the statute. See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 837–38 (1984). But in those cases, Congress has delegated interpretive authority to the agency, and so the "win" procured in the legislative process includes the decision to push certain decisions over to the agency.

[278] Hills, supra note 205, at 12–13; Richard B. Stewart, Madison's Nightmare, 57 U. Chi. L. Rev. 335, 340–42 (1990).

[279] Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1339–40 (2001); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 70–77 (2001).

[280] Clark, supra note 279, at 1339–40; Manning, supra note 279, at 70–77.

[281] Scalia, supra note 68, at 897.

[282] U.S. Const. art. II, § 3.

[283] United States v. Smith, 27 F. Cas. 1192, 1201, 1229–30 (C.C.D.N.Y. 1806) (No. 16,342); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("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."); id. at 655 (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power."); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 612–13 (1838) ("[T]his right of the

"To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."[284] Policy-driven nonenforcement decisions are in tension with these understandings of separation of powers.[285]

Of course, resource constraints will require the executive to emphasize some legal commitments and deemphasize others.[286] Congress may also explicitly or implicitly delegate to the executive the power to make policy-laden enforcement judgments.[287] Some amount of enforcement discretion is inevitable, and it is not always clear what kinds of nonenforcement decisions are permissible.[288] But *Lujan* assumes the executive should have the power not to enforce federal statutes in all arenas based on a general assessment of where the public interest in the execution of federal law lies, subsequently limiting Congress's power to create private rights of action in order to preserve this prerogative. The notion that we should structure legal regimes in order to ensure that the executive, sitting by himself, has the unreviewable power to make this determination is a challenge to the rule of law. It is one thing to suggest that the executive must set priorities among various statutory prohibitions, or to

President [to dispense with the law] is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.").

[284] 37 U.S. (12 Pet.) at 613.

[285] See Daniel T. Deacon, Deregulation Through Nonenforcement, 85 N.Y.U. L. Rev. 795, 795–96 (2010); Love & Garg, supra note 15, at 1197–99; Price, supra note 19, at 673–75.

[286] Saikrishna Bangalore Prakash, The Statutory Nonenforcement Power, 91 Tex. L. Rev. See Also 115, 116–19 (2013). If nonenforcement reflects resource constraints, state and private enforcement would further the President and the public's preferred enforcement policy by adding the resources necessary to arrive at the desired enforcement level. See infra text accompanying notes 302–03.

[287] Adam B. Cox & Cristina M. Rodriguez, The President and Immigration Law, 119 Yale L.J. 458, 460–62 (2009). There may also be specific contexts, including immigration law and certain criminal prohibitions, in which executive enforcement discretion is a means to enforce particular constitutional norms. For example, Rick Hills has argued that enforcement discretion in the immigration context is a way to safeguard egalitarian and equal protection norms prohibiting discrimination against persons unauthorized to be in the United States. Hills, supra note 195, at 191–92.

[288] Prakash, supra note 286, at 115–19.

suggest that some amount of executive enforcement discretion is inevitable, or to suggest that Congress has delegated lawmaking powers to the executive. But it is another to limit Congress's powers to authorize nonexecutive actors to enforce federal law in order to ensure that the President has unfettered discretion to abandon law in accordance with his own assessment of the public good.

The rule-of-law problem is exacerbated by *Lujan*'s assumptions about how the legislature may respond to executive nonenforcement. Recall the observation that executive nonenforcement of Sunday blue laws led to the repeal of those laws.[289] That example represents an occasion where both the legislature's and the executive's assessments of the public interest overlapped, agreeing that the public no longer had a shared interest in the enforcement of Sunday blue laws. But what if the legislature disagrees with the executive's assessment? What if the executive is incorrect about public sentiment, or imposes his policymaking views, and declines to enforce statutes that continue to enjoy majority support? In the context of desuetude, judicial *repeal* of a statute can be remedied when the legislature reenacts the statute.[290] But what should happen when, as *Lujan* envisions, the executive declines to enforce a statute while it remains on the books? A motivated legislature that disagrees with the executive could reenact the statute, but that asks Congress to reenact what is already the law. Furthermore, reenacting the law does not empower anyone to enforce the law other than the executive who has been persistently declining to do so.

One additional point: The intuitions motivating *Lujan*'s interpretation of the Take Care Clause are in some tension with *Lujan*'s method of interpreting the Take Care Clause. The Court's interpretation is formalistic in important ways—specifically, it relies on the Constitution's reference to the executive's duty to "take Care that the Laws be faithfully executed"[291] to infer that the executive alone can execute federal law.[292] By contrast, the intuitions that appear to motivate *Lujan*'s interpretation of the Take Care Clause are deeply pragmatic. It is not clear why a formalist should be concerned with whether laws continue to enjoy popular support. From a formalist perspective, to put the point bluntly, laws are

[289] Scalia, supra note 68, at 897.
[290] See Bickel, supra note 264, at 152.
[291] U.S. Const. art. II, § 3.
[292] See Caminker, supra note 154, at 1102–03.

laws, and they remain law until they are repealed or invalidated by a court. The Constitution specifies a mechanism for law to become authoritative—bicameralism and presentment—and that is the *only* source of law's authority; there are no hierarchies in authority that differentiate between old and new laws. The fact that repealing an outdated statute is difficult should also not, from a formalist perspective, explain why executive nonenforcement may act as a substitute for legislative repeal.

b. Presidential Responsiveness

The Court's interpretation of the Take Care Clause also assumes that executive enforcement decisions will be guided by public sentiment. This assumption is shaped in part by the unitary-executive theory and the corresponding literature's story about the ways in which presidents are accountable to the public: Presidents are elected, they must build national coalitions, and they are concerned about their legacies.[293]

But there are reasons to doubt whether presidents are accountable to the public for particular *enforcement* policies.[294] Angela Davis has argued that the public is unaware of most prosecutorial decisions and, in any event, has little opportunity to actually hold prosecutors accountable, especially at the federal level.[295] In other enforcement contexts as well, the public may not have the kind of information that enables them to hold the President accountable for enforcement decisions. Enforcement decisions and enforcement policies are rarely formalized,[296] and even when they are formalized, enforcement decisions are not often presented in any public fashion that would allow the public to provide feedback or demand accountability.[297] President Obama's memorandum of understanding announcing the nonenforcement of particular applications of federal immigration law is the exception.[298] But when it comes to, for

[293] James P. Pfiffner, The Modern Presidency 40–50 (1994).

[294] Rick Hills has noted that Justice Scalia's statements in *Arizona* expressing concern about whether the President is enforcing law consistent with public opinion are inconsistent with his conviction in *Morrison* that presidential enforcement is the best way of ensuring accountable enforcement. Hills, supra note 14.

[295] See Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 Iowa L. Rev. 393, 439–49 (2001).

[296] See Deacon, supra note 285, at 809.

[297] See id. at 796.

[298] Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), available at

example, the unauthorized-employment restrictions in the IRCA, the applicability of environmental statutes to new forms of land use, or the applicability of financial regulations to new commercial practices, the President has not announced criteria for when and under what circumstances federal prohibitions will be enforced.[299]

It is also unlikely that the public could collect and assemble the kind of data that would reveal the enforcement policy the President is pursuing. Identifying an enforcement policy requires both knowing when a legal violation has occurred and whether it resulted in enforcement proceedings.[300] Because this information is difficult to gather, the public's knowledge of enforcement decisions may depend on information that comes from the executive branch, which does not have an incentive to broadcast unpopular decisions.[301]

All this suggests that presidents may have reasons to execute federal law less forcefully than the public desires.[302] But presidents may also be genuinely limited in their ability to execute federal law as much as they desire. *Lujan* assumes that executive nonenforcement signals a lack of popular support for a statute, but presidents may decide not to enforce segments of federal law due to resource constraints.[303] In these cases, private or state enforcement will vindicate, rather than undermine, the President and the public's views about whether enforcing law is in the public interest.

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http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferredaction-process-young-people-who-are-low; Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at http://www.ice.gov/doclib/ secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[299] See, e.g., Deacon, supra note 285, at 819 (discussing how "[p]ursuing broad policy goals . . . through a series of individual, apparently isolated, decisions" can obscure the President's enforcement policy and providing examples from the George W. Bush Administration).

[300] See id. at 819–820; Love & Garg, supra note 15, at 1235.

[301] See Evan J. Criddle, Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking, 88 Tex. L. Rev. 441, 463–64 (2010); Deacon, supra note 285, at 820.

[302] See Criddle, supra note 301, at 464–65 ("Centralizing rulemaking authority in the White House may facilitate countermajoritarian lawmaking by enabling presidents to cater to 'narrow, sub-national political interests, including those playing major roles in [their] national campaigns.' This threat of White House capture is far from merely hypothetical . . . ." (footnote omitted) (alternation in original)); sources cited supra note 285.

[303] See Frank H. Easterbrook, On Not Enforcing the Law, AEI J. Gov't & Soc'y 14, 15 (Jan.–Feb. 1983).

c. Democracy-Forcing Benefits

Another intuition animating the Court's interpretation of the Take Care Clause is that executive nonenforcement is a way to make the law on the books cohere with popular opinion. The literature on *Lujan* implies that the legislature may align the law on the books with the executive's decision not to enforce the law (such as in the case of Sunday blue laws).[304] But two observations about the legislative process complicate this rosy picture.

First, nonenforcement may be a poor tool for eliciting a legislative response and, specifically, the repeal of outdated statutes. Executive nonenforcement actually exacerbates one of the pathologies the doctrine purportedly remedies—the difficulty of getting Congress to repeal outdated statutes. That is, the doctrine assumes that it may be prohibitively difficult to mobilize the public and Congress to care enough to repeal an outdated statute. Nonenforcement adds to this dilemma—not enforcing a statute reduces the incentive to care enough about the statute to try to repeal it.

By contrast, aggressive private or state enforcement of outdated statutes could elicit a legislative response. In the employment context, for example, Congress has amended statutes to codify theories of liability advanced by private parties.[305] It has also amended statutes to foreclose them. Congress has amended statutes when private parties obtained relief based on theories of liability that were inconsistent with Congress's views.[306] In these cases, private enforcement, rather than nonenforcement, led to a legislative response.

Second, *Lujan* reduces the incentive for regulated entities to seek legislative action. This point borrows from Einer Elhauge's argument for so-called "penalty default" rules. Elhauge reasoned that courts should adopt the interpretation of a statute that is more unfavorable to the group best positioned to persuade Congress.[307] If *Lujan* hopes to have the leg-

[304] Scalia, supra note 68, at 897.

[305] See J.H. Verkerke, Disaggregating Antidiscrimination and Accommodation, 44 Wm. & Mary L. Rev. 1385, 1396 (2003).

[306] Congress passed the Westfall Act to amend the Federal Tort Claims Act in response to the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563; Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 425–26 (1995).

[307] Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 Colum. L. Rev. 2162, 2165–66 (2002).

islature repeal outdated statutes, then Elhauge's decisional rule suggests *Lujan* should structure the process so that the group better positioned to urge Congress to repeal a statute has an incentive to do so.[308] In this respect, *Lujan* may have things backwards. The classic dispute over the "public interest" in the enforcement of federal law will pit a regulated entity or set of entities against a collection of citizens coalesced around a particular interest. As Rick Hills has observed, organizations devoted to particular principles are more likely to pursue publicity strategies designed to persuade the public to adopt their position.[309] That is, these entities are predisposed to seek congressional support for their position. Regulated entities, by contrast, "are normally inclined to lie low," and will attempt to influence policy through "informal arm-twisting behind the scenes."[310] Hills argues that these entities are more likely to try to accomplish their goals through less public "obstruction, [that is] through gridlock-promoting congressional procedures."[311] Rather than discouraging such practices, *Lujan* encourages them. *Lujan* allows regulated entities to achieve their desired end through back-channel lobbying for minimal or no enforcement. Having achieved an acceptably low enforcement equilibrium, regulated entities then have little incentive to cement that win in a public forum that requires the arguably more-difficult mobilization of public opinion.

C. Toward Shared Execution

The previous Section suggested the case for presidential exclusivity in the context of vindicating the public's shared interest in the enforcement of federal law is questionable. This Section considers the implications of embracing the idea that the execution of federal law may be a shared enterprise. Specifically, it addresses (1) arguments from text and constitutional structure; (2) the costs of nonexecutive enforcement; and (3) whether Congress may delegate other kinds of enforcement decision to nonexecutive actors.

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[308] Hills, supra note 205, at 28, 35–36 (relying on Elhauge's penalty-default structure to justify presumption against preemption).

[309] Id.

[310] Id.; see also William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Legislation: Statutes and the Creation of Public Policy 52–57 (4th ed. 2007).

[311] Hills, supra note 205, at 35 (citation omitted).

1. Text and Structure

The arguments for and against presidential exclusivity in the administration and enforcement of federal law are well rehearsed and I will only briefly outline them here.[312] The point here is that text and structure are sufficiently ambiguous to accommodate current practices that allow nonexecutive actors to execute federal law.[313]

The argument for presidential exclusivity rests largely on the observation that Article II vests the executive power in the President with a corresponding duty to faithfully execute the laws.[314] But, the rejoinder goes, other provisions give Congress powers that overlap in significant part with the executive. For example, the President is the Commander-in-Chief of the Army,[315] but Congress has the power to declare war and influence other aspects of foreign affairs.[316] The Constitution also suggests that Congress has some power to decide how federal law is executed: Congress has the power "[t]o make all Laws which shall be necessary and proper *for carrying into Execution* the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[317]

Constitutional structure is also ambiguous.[318] On the one hand, the Constitution establishes three different branches of government.[319] But on the other hand, the powers granted to each branch of government

[312] Compare, e.g., Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1158 (1992) (arguing that the Constitution requires presidential execution), with Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 2 (1994) (arguing Congress can assign nonexecutive actors executive functions).

[313] See generally Cass R. Sunstein, Correspondence: Article II Revisionism, 92 Mich. L. Rev. 131, 132 (1993).

[314] U.S. Const. art. II.

[315] Id. § 2.

[316] Id. § 8.

[317] Id. (emphasis added).

[318] See, e.g., Bradley & Morrison, supra note 239, at 417–18 (suggesting congressional practice informs separation-of-powers questions because there is no separation-of-powers provision in the Constitution); Manning, supra note 243, at 43–66 (explaining competing inferences that could be drawn from individual constitutional provisions and constitutional structure more generally).

[319] See, e.g., Free Enter. Fund v. PCAOB, 561 U.S. 477, 483 (2010) ("Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" (quoting INS v. Chadha, 462 U.S. 919, 951 (1983))); Springer v. Gov't of the Phil. Is., 277 U.S. 189, 201–02 (1928).

overlap in significant respects: Congress passes laws,[320] but the President may veto them;[321] the President can make treaties, but the Senate must ratify them.[322] These overlapping areas of authority create a system of checks and balances that promote values similar to the ones animating a system of strict separation of powers. But instead of relying on strict independence, a system of checks and balances furthers these norms through mutual dependence and interactions.[323]

2. Costs to Shared Execution

The benefits to presidential enforcement are well catalogued. Presidential oversight increases the chance that federal laws will be enforced uniformly and that enforcement will be coordinated on a national level.[324] Regulated entities may also develop relationships with the executive that foster regulatory compliance.[325] On the other hand, private or state enforcement may advance local concerns at the expense of the public good.[326] And because private or state litigants may not consider the cost of enforcement to other states or political communities, private and state enforcement may result in over- and inefficient enforcement of federal law.[327]

To begin, any risks animating the need for presidential exclusivity are already present where Congress creates private rights of action for persons who suffer "injury in fact" from violations of federal law and have standing to sue. Private litigants—even those with concrete, particularized interests—"lack . . . accountability for the social impact of their enforcement decisions."[328] Richard Stewart and Cass Sunstein have argued that any amount of private enforcement may interfere with an agency's

[320] U.S. Const. art. I, § 8.

[321] Id. § 7.

[322] Id. art. II, § 2.

[323] Bond v. United States, 131 S. Ct. 2355, 2365 (2011) ("Yet individuals, too, are protected by the operations of separation of powers and checks and balances.").

[324] Jeannette L. Austin, The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 Nw. U. L. Rev. 220, 236 (1987).

[325] Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1292–93 (1982).

[326] Krent & Shenkman, supra note 78, at 1808.

[327] Id.

[328] Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va. L. Rev. 93, 119 (2005).

ability "to negotiate with regulated firms and other affected interests in order to establish a workable and consistent regulatory system."[329]

And ultimately, the Court has repeatedly insisted that Congress is free to determine whether these costs are outweighed by the benefits of private enforcement.[330] Indeed, the Court has described the decision whether to create a private right of action as uniquely legislative in nature in part because it entails such balancing, which may vary by context.[331] Not only does this reasoning suggest that Congress is capable of weighing the costs and benefits to various enforcement schemes, but also the fact that there are costs suggests that Congress will not overuse its authority to delegate enforcement authority to nonexecutive actors. The President's role in the enforcement of federal law is deeply entrenched, and permitting some nonexecutive actors to enforce federal law is unlikely to tip the overall balance away from presidential administration.[332]

My argument is not that nonexecutive actors should more regularly be enforcing federal law. Nor is it that we should more freely imply private rights of action to enforce federal law. Rather, it is that the Constitution permits Congress to decide to authorize an individual to bring suit in federal court for violation of federal law.

3. Implications for Criminal Law

Abandoning *Lujan*'s understanding of the Take Care Clause raises the question whether there is any limit to Congress's ability to authorize nonexecutive actors to vindicate the public interest in the enforcement of federal law. For example, could Congress permit states or private actors to enforce federal criminal laws? In a very general sense, all federal criminal prosecutions embody the public interest in seeing federal law enforced—federal criminal prosecutions are not conducted by the victims or by those especially injured by the crimes.[333]

[329] Stewart & Sunstein, supra note 325, at 1292–93.

[330] See, e.g., Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

[331] Id. at 286–87.

[332] Terry M. Moe & William G. Howell, Unilateral Action and Presidential Power: A Theory, 29 Pres. Stud. Q. 850, 860 (1999).

[333] See, e.g., Edward A. Hartnett, The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places, 97 Mich. L. Rev. 2239, 2247 (1999).

But there are additional concerns unique to criminal law that may limit nonexecutive enforcement. Various doctrines single out for special treatment a sovereign's interest in enforcing its criminal code. For example, in the double-jeopardy context, a state may bring charges against an individual who was previously acquitted of the same offense under the law of another state or the federal government, just as the federal government may bring to trial an individual who was previously acquitted of the same offense under state law. This doctrine is in part "founded on the common-law conception of crime as an offense against the sovereignty of the government."[334] Similarly, federal courts are required to abstain in cases where a claim is simultaneously being raised in a state *criminal* proceeding, though the same prohibition does not necessarily apply to state *civil* proceedings.[335] This doctrine also reflects the intuition that each sovereign should enforce its own criminal code. This principle has deep historical roots[336] and could mean that the executive, as the chief law-enforcement officer of the United States, has a greater claim to enforcing a criminal statute than a civil one.

Rachel Barkow has also argued that a strict separation of powers may be necessary in the criminal context even if it is not justified elsewhere,[337] in part because these executive decisions are not subject to meaningful judicial review or political oversight.[338] She also suggests structural safeguards are important because individual-rights provisions act as poor safeguards against systemic abuses and inequities.[339] The line between civil and criminal enforcement, moreover, offers clarity that the current doctrinal rule, which differentiates between public and private rights, does not.

There may also be criminal-procedure doctrines that limit Congress's ability to permit nonexecutive enforcement of criminal law. For example, there could be due process issues with permitting ultimately unac-

[334] Heath v. Alabama, 474 U.S. 82, 88 (1985).

[335] Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 588 (2013).

[336] Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Crimes and offenses against the laws of any state can only be defined, prosecuted and pardoned by the sovereign authority of that state . . . ."); 1 F. Wharton, Criminal Law § 10, at 11 (9th ed. 1885) ("Penal justice . . . is a distinctive prerogative of the State, to be exercised in the service . . . of the State . . . .").

[337] Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1036–40 (2006).

[338] Id. at 993; Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 871 (2009).

[339] Barkow, supra note 338, at 886; Barkow, supra note 337, at 1031–32.

countable entities from criminally prosecuting individuals.[340] Equal protection and due process principles may also limit private or state actors' ability to reinvigorate outdated criminal statutes or engage in selective prosecutions.[341]

In light of the differences between criminal and civil enforcement proceedings, Congress may not be able to authorize anyone to enforce federal criminal laws even if it has the power to create all manners of private rights of action in civil statutes.[342] Whether and when federal criminal law enforcement may be conducted by nonexecutive actors is ultimately beyond the scope of this Article.

CONCLUSION

Over the last two decades, the Court has repeatedly suggested that Article II requires the President alone to execute federal law on behalf of the public. This Article has questioned that interpretation of Article II, focusing on how several recent preemption cases have embraced the idea that states should be able to execute federal law on behalf of the public, and, in doing so, limit the President's discretion over the execution of federal law. These cases, coupled with the widespread practice of states and private litigants executing federal law, suggest that Article II should not be understood to prohibit Congress from authorizing nonexecutive actors to enforce federal civil laws.

[340] Cf. Robertson v. United States ex rel. Watson, 560 U.S. 272, 277–78 (2010) (Roberts, J., dissenting from denial of certiorari).

[341] See Lawrence v. Texas, 539 U.S. 558, 578–79 (2003); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[342] Some literature has suggested there is evidence that early federal criminal prosecutions were conducted by state officials, as well as by officials not under direct control of the President. See, e.g., Harold J. Krent, Executive Control over Criminal Law Enforcement: Some Lessons from History, 38 Am. U. L. Rev. 275, 303 (1989); Ryan W. Scott, Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases, 89 Ind. L.J. 67, 80 n.103 (2014). *Morrison v. Olson* permitted Congress to create an independent counsel, not subject to meaningful presidential review, to investigate and criminally prosecute executive employees. 487 U.S. 654 (1988).