COLUMBIA LAW REVIEW

VOL. 114 JANUARY 2014 NO. 1

ARTICLE

IMPLIED PUBLIC RIGHTS OF ACTION

*Seth Davis**

This Article analyzes the federal courts' power to provide public remedies when the legislature has been silent. Like private parties, the United States and the states regularly claim a right to judicial relief or a particular remedy that is not mandated by a federal legislative text. Scholars have mined the depths of implied private rights of action, but have all but ignored implied public rights of action. This Article fills that gap. In particular it argues that when a public litigant sues in what amounts to a private capacity, courts should treat it like a private litigant by placing appropriate constraints on implied rights of action. Conversely, when a public litigant sues in a uniquely public capacity, a significantly more generous implication doctrine is appropriate. Contrary to some common wisdom, when a government sues in a corporate capacity to protect garden-variety property and contract interests, there is no special reason for courts to recognize a right of action. Nor should federal courts broadly provide public rights of action when a government seeks to substitute public for private enforcement of the private rights of its citizens. By contrast, federal courts should more freely imply rights of action when a government sues to vindicate public interests. In the modern administrative state, a public litigant often claims an implied right of action to implement a regulatory program. A government may also

* Climenko Fellow and Lecturer on Law, Harvard Law School. Email: sdavis@law.harvard.edu. I would like especially to thank Jake Gersen and David Barron for their helpful comments as this project progressed. In addition I would like to thank Andrew Bradt, Michael Coenen, James Coleman, Tessa Davis, Avlana Eisenberg, Stella Burch Elias, Dick Fallon, Elisabeth de Fontenay, Billy Magnuson, Dan Meltzer, Gillian Metzger, Leah Plunkett, Lisa Sandoval, Babak Siavoshy, Micah Smith, Matthew Stephenson, and Susannah Barton Tobin for helpful comments on previous drafts, and Maria Glover, Michael Heller, Anton Metlitsky, Joe Singer, and Andrew Woods for helpful conversations. This Article also benefitted from many helpful comments of participants in workshops at Florida International University College of Law; Florida State University College of Law; Harvard Law School; Northern Kentucky University Salmon P. Chase College of Law; Sandra Day O'Connor College of Law, Arizona State University; the University of Arizona James E. Rogers College of Law; the University of Colorado School of Law; the University of Houston Law Center; the University of Illinois College of Law; the University of Richmond School of Law; UCLA School of Law; and the annual conference of the Law and Society Association.

sue to vindicate its institutional immunities and authority to regulate. That government powers, rather than rights, imply public remedies may seem a paradox. It is not, or so this Article argues.

INTRODUCTION

One of the most contentious and practically important debates about judicial authority in the administrative state concerns the question of whether federal courts may recognize private rights of action in the face of "legislative silence."[1] This Article asks the same question about public rights of action.[2] Like private parties, the United States and the states regularly claim a right to judicial relief or a particular remedy that is not mandated by a statute or the Constitution. Yet for all the scholarly attention to implied private rights of action, there has been little discussion of implied public rights of action.[3]

The problem is of more than conceptual interest. The Obama Administration's challenge to Arizona's controversial "papers, please" immigration policy in *Arizona v. United States*[4] is one of many suits resting

1. Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1230 (1982).

2. This Article distinguishes between private rights of action in favor of private parties and public rights of action in favor of the United States and the states. Where necessary, it also distinguishes between implied rights to sue, which are labeled implied rights of action, and implied forms of judicial relief, which are labeled implied remedies, following Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 65 (1992).

3. The category of implied public rights of action has been discussed in its own right in passing. See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1456 (2001) [hereinafter Clark, Separation of Powers] (arguing for limitation on "judicial authority to recognize implied public rights of action"); Oliver A. Houck, Rising Water: The National Flood Insurance Program and Louisiana, 60 Tul. L. Rev. 61, 151 n.527 (1985) ("There is . . . authority for the proposition that implied 'public' rights of action are more easily found than are 'private' ones."). For the most part scholars have focused solely upon implied private rights of action. For recent examples with citations to the voluminous literature from the 1970s and 1980s, see Lumen N. Mulligan, Federal Courts Not Federal Tribunals, 104 Nw. U. L. Rev. 175, 178–80 (2010); Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va. L. Rev. 93, 102–06 (2005); Daniel P. Tokaji, Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws, 44 Ind. L. Rev. 113, 126–33 (2010).

4. 132 S. Ct. 2492 (2012). Arizona's "papers, please" policy directs state and local police to check the immigration status of a person when they have a "reasonable suspicion" that he or she is an undocumented immigrant. Ariz. Rev. Stat. Ann. § 11-1051(B) (2012). The United States sued to enjoin implementation of the policy, which the Supreme Court upheld while striking down other elements of the statutory scheme. See *Arizona*, 132 S. Ct. at 2510 (striking down several statutory sections while rejecting pre-enforcement challenge to "papers, please" policy).

upon an implied public right to judicial relief. In recent years, the United States or its agencies have claimed implied remedies to enforce the Commerce Clause, the doctrine of intergovernmental immunity, the Investment Advisers Act, the Federal Food, Drug, and Cosmetic Act (FDCA), the Medicare Act, the National Labor Relations Act (NLRA), and the PATRIOT Act, to name a few.[5] States or their agencies have sued without express statutory authorization to enforce the Constitution, federal statutes that delegate implementation authority to state officials, and federal civil rights and employment laws, among others.[6] Some of the most high-profile litigation of the last few years has posed the problem of implied public rights of action; consider, for example, the various state suits to enjoin implementation of the Patient Protection and Affordable Care Act directly under the Constitution.[7]

For all its practical importance, the jurisprudence of implied public rights of action is a muddle. Federal courts often adopt a unitary approach, treating public litigants like private ones by looking to the jurisprudence of implied private rights of action when deciding whether to imply a public right of action, particularly in statutory cases.[8] But federal

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5. See, e.g., United States v. City of Arcata, 629 F.3d 986, 990 (9th Cir. 2010) (intergovernmental immunity); SEC v. DiBella, 587 F.3d 553, 569 (2d Cir. 2009) (Investment Advisers Act); United States v. Lane Labs-USA Inc., 427 F.3d 219, 223 (3d Cir. 2005) (Federal Food, Drug, and Cosmetic Act); United States v. Lahey Clinic Hosp., Inc., 399 F.3d 1, 15 (1st Cir. 2005) (Medicare Act); NLRB v. Arizona, No. CV 11-00913-PHX-FJM, 2011 WL 4852312, at *6 (D. Ariz. Oct. 13, 2011) (National Labor Relations Act); United States v. Alabama, 813 F. Supp. 2d 1282, 1335 (N.D. Ala. 2011) (Commerce Clause), aff'd in part, rev'd in part, dismissed in part, 691 F.3d 1269 (11th Cir. 2012), cert. denied, 133 S. Ct. 2022 (2013); Doe v. Ashcroft, 334 F. Supp. 2d 471, 496–97 (S.D.N.Y. 2004) (PATRIOT Act), vacated on other grounds sub nom. Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006) (per curiam).

6. See, e.g., Wyoming v. Oklahoma, 502 U.S. 437 (1992) (suit between states to enforce Dormant Commerce Clause); Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin., 603 F.3d 365 (7th Cir. 2010) (en banc) (suit between state agencies to enforce Protection and Advocacy for Individuals with Mental Illness Act of 1986, which delegates implementation authority to state agencies); New York v. 11 Cornwell Co., 695 F.2d 34 (2d Cir. 1982) (suit by state under 42 U.S.C. § 1985), vacated in part, 718 F.2d 22 (2d Cir. 1983); Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981) (en banc) (per curiam) (suit by state against municipal officers to enforce Fourteenth Amendment); Hodges v. Shalala, 121 F. Supp. 2d 854 (D.S.C. 2000) (suit by state against federal official to enforce Tenth Amendment); Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90 (D. Mass. 1998) (suit by state against private party to enforce Age Discrimination in Employment Act).

7. See, e.g., Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 269–72 (4th Cir. 2011) (holding state lacks standing to challenge Patient Protection and Affordable Care Act); Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011) (declining to reach state standing question), aff'd in part, rev'd in part sub nom. Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

8. See, e.g., Fla. Dep't of Bus. Regulation v. Zachy's Wine & Liquor, Inc., 125 F.3d 1399, 1403 (11th Cir. 1997) (refusing to imply right of action in favor of state without "'clear evidence of Congress's intent to create a cause of action'" (quoting Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1345 (11th Cir. 1997))); SEC v. Bolla, 550 F.

courts sometimes veer—rather sharply—from this unitary approach when deciding whether a government enjoys an implied right to judicial relief. For example, courts have called the distinction between private and public enforcement "natural" when the United States claims an implied remedy[9] and doubted whether a state official "brings a 'private right of action,' when suing in her official capacity."[10] Even Justice Lewis Powell, whose dissenting opinion in *Cannon v. University of Chicago* was a remarkably influential manifesto against implied private rights of action, thought that implied public rights of action presented a "significantly different" question.[11]

Justice Powell was correct, or so this Article argues. Its thesis is straightforward: When a public litigant sues to protect typically private interests, courts should treat it like a private litigant. Conversely, when a public litigant sues to protect typically public interests, a different and more generous implication doctrine is appropriate.

To elaborate this thesis, Part I argues that the adjudicatory principle that a right implies a remedy is not an appropriate baseline for evaluating the problem of implied public rights of action. Whether founded in corrective justice or civil recourse theory, the "right-remedy principle"[12] of private litigation does not have normative force when a government sues. Instead, judicial authority to imply public rights of action is founded upon the background understanding that a federal court may elaborate the remedial implications of federal law in a regulatory mode in order to ensure an effective enforcement system.

Part II charts the development of a distinctive jurisprudence of implied public rights of action. In doing so, it sketches this Article's framework for elaborating the regulatory function of implied public rights of action by describing the four types of interests—corporate, institutional, administrative, and substitute—that a public litigant may seek to vindi-

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Supp. 2d 54, 60–63 (D.D.C. 2008) (holding, based upon Supreme Court cases denying aiding and abetting liability in private litigation, SEC cannot recover against aiders and abettors under Investment Advisers Act).

9. *Lane Labs*, 427 F.3d at 231 (reasoning "it is natural . . . to adopt a more restrictive view" of remedies available to private enforcers than those available to United States).

10. Gregoire v. Rumsfeld, 463 F. Supp. 2d 1209, 1223 (W.D. Wash. 2006).

11. 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting); see infra notes 40–43 and accompanying text (discussing Powell's dissent). In *County of Oneida v. Oneida Indian Nation*, Justice Powell, writing for the Court, held that Indian Tribes have a nonstatutory right to sue to protect property rights, a position inconsistent with his views on implied private rights of action. 470 U.S. 226, 234–36 (1985); see also Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 943 n.261 (1986) (noting inconsistency). This Article does not explore the problem of tribal enforcement of federal law, which presents additional complexities in light of federal Indian law. See Seth Davis, Tribal Rights of Action, 45 Colum. Hum. Rts. L. Rev. (forthcoming 2014) (manuscript at 1–5) [hereinafter Davis, Tribal Rights of Action] (on file with the *Columbia Law Review*) (exploring justifications for implied rights of action in favor of Indian Tribes).

12. See generally John F. Preis, Constitutional Enforcement by Proxy, 95 Va. L. Rev. 1663, 1691–95 (2009) (discussing "right-remedy principle").

cate in claiming an implied right to judicial relief. Distinguishing these interests helps explain some of the otherwise confusing patterns in the case law and points toward reform of the doctrine. Contrary to some common wisdom, reflected in standing decisions such as *Massachusetts v. EPA*,[13] when a government sues in a corporate capacity to protect garden-variety property and contract interests, there is no special reason for federal courts to imply public rights of action. Nor, again contrary to some common wisdom,[14] should federal courts broadly imply public rights of action when a government seeks to substitute public for private enforcement in order to vindicate the private rights of its citizens. In both instances, the demand that a right imply a remedy cannot sustain a broad doctrine of implied public rights of action.[15] And in the case of substitute claims, adjudicatory demands counsel in favor of private enforcement of private rights rather than potentially preclusive public enforcement.

By contrast, when a government sues in institutional litigation to vindicate intergovernmental immunities or its authority to regulate, implied public rights of action may be appropriate. Federal courts should also favor implied rights of action when a public litigant sues to vindicate administrative interests in the implementation of federal law. In both institutional and administrative cases, the demand for judicial action to make enforcement effective supports a broad implication doctrine.

To begin to show why, Part II opens the black box of public enforcement to attend to the functional differences between private, federal, and state enforcement of federal law.[16] Private litigation engenders

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13. 549 U.S. 497, 519–20 (2007) (holding state "is entitled to special solicitude in our standing analysis"); see also Benjamin Ewing & Douglas A. Kysar, Prods and Pleas: Limited Government in an Era of Unlimited Harm, 121 Yale L.J. 350, 398 (2011) (arguing "proprietary interests can top off" sovereign interests for purposes of establishing state standing). Massachusetts had an express right to sue, but the Court's opinion drew upon cases in which no express rights of action existed, 549 U.S. at 518–19, and its analysis has ramifications for the problem of implied public rights of action. See infra notes 275–276 and accompanying text (discussing *Massachusetts v. EPA*).

14. Scholars have celebrated states' parens patriae suits to vindicate their citizens' rights. See, e.g., Myriam Gilles & Gary Friedman, After Class: Aggregate Litigation in the Wake of *AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 630 (2012) (arguing states should "make broad use of their parens patriae authority" to compensate for restrictions upon private class actions). By contrast, the courts generally deny the United States a parens patriae right to sue. See infra Part III.B.2 (discussing limitations on United States' substitute suits).

15. Under current law, implied private rights of action are "disfavored" when one private party sues another under a federal statute or claims an implied damages remedy under the Constitution. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009) ("[I]mplied causes of action are disfavored . . . ."); Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) (holding "courts may not create" implied private right of action without clear evidence Congress intended to create one).

16. Cf. Elizabeth Magill & Adrian Vermeule, Allocating Power Within Agencies, 120 Yale L.J. 1032, 1035 (2011) (offering analytical framework to "crack[] open the black box of [administrative] agencies"); Mark Seidenfeld, Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking, 87 Cornell L. Rev. 486, 487 (2002) ("Adminis-

concerns about overdeterrence, lack of political accountability, and uncoordinated enforcement that have far less purchase when the United States and its agencies sue, and less weight when states or state agencies seek to enforce federal law.

That is not to deny the need for constraints upon implied public rights of action. As Part II discusses, the separation of powers and federalism principles reflected in the *Erie* doctrine are important considerations at the retail level.[17] Implication of a right of action may be inconsistent with legislative policies, particularly in statutory cases. Some jurists and scholars, however, would read *Erie* to stand for the broader proposition that federal courts have little or no authority to imply rights of action on a wholesale level. In many private rights cases, this revisionist objection now dominates the doctrine. But federal courts have implied private and public rights of action for nearly two centuries, and revisionist arguments about judicial competence cannot sustain a wholesale objection to that tradition.

Drawing upon Part II's framework, Part III identifies the situations in which implication of a public right of action is appropriate to effectuate federal statutes. Courts and scholars have paid little systematic attention to this problem, particularly as it arises in enforcement of regulatory programs by federal and state agencies. This Article fills that gap, arguing that the pattern of judicial retrenchment from implied private rights of action to enforce statutes should not extend to claims of implied public rights of action premised upon administrative and institutional interests.

Part IV turns to constitutional remedies for governments. In private rights cases involving constitutional interests, the task is understood as one of translating from the common law baseline of remedies into a world of statutes and expanded understandings of constitutional rights.[18]

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trative law generally treats an agency as a black box."). Much of the theory distinguishing public from private enforcement corresponds to distinctions between enforcement by the United States and private enforcement. With few exceptions, legal scholars have not mapped the terrain of state enforcement of federal law through litigation in detail. See Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 701–02 (2011) [hereinafter Lemos, State Enforcement] (discussing literature).

17. *Erie* held that the diversity jurisdiction statute does not authorize the creation of substantive federal common law, and opined more generally that there is no "federal general common law." Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). Jurists and commentators have debated whether *Erie*'s rejection of "federal general common law" entails limitations on the remedial authority of federal courts. For helpful discussions of the debate, see generally George D. Brown, Of Activism and *Erie*—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts, 69 Iowa L. Rev. 617 (1984); Mulligan, supra note 3, at 175.

18. The common law baseline reflects the remedies, such as trespass actions, that were available to enforce the Constitution at the Founding. See, e.g., Sina Kian, The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded, 87 N.Y.U. L. Rev. 132, 138–49 (2012) (discussing "original system of constitutional remedies"); Ann Woolhandler, The Common Law Origins of

Drawing upon *Ex parte Young* and its progeny, federal courts permit private parties to sue directly under the Constitution for injunctive relief as a matter of course, but are much more wary of implied damages remedies under the *Bivens* doctrine.[19] Public litigants rarely claim implied damages remedies but regularly seek injunctive relief to enforce constitutional norms. The Supreme Court has moved far from the common law baseline for constitutional remedies for governments, which was designed for a world of dual sovereignty and denied a public right of action to litigate sovereign interests. In some, though not all, instances, the Court has permitted sovereigns to sue to protect their institutional interests against other sovereigns. Scholars have only begun to scratch the surface of what this transformation means for constitutional remedies for governments.[20] Part IV focuses upon the central design question concerning enforcement of intergovernmental immunities and jurisdictional powers. It argues that suits to enforce institutional interests have an important structural role in enforcing the Constitution in a transformed world of overlapping sovereignties. As in the case of implied statutory remedies, this Article argues, a government's corporate and substitute interests are not sufficient bases for a broad implication doctrine.

To be sure, the effectiveness of implied public rights of action may be limited in light of political and resource constraints on public enforcement, as well as by judicial hostility to litigation. Nevertheless, if *Arizona v. United States*,[21] *Virginia ex rel. Cuccinelli v. Sebelius*,[22] and *Massachusetts v. EPA*[23] are any indication, the time has come for a more complete account of the questions that arise when public litigants seek public remedies. Properly understood, implied public rights of action can play an important role in effectuating national regulation and federal constitutional law.

I. THE PROBLEM OF IMPLIED PUBLIC RIGHTS OF ACTION

What are implied public rights of action, and how do they differ from implied private rights of action? This Part begins to answer these

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Constitutionally Compelled Remedies, 107 Yale L.J. 77, 99 (1997) (discussing use of trespass actions to enforce Constitution during common law era).

19. Compare Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 n.2 (2010) (citing Ex parte Young, 209 U.S. 123 (1908)) (holding injunctive relief generally available), with Minneci v. Pollard, 132 S. Ct. 617, 620 (2012) (holding *Bivens* damages remedy is unavailable when state tort law provides comparable compensation and deterrence).

20. The literature focuses on state standing. There is far less commentary on constitutional remedies for the United States, and no systematic study of constitutional remedies for governments. See infra Part IV (discussing implication of public rights of action under Constitution).

21. 132 S. Ct. 2492 (2012).

22. 656 F.3d 253 (4th Cir. 2011).

23. 549 U.S. 497 (2007).

questions by providing background on implied public rights of action and implied private rights of action. Its main argument is that the justification for implied public rights of action lies in the understanding that judicial implication may be appropriate to deter, detect, and correct violations of federal law.

A. *Implying Rights of Action*

The public/private distinction "continually resurfaces" in public law.[24] A diverse array of doctrines suggests that the "peculiar powers and duties of government" support principles peculiar to government suits.[25] As this Article uses it, the basic distinction between implied public rights of action and implied private rights of action is formal. A public right of action gives the United States or a state (or a federal or state agency or state subdivision) the right to sue for judicial relief to enforce federal statutory or constitutional law. A public remedy is the form judicial relief takes when a public litigant succeeds on the merits of its suit.[26] By contrast, private rights of action and private remedies concern claims by nongovernmental litigants.

Rights of action or remedies may be implied from primary law as a matter of judicial interpretation of legislative intent or common lawmaking.[27] Interpretation blends into common lawmaking as the link between an implied right of action and a specific legislative command becomes less explicit. To the extent statutory interpretation and the common law differ "in emphasis" but not "in kind,"[28] the distinction between "implied" and "judge-made" rights of action and remedies is one of degree: As the textual predicate for a right of action fades into the backdrop, an implied right of action shades into a judge-made one. Thus

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24. Michael Herz, United States v. United States: When Can the Federal Government Sue Itself?, 32 Wm. & Mary L. Rev. 893, 962 (1991); see, e.g., Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 565 (2007) ("The contrast between public rights and private rights is so deeply ingrained in American-style separation of powers, and so fundamental to our system of government, that it cannot plausibly be excised."); Michael Wells & Walter Hellerstein, The Governmental-Proprietary Distinction in Constitutional Law, 66 Va. L. Rev. 1073, 1075 (1980) (exploring whether governmental-proprietary variation on public-private distinction is "more subtle and intelligible . . . than its reputation would suggest").

25. L. Harold Levinson, The Public Law/Private Law Distinction in the Courts, 57 Geo. Wash. L. Rev. 1579, 1594 (1989).

26. Thus defined, implied public rights of action do not include instances of "pure" federal common law where a federal court creates primary rights and the means of their enforcement. See Louise Weinberg, Federal Common Law, 83 Nw. U. L. Rev. 805, 832 (1989) (defining "pure federal common law").

27. For a classic discussion of primary and remedial law, see Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 134–38 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

28. Peter Westen & Jeffrey S. Lehman, Is There Life for *Erie* After the Death of Diversity?, 78 Mich. L. Rev. 311, 332 (1980).

understood, implied rights of action present a problem of judicial authority. Remedies are not mere "adjective" law.[29] Instead, they are threads of the warp and woof of law as lived. To the extent that primary and remedial law are "functionally inseparable,"[30] implied rights of action and implied remedies present the problem of using judicial authority to develop primary rights by developing the means of their enforcement.

B. *Judicial Retrenchment from Implied Private Rights of Action*

This problem of judicial implication of rights and remedies arises in both public and private litigation. Compared to its private counterpart, the jurisprudence of implied public rights of action is poorly understood. For the most part, jurists and scholars have focused upon implied private rights of action.[31] A common starting point is the common law maxim *ubi jus ibi remedium*: Where there is a right there is a remedy.[32] Chief Justice John Marshall famously celebrated the right-remedy principle in *Marbury v. Madison*, reasoning that the "essence of civil liberty" demands that the government recognize a personal remedy "for the violation of a vested legal right."[33] For much of this nation's history, the "adjudicatory" impulse of *Marbury*'s dictum explained judicial implication of private rights of action.[34] Defenders of implied private rights of action, who today command a majority in the academy but not at the Court,[35] often point to the right-remedy principle as background understanding that supports the implication of remedial rights.[36]

But, as critics of implied private rights of action insist, empowering private parties with enforcement discretion is not without costs. To a carpenter with a hammer, every problem looks like a nail. Federal judges

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29. See Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, *in* Jurisprudence: Realism in Theory and Practice 3, 10–11 (1962) (criticizing conception of remedies as "adjective" law of lesser interest than substantive rights).

30. Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 858 (1999) [hereinafter Levinson, Rights Essentialism].

31. See supra note 3 (listing representative examples from literature).

32. See, e.g., Anthony J. Bellia Jr., Article III and the Cause of Action, 89 Iowa L. Rev. 777, 838–48 (2004) (discussing *ubi jus* baseline and criticizing it on originalist grounds).

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

34. "Adjudicatory impulse" here refers to the right-remedy idea reflected in *Marbury*'s dictum. See Susan Bandes, Reinventing *Bivens*: The Self-Executing Constitution, 68 S. Cal. L. Rev. 289, 303–22 (1995) (distinguishing between "adjudicatory" and "structural" roles of Article III judiciary).

35. See Bellia, supra note 32, at 838–48 (discussing and criticizing majority position among scholars that Court has retrenched too far from implying private rights of action).

36. See, e.g., Bandes, supra note 34, at 304 (linking right-remedy principle of *Bivens* to *Marbury* and arguing it reflects traditional judicial role); H. Miles Foy, III, Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts, 71 Cornell L. Rev. 501, 584 (1986) ("[I]n civilized society people [are] entitled to have adequate remedies . . . ."); Donald H. Zeigler, Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts, 38 Hastings L.J. 665, 678–79 (1987) (calling for return to right-remedy principle).

are no different, critics suggest. Free these empire builders to operate at the behest of private litigants whose private motives lead them to sue too often, and the predictable results will be overdeterrence, inconsistent enforcement, and interference with prosecutorial discretion.[37] Better for the Supreme Court to cabin judicial—and by extension private—discretion by harnessing federal courts with a rule that directs them rarely to imply private rights of action.

In the last three decades, this argument against implied private rights of action has been influential. Following *Erie* in 1938, courts began to conceive of implied private rights of action in positivist terms, as regulatory tools that could effectuate statutory and constitutional policies.[38] That is not to say, however, that courts became deaf to the demands of political morality. Hence *Bivens*, decided in 1971.[39] In an *Erie* time lag, however, the Court began in the late 1970s to backtrack from the common wisdom that federal courts were competent to imply private remedial rights. The turning point was Justice Powell's manifesto against implied private rights of action in his dissenting opinion in *Cannon*.[40] For Justice Powell, the specter of "crippling" liability was haunting the securities markets because federal courts had implied private rights of action to enforce the securities laws.[41] According to his *Cannon* attack, federal common law—including any implied rights of action not tied to specific legislative intent—encroaches upon Congress's legislative power and

37. See Cannon v. Univ. of Chi., 441 U.S. 677, 747 (1979) (Powell, J., dissenting) (discussing "burden of expensive, vexatious litigation upon institutions whose resources often are severely limited"); Amanda M. Rose, Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5, 108 Colum. L. Rev. 1301, 1303–05 (2008) [hereinafter Rose, Reforming Securities] (discussing view that implied right of action under section 10(b) of Securities Exchange Act has led to overdeterrence and inconsistent enforcement).

38. See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (calling implied rights of action "necessary supplement" to other forms of enforcement); Foy, supra note 36, at 556–69 (recounting historical shift in conceptions of implied private rights of action).

39. In *Bivens*, the Court implied a private damages remedy from the Fourth Amendment in favor of a private litigant who alleged he had been unlawfully arrested in his home before ultimately being released without a criminal charge. See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971) (holding Fourth Amendment implies damages remedy to protect private rights); id. at 410 (Harlan, J., concurring in the judgment) (arguing court should imply remedy because for Webster Bivens it was "damages or nothing").

40. See 441 U.S. at 740–43 (Powell, J., dissenting) (arguing implied private rights of action are presumptively illegitimate). Judicial retrenchment began in 1975 with Cort v. Ash, 422 U.S. 66 (1975), which created a four-factor test for implying private rights of action.

41. See A.C. Pritchard, Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws, 52 Duke L.J. 841, 885 (2003) ("Powell worried that novel causes of action for securities law violations could impose crippling liability.").

thus invalidly displaces state law.[42] This "new *Erie*" revisionism pointed toward a strong presumption against implied private rights of action.[43]

The jurisprudence has taken a Powellian swerve. Under current law, implied private rights of action are, in a word, "disfavored."[44] In statutory cases, the Court treats implication as an exercise in statutory construction and requires clear evidence that Congress intended to create "not just a private right but also a private remedy."[45] And even where Congress has created a right of action, the law regarding implied private remedies has followed the recent trend against private enforcement.[46] By contrast, judicial retrenchment from implication has been less pronounced in constitutional cases. The Court has not abandoned the conventional premise that the Constitution supports implied injunctive remedies—although in recent years five Justices have authored or joined opinions that suggest this doctrine should be cut back.[47] Implied damages remedies are another matter; the Court has called them a judicial "cure" likely "worse than the disease."[48] This critique portrays private litigants as harassing American business and government, seeking to obtain through litigation what they could not through politics.[49]

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42. See 441 U.S. at 740–43 (Powell, J., dissenting) (explaining constitutional objections to implied private rights of action).

43. See Brown, supra note 17, at 625 (referring to "new *Erie* doctrine").

44. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009).

45. Alexander v. Sandoval, 532 U.S. 275, 286 (2001). The principal exception involves claims for injunctive relief against unlawful government action. See infra Part III.C.1 (discussing *Ex parte Young* doctrine permitting judicial implication of private rights to injunctive relief against government action).

46. Traditionally the Court treated the problem of unspecified remedies as "analytically distinct" from implication of a right of action and presumed traditional remedies were available. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 65–66 (1992). But it has begun to interpret remedial provisions narrowly and to assume that if Congress specifies one remedy, it intended to preclude others. See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209–10 (2002) (reasoning express creation of some remedies is strong evidence of implied intent to foreclose others); Meghrig v. KFC W., Inc., 516 U.S. 479, 488 (1996) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (quoting Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14–15 (1981)) (internal quotation marks omitted)); Judith Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power, 78 Ind. L.J. 223, 231–70 (2003) (discussing jurisprudence).

47. See Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting, joined by Scalia, Thomas & Alito, JJ.) (arguing implied remedies under Supremacy Clause "would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence"); Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) (reading Ex parte Young, 209 U.S. 123 (1908), to stand for narrow proposition that federal courts will permit "preemptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings").

48. Wilkie v. Robbins, 551 U.S. 537, 561 (2007).

49. Judicial retrenchment from implied private rights of action is an example of the Court's apparent "hostility" to private enforcement. See generally Andrew M. Siegel, The

C. *The Inapplicability of the Right-Remedy Principle to Public Litigation*

Replace that private litigant with a public one and the picture changes. The modern Court's treatment of public enforcement has not tracked its attitude toward private enforcement.[50] For instance, the Court has rejected private litigation against states on sovereign immunity grounds, while praising "political responsibility" when permitting the United States to sue states to "take Care that the Laws be faithfully executed."[51]

This preference for public enforcement surfaces in some cases involving implied public rights of action. The result is something of a paradox. Consider, for example, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.[52] In *Snapp*, the Court adopted a broad doctrine of parens patriae standing that permits a state to sue on behalf of its citizens under federal statutes that do not clearly authorize private, much less public, rights of action.[53] *Snapp* is hardly the stuff of judicial restraint, yet the Court that decided it also restricted implied private rights of action. Thus, as the right-remedy principle has declined in private litigation, federal courts have expanded public remedies.

The *Snapp* approach seems to be a paradox because the protection of private rights is often taken to be a quintessential judicial function, and the protection of public rights a legislative prerogative.[54] The point is underscored by the ill fit between the adjudicatory impulse of *Marbury*'s

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Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence, 84 Tex. L. Rev. 1097 (2006) (arguing Rehnquist Court was systematically hostile to private enforcement). Across diverse doctrinal areas—standing, pleading requirements, state sovereign immunity, attorney fee shifting, class action litigation, and constitutional criminal procedure, to name a few—the Court has beat a "retreat from the principles of citizen access" to the judicial process. Arthur R. Miller, From *Conley* to *Twombly* to *Iqbal*: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1, 10 (2010).

50. See, e.g., Pamela S. Karlan, Disarming the Private Attorney General, 2003 U. Ill. L. Rev. 183, 209 (explaining Court has preferred public to private enforcement of federal law); Trevor W. Morrison, Private Attorneys General and the First Amendment, 103 Mich. L. Rev. 589, 596 (2005) (same).

51. Alden v. Maine, 527 U.S. 706, 755–56 (1999) (quoting U.S. Const. art. II, § 3) (internal quotation marks omitted).

52. 458 U.S. 592 (1982).

53. Treating Puerto Rico like a state, the Court held that it could sue on behalf of its residents in order to ensure that federal statutes "operate[d] to [their] full benefit." Id. at 610.

54. See, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2612–15 (2011) (explaining distinction between public and private rights in allocation of adjudicatory authority between agencies and courts); Thomas W. Merrill, Is Public Nuisance a Tort?, 4 J. Tort L. 1, 30–31 (2011) [hereinafter Merrill, Tort] (arguing for legislative control of public rights); Nelson, supra note 24, at 562–63 (discussing history of public and private rights of action and allocation of control over public rights to political branches); Ann Woolhandler, Public Rights, Private Rights, and Statutory Retroactivity, 94 Geo. L.J. 1015, 1019–22 (2006) (discussing "nonretroactivity principle as an aspect of separation of powers").

right-remedy principle and a public litigant's claim of an implied right of action. The right-remedy principle correlates the plaintiff's right with the defendant's duty and the plaintiff's remedy with the defendant's liability.[55] In one view, the right-remedy principle "recognizes the corrective justice ideal" of remedying a relational wrong between a victim and a tortfeasor.[56] Conceptual heavy lifting is necessary, however, to explain how "a collective entity like the government can qualify as a moral agent" for purposes of the corrective justice ideal.[57] It is a fallacy of misplaced concreteness to think that corrective justice demands a remedy when a government suffers a legal harm.[58]

The principle that rights imply remedies may also be explained in terms of civil recourse. Unlike corrective justice, the theory of civil recourse focuses on the state's obligations toward injured parties. The underlying logic can be understood through the lens of the Lockean social contract. Civil recourse theory holds that the government has assumed a political duty to provide victims of legal wrongs, who have surrendered their natural right to self-help, with a means of recourse against those who wronged them.[59]

This political demand does not hold when the government sues without specific statutory authorization. The United States hardly owes itself a duty to provide civil recourse.[60] And the relationship between the

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55. Cf. Ernest J. Weinrib, The Idea of Private Law 32–35 (1995) (arguing "salient characteristic" of private law relationships is "linking of plaintiff and defendant" through correlative rights and duties).

56. Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L.J. 695, 695 (2003).

57. Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345, 408 (2000).

58. This is not to say, however, that *retributive* justice has no place in criminal law. Cf. Kenneth W. Simons, Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation, 15 Harv. J.L. & Pub. Pol'y 849, 871 (1992) ("Corrective justice should be distinct from retributive justice in providing a specific right or claim to the victim . . . ."). This Article does not enter the debate on justifications for criminal punishment. Rather, the point here is that corrective justice does not explain why the law might provide a specific remedy to the United States or a state as a victim of a wrong.

59. See Andrew S. Gold, The Taxonomy of Civil Recourse, 39 Fla. St. U. L. Rev. 65, 70–71 & n.24 (2011) (explaining civil recourse principle through lens of social contract theory); see also John C.P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 Yale L.J. 524, 529, 550–51 (2005) (rooting right-remedy principle in Anglo-American legal tradition); Zipursky, supra note 56, at 735 (discussing civil recourse principle in relation to tort law). In theory, one might defend the right-remedy principle on deterrence grounds. But "[o]ptimal levels of deterrence can rarely be reduced to the one-to-one formula that the principle implies." Preis, supra note 12, at 1692 n.109.

60. To the extent that the United States owes a duty of civil recourse to individuals or groups—a question this Article does not address—the civil recourse principle would counsel in favor of giving those individuals or groups rights of action. See Davis, Tribal Rights of Action, supra note 11 (manuscript at 11–31) (discussing principle of self-

United States and the states, which have their own legal systems in which to vindicate their interests, is not analogous to a social contract.

If one burrows deeply enough, something resembling the principle that rights imply remedies may be found in the common law of public remedies. Early on, the Court recognized the rights of the United States and the states to sue without specific statutory authorization when their property or contract rights were at issue.[61] But while the Court appealed to political morality in recognizing remedies for private wrongs, it focused in public cases on the "fitness" and convenience of permitting a government to sue, reasoning that it would be "strange" to deny it a right to invoke the common law forms of action.[62] Thus, right-remedy rhetoric, to the extent it has surfaced in public litigation, springs from a different remedial imperative than *Marbury*'s celebrated dictum.[63]

D. *The Regulatory Dimension of Implied Public Rights of Action*

In short, the early Court focused on what this Article calls the regulatory dimension of implying a public remedy.[64] Implication of a private right of action may help in "deterring, detecting, and correcting" violations of constitutional and statutory law.[65] Call this the regulatory impulse for implied private rights of action, in contrast to the adjudicatory

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determination in civil recourse theory and linking it with federal policy of self-determination for Indian Tribes).

61. See, e.g., Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850) (permitting United States to sue without statutory authorization where proprietary rights are in controversy); Dugan v. United States, 16 U.S. (3 Wheat.) 172, 181 (1818) (permitting United States to sue in contractual disputes for specific performance or damages); Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 405–09 (1792) (permitting state to sue to vindicate its common law proprietary rights); Ann Woolhandler & Michael G. Collins, State Standing, 81 Va. L. Rev. 387, 406–07 (1995) (discussing *Brailsford* and other examples of states' right to sue to vindicate common law proprietary rights).

62. *Dugan*, 16 U.S. (3 Wheat.) at 181.

63. There is no better illustration of this difference than a nineteenth-century case in which the United States expressly and successfully invoked the *ubi jus* maxim before the Court. In *Florida v. Georgia*, the United States requested an opportunity to appear in a boundary dispute between the two states. 58 U.S. (17 How.) 478 (1851). Attorney General Caleb Cushing invoked the principle that rights imply remedies. Id. at 480–81. Attorney General Cushing's argument apparently moved the Court, which permitted the government to appear, though not as a party entitled to judgment. The Court reasoned that "[j]ustice . . . require[d]" that the "twenty-nine other States" be heard through the voice of the federal government and pointed to the "duty" of the United States "to watch over [the] interests" of the Union "when they are in litigation." Id. at 494–95.

64. Cf. Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 57 (1993) [hereinafter Monaghan, Protective Power] (attributing cases to judicial recognition of "Executive's 'managerial' power to fill in the details of statutes").

65. Stephenson, supra note 3, at 96; see, e.g., Stewart & Sunstein, supra note 1, at 1299–305 (exploring rule of law justifications for implying private rights of action in constitutional context); Carlos Manuel Vázquez, What Is Eleventh Amendment Immunity?, 106 Yale L.J. 1683, 1800 (1997) (arguing implied constitutional remedies serve to ensure rule of constitutional law).

impulse of *Marbury*'s dictum. Implication in a regulatory mode is particularly appropriate where a private victim of a legal wrong is likely to be in the best position to know of the violation and to sue the violator. The classic example is a tort that violates positive law.[66]

Applied to public litigation, the regulatory justification calls for implication of a public right of action to ensure the rule of federal law. There is a distinctive jurisprudence that supports this regulatory justification for implied public rights of action, but its contours remain unmapped. Part II maps them.

II. THE MUDDLED JURISPRUDENCE OF IMPLIED PUBLIC RIGHTS OF ACTION

Federal courts often treat public litigation differently from private litigation according to the substantive interests at stake. The United States, for example, is not subject to estoppel on the same terms as private litigants when it sues to vindicate its sovereign interests.[67] When the United States sues as a subrogee of a private party under state law, it is bound by state procedural rules, but the outcome is different when the government "proceed[s] in its sovereign capacity."[68] State sovereign immunity does not shield states from suits by the federal government or other states.[69] Neither the United States nor the states are "normal litigants for the purposes of invoking federal jurisdiction"[70] or claiming rights under federal common law.[71] And so on.

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66. See, e.g., Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916) (permitting victim of workplace accident to sue under implied right of action); Thomas M. Cooley, A Treatise on the Law of Torts: Or the Wrongs Which Arise Independent of Contract 20–21 (2d ed. 1888) (discussing common law doctrine that statutes prohibiting tortious wrongs imply rights of action); Ezra Ripley Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317, 317–19 (1914) (discussing common law principle that violation of criminal statute is also tortious wrong).

67. See, e.g., Cox v. Kurt's Marine Diesel of Tampa, Inc., 785 F.2d 935, 936 (11th Cir. 1986) (distinguishing between United States' sovereign and proprietary interests for purposes of estoppel doctrine).

68. United States v. California, 507 U.S. 746, 757 (1993); cf. United States v. Summerlin, 310 U.S. 414, 417 (1940) (holding United States is immune from state statute of limitations when "acting in its governmental capacity").

69. See Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991) ("We have . . . found a surrender of immunity against particular litigants in only two contexts: suits by sister States, and suits by the United States." (citations omitted)). But see New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883) (holding state sovereign immunity bars suit when state is nominal party suing on behalf of private individual). Scholars disagree as to whether the nominal party exception applies when the United States sues. Compare Jonathan R. Siegel, The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity, 73 Tex. L. Rev. 539, 554 (1995) (arguing exception does not apply), with Evan H. Caminker, State Immunity Waivers for Suits by the United States, 98 Mich. L. Rev. 92, 118–19 (1999) (arguing scope of waiver of sovereign immunity is "interest-driven").

70. Massachusetts v. EPA, 549 U.S. 497, 518 (2007); see, e.g., Dep't of Emp't v. United States, 385 U.S. 355, 358 (1966) (holding Tax Injunction Act does not restrict suits by United States to protect itself from unconstitutional state taxation); United States v.

One need look no further than the underlying agreement between the dueling opinions in *Cannon* to see the public/private distinction arise in the jurisprudence of implied rights of action. In *Cannon*, the Court implied a private right of action to enforce Title IX's prohibition of sex discrimination in colleges and universities.[72] The *Cannon* Court explained that it traditionally had been willing to imply a private right of action to enforce statutes that protect private entitlements, while generally refusing to imply rights of action "under statutes that create duties on the part of persons *for the benefit of the public at large*."[73] By contrast, the majority noted, "the Court has implied causes of action in favor of the United States in cases where the statute creates a duty *in favor of the public at large*."[74] And while Justice Powell argued the Court went too far to imply a right of action in *Cannon*,[75] he also noted that implication of a public right of action in favor of the United States presented a different matter altogether.[76]

This Part explores the muddled jurisprudence of implied public rights of action in three steps. Part II.A offers a typology of implied public rights of action. Part II.B explores how the different incentives and structures of public and private enforcement help to explain the distinctive jurisprudence of implied public rights of action. Part II.C considers threshold objections to judicial implication of public rights of action.

A. *A Typology of Implied Public Rights of Action*

Federal courts may imply public rights of action to enforce four different types of government interests: corporate, institutional, substitute, and administrative.

1. *Corporate Interests.* — Governments have *corporate* interests as proprietors and parties to contracts. The common law forms of action implied private remedies for many (though not all) private rights. Governments, like private corporations, could invoke the forms of action to vindicate their common law rights in contract, property, and tort.[77] Although the importance of fitting a claim within the common law forms

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Raines, 362 U.S. 17, 27 (1960) (holding Congress may authorize United States to sue to vindicate general public interest); Leiter Materials, Inc. v. United States, 352 U.S. 220, 225–26 (1957) (holding Anti-Injunction Act does not apply to suits by United States).

71. Suits involving the rights and obligations of the United States are proper subjects of federal common law, even though many private suits are not. See, e.g., Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95 (1981) (discussing scope of federal common law).

72. Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979).

73. Id. at 692 n.13 (emphasis added).

74. Id. at 691 n.13 (emphasis added).

75. Id. at 730 (Powell, J., dissenting).

76. Id. at 733 n.3 (discussing implied public rights of action).

77. See supra note 61 (listing cases).

has lessened over time, the pattern of treating a government's corporate interests like private rights has not.[78]

2. *Institutional Interests.* — A government may also claim an implied right of action to vindicate *institutional* interests as a political, rather than a corporate, actor. Like corporate interests, these institutional interests belong to the government as a beneficiary of federal law rather than to citizens.[79] But unlike corporate interests, institutional interests concern injuries to political powers and rights, not injuries to particular government-owned property or contract rights. Some cases involve federal constitutional or statutory law that gives the government or its officials immunity from judicial process, taxation, or regulation.[80] Others involve federal law that establishes or protects a sovereign's authority to govern.[81]

The law concerning these cases has long been confused. In characterizing the early common law, a dictum of Chief Justice Marshall is again instructive. In *Cherokee Nation v. Georgia*, the Cherokee Nation sued to enjoin Georgia from encroaching upon its sovereign jurisdiction in violation of federal law.[82] Although he dismissed the complaint on other grounds, the Chief Justice mused that unlike civil liberties, civil powers did not imply civil remedies.[83] Unless a public litigant could bring an institutional claim in the guise of a corporate suit, as in, most famously, *Osborn v. Bank of the United States*,[84] the common law forms would not provide a remedy.[85] No matter, however: During an era in which federal

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78. See United States v. San Jacinto Tin Co., 125 U.S. 273, 284–85 (1888) (reiterating United States needs no specific statutory authorization to sue to vindicate its contract and property rights); infra Part III.B.1 (discussing corporate interests of states and United States).

79. Consider, for example, the Tenth Amendment's distinction between the powers and rights of states and those of the people. See Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("The limitations that federalism entails are not . . . a matter of rights belonging *only* to the States." (emphasis added)).

80. See, e.g., United States v. City of Arcata, 629 F.3d 986, 991–92 (9th Cir. 2010) (invalidating municipal ordinances violating intergovernmental immunity); infra Part IV.C (discussing Constitution's protection of institutional interests).

81. See, e.g., Oregon v. Mitchell, 400 U.S. 112, 117 (1970) (Black, J.) (addressing constitutional challenge to Voting Rights Act brought by states); infra Part IV.C (discussing institutional interests). A more recent example involves the local government's constitutional challenge to the Voting Rights Act reauthorization in Shelby County v. Holder, 133 S. Ct. 2612 (2013).

82. 30 U.S. (5 Pet.) 1 (1831).

83. Id. at 20 (Marshall, C.J.) ("[The dispute] savours too much of the exercise of political power to be within the proper province of the judicial department.").

84. In *Osborn*, the Bank of the United States sued in trespass to enjoin state officials from enforcing a tax against it. 22 U.S. (9 Wheat.) 738, 739–40 (1824); see Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 763 (6th ed. 2009) [hereinafter Fallon et al., Hart and Wechsler's Sixth Edition] ("It may be anachronistic to try to characterize the right of action [in *Osborn*], with our post-*Erie* consciousness, as being either federal or state in character.").

85. See Woolhandler & Collins, supra note 61, at 406–07 (discussing how, at time of Founding, "in the typical case, a state's ability to bring an original suit in the Supreme

and state governments operated in relatively separate spheres, inter-sovereign litigation over institutional interests was rare.

That changed with the expansion of federal power during the Civil War, the subsequent Reconstruction Amendments and Acts, and the rise of the administrative state. In some cases the Court hewed to the *Cherokee Nation* dictum. For example, the Court held in the Reconstruction Act cases that Southern states could not sue to enjoin implementation of the Reconstruction Acts on constitutional grounds.[86] Similarly, at the dawn of the modern administrative state, the Court held in *Massachusetts v. Mellon* that Massachusetts could not challenge the federal Maternity Act as encroaching upon its reserved powers under the Tenth Amendment.[87] But, in between the Reconstruction Act cases and *Mellon*, the Court decided *Missouri v. Holland*,[88] which departed from previous jurisprudence on the issue of institutional interests. Justice Oliver Wendell Holmes, writing for the Court, held that a state could sue to enjoin implementation of the Migratory Bird Treaty Act on Tenth Amendment grounds[89]—a decision that, as David Currie noted, stands in frank contradiction to the *Cherokee Nation* dictum and which the Court inexplicably distinguished in *Mellon* as involving Missouri's "quasi-sovereign" right over natural resources.[90] The tension in the case law has deepened over time. The Court expanded the availability of institutional remedies in *South Carolina v. Katzenbach*, where it held that South Carolina could sue to enjoin implementation of the Voting Rights Act on constitutional grounds,[91] without reconciling its holding with *Mellon*.[92] Implied institu-

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Court depended on its ability to plead a traditional common-law case, including the kind of injury that would give a private party a right of action").

86. See Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76–77 (1868) (holding challenge presented political question not fit for judicial review); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499 (1867) ("[W]e are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.").

87. See 262 U.S. 447, 485 (1923) (relying upon Reconstruction Act cases to deny right to relief).

88. 252 U.S. 416 (1920).

89. Id. at 431.

90. The distinction is inexplicable because both cases presented a clash between the United States' and a state's institutional interests in governing. See David P. Currie, The Constitution in the Supreme Court: 1921–1930, 1986 Duke L.J. 65, 125 [hereinafter Currie, Constitution] (discussing "striking contrast" between cases); see also *Mellon*, 262 U.S. at 482 (distinguishing *Holland*).

91. 383 U.S. 301, 307 (1966), abrogated by Shelby County v. Holder, 133 S. Ct. 2612 (2013).

92. See Alexander M. Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 86–87 [hereinafter Bickel, Voting Rights] (highlighting inconsistency between *Katzenbach* and *Mellon* decisions); Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1382 (1973) [hereinafter Monaghan, Who and When] ("[The voting rights cases] stand in open contradiction to the Reconstruction cases and *Massachusetts v. Mellon*."). But see Woolhandler & Collins, supra note 61, at 492 (suggesting cases can be

tional remedies in favor of the United States have diverged, as the recent *Arizona v. United States* attests,[93] from the law of implied state remedies without scholarly comment. While there remains controversy about, and significant limits on, the ability of a state to vindicate its institutional interests in governing against the United States through litigation, the United States may sue as a matter of course to preempt state law that interferes with federal law and policy.

3. *Administrative Interests.* — In an *administrative* case, the government litigant claims an implied right of action as an adjunct to its administrative authority to implement federal objectives. The executive branch, for example, may claim that its Article II duty to execute the laws implies a right of action to enforce them in court.[94] Alternatively, the United States or one of its agencies may claim that a particular delegation of authority—such as the authority to implement a specific regulatory program—implies a right to seek judicial relief to enforce it.[95] Similarly, when Congress has integrated states and their agencies into federal administration through cooperative programs, states have argued their unique roles support a right to sue in federal court.[96]

Here, too, the law is full of contradictions. In *United States v. Hudson & Goodwin*, the Court famously refused to create a common law crime, reasoning that the legislature must specify both the primary and remedial content of criminal law.[97] *Hudson & Goodwin* has been taken to cut against implied public rights of action to enforce statutory or constitutional law through civil suits.[98] But civil liability was a different matter even during the antebellum period.[99] And by the late 1860s the Court had begun incorporating the executive branch's duty to execute the laws into its analysis of implication of public rights of action to protect the government's nominally corporate interests. For example, the Court rec-

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reconciled because *Katzenbach* involved "specific provisions" that protected state sovereignty over voting).

93. See supra note 4 and accompanying text (discussing nature and holding of case).

94. See infra text accompanying note 189 (recognizing executive's nonstatutory right to sue in antebellum common law cases).

95. See infra notes 282–288 and accompanying text (discussing various contexts in which regulatory programs have given rise to implied right of action).

96. See infra Part III.C.2.c (discussing state rights of action emerging from cooperative federalism programs).

97. 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

98. 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, 2255 (1999) ("[T]he example of criminal prosecutions suggests the wisdom of insisting that it is the job of Congress, not the courts, to create rights of action to vindicate the public's interest in obedience to the law.").

99. See supra note 61 and accompanying text (discussing early cases providing United States with common law right of action to vindicate corporate interests).

ognized a public right of action where necessary to ensure the Land Office could discharge its obligations under the scheme for westward expansion set up by Congress.[100] During the Gilded Age the Court built upon these cases by confirming that implied public rights of action may be appropriate to effectuate the "obligations which" the United States "is under to promote" the public interest.[101] The (in)famous example is *In re Debs*. In that case the United States sued without statutory authorization to enjoin the Pullman car strike of 1894. Although the Court adverted to the government's corporate interest in protecting its property in the United States mails, it implied a right of action based upon the executive's "obligations" to protect the public interest as an administrator.[102] Thus, a duty, not a right, was the predicate for an implied right of action.

During the four decades separating *Debs* from *Erie*, federal courts read the Gilded Age cases to support the United States' requests for implied injunctive remedies in aid of the burgeoning administrative state.[103] And during the heyday of public law litigation in the 1960s and 1970s, the Court continued to construe its remedial authority broadly when called upon by the United States to assist in the implementation of a regulatory program. In *NLRB v. Nash-Finch Co.*, for example, the Court held that the National Labor Relations Board, "though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the purposes" of the National Labor Relations Act.[104]

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100. See Hughes v. United States, 71 U.S. (4 Wall.) 232, 236 (1866) (explaining standing in United States v. Hughes, 52 U.S. (11 How.) 552 (1851), was founded upon "plain duty of the United States to seek to vacate and annul" fraudulently obtained land patent).

101. In re Debs, 158 U.S. 564, 584 (1895).

102. See id. ("The obligations which [the United States] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."); see also United States v. Am. Bell Tel. Co., 128 U.S. 315, 367 (1888) ("The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud . . . ."); United States v. San Jacinto Tin Co., 125 U.S. 273, 286 (1888) ("[I]f there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."). For a history of these cases and criticism of *Debs*, see Note, Nonstatutory Executive Authority to Bring Suit, 85 Harv. L. Rev. 1566, 1569 (1972) (noting ambiguous and conflicting interpretations of *Debs*); Note, Protecting the Public Interest: Nonstatutory Suits by the United States, 89 Yale L.J. 118, 122–24 (1979) (discussing cases subsequent to *Debs*).

103. See, e.g., Sanitary Dist. v. United States, 266 U.S. 405, 423 (1925) (permitting federal government to sue municipal sewer agency to enforce federal treaty and implementing regulations); Babcock v. United States, 9 F.2d 905, 906 (7th Cir. 1925) (implying right of action to enforce federal regulations); Robbins v. United States, 284 F. 39, 46 (8th Cir. 1922) (same); United States v. Gilbert, 58 F.2d 1031, 1032 (M.D. Pa. 1932) (same).

104. 404 U.S. 138, 142 (1971); see also United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960) (approving statutorily inferred remedies); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960) (holding court may imply right to injunctive

Modern jurisprudence is of two minds on the subject. Under the private rights model of some cases,[105] the public interest in federal administration does not qualify as a predicate for implication of a public right of action.[106] But other cases suggest that the private rights model is not a good proxy for the problems raised when a federal court must decide whether the legislature intended for a public enforcer to have discretion to pursue remedies not specified by statute.[107] Some of the most interesting disputes involve cooperative federalism, which has yoked state agencies to the wagon of federal regulation. States, no less than the federal government, may claim an implied right of action to enforce federal law as an administrative agent of Congress. Here, too, the law takes more than one tack. In some instances courts imply state rights of action more generously than they do private rights of action, while in others they hew to the private rights model.[108]

4. *Substitute Interests.* — Finally, consider a substitute suit in which a government claims that its authority as its citizens' political representative implies a public right of action to sue to vindicate their private rights. Under the law of third party standing, substitute suits are disfavored in private litigation. A litigant must satisfy the constitutional standing re-

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remedy "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment"). The Court's decision in Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967), is usually interpreted similarly, but this Article argues that is error. See infra notes 181–183 and accompanying text (arguing *Wyandotte* involved implication of public right of action to protect corporate interests).

105. "Private rights model" here refers to the jurisprudential categories of the doctrine on implied private rights of action.

106. See, e.g., United States v. FMC Corp., 717 F.2d 775, 782–83 (3d Cir. 1983) (holding court cannot imply public right of action in favor of United States from "duty-creating provision[]" that does not single out United States as beneficiary).

107. Compare Barnacle Marine Mgmt. Inc. v. Vulcan Materials Co. (In re Barnacle Marine Mgmt. Inc.), 233 F.3d 865, 870 (5th Cir. 2000) (relying upon disfavor for implied private rights of action when considering implied public right of action), and United States v. City of Philadelphia, 644 F.2d 187, 192 (3d Cir. 1980) (reasoning jurisprudence of implied private rights of action also constrains implied public rights of action), with United States v. Alameda Gateway Ltd., 213 F.3d 1161, 1166–67 (9th Cir. 2000) (looking to Supreme Court precedent on implied public rights of action, rather than private rights jurisprudence, when implying remedy in favor of United States under federal statute), United States v. Oswego Barge Corp. (In re Oswego Barge Corp.), 673 F.2d 47, 49 (2d Cir. 1982) (stating United States may obtain injunctive relief "when there is 'enough federal law' from which the remedy may be inferred" and not looking to private rights of action jurisprudence), United States v. Seminole Tribe, 45 F. Supp. 2d 1330, 1331 (M.D. Fla. 1999) (citing Supreme Court precedent on implied public rights of action to imply public right of action from criminal statute), and FDIC v. Mallen, 661 F. Supp. 1003, 1010 (N.D. Iowa 1987) (holding "federal agency may obtain injunctive relief to enforce Congress' will" based upon distinctive public rights jurisprudence).

108. Compare N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth., 30 F.3d 403, 422 (3d Cir. 1994) (denying public right of action to state agency based on presumption against implying private rights of action), with Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin., 603 F.3d 365, 385–86 (7th Cir. 2010) (en banc) (implying public right of action in favor of state agency based upon purposes of statute).

quirements and show that it fits within one of the prudential exceptions to the ban on third party litigation.[109]

There has been remarkably little consideration of the relevance of third party standing doctrine for substitute suits by governments. Some of the results in the case law are hard to square, if not bizarre. Under current law, for example, the United States needs specific statutory authorization to sue to vindicate the Fourteenth Amendment rights of its citizens, but the states do not need congressional authorization to sue to protect the Fourteenth Amendment or statutory civil rights of their citizens.[110]

Substitute suits involving the states have provoked the most scholarly commentary on the subject of implied public rights of action. This commentary, however, addresses the problem as one of standing.[111] The seminal precedents, decided in the early twentieth century, recognized the right of a state to sue in parens patriae to enjoin interstate nuisances.[112] That seems unexceptionable. It has long been a sovereign prerogative to sue to enjoin public nuisances, which are quintessential public rights.[113] This federal common law doctrine has gradually expanded to include state enforcement of private rights, sometimes with little or no attention to congressional intent. In *Snapp*, the Court suggested a state may sue in parens patriae for almost any problem it would

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109. A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). To sue on behalf of a third party, the plaintiff must satisfy the Article III constitutional requirements for standing and show that she has a "close relationship" with the third party and that the third party is hindered in protecting her own interests. Kowalski v. Tesmer, 543 U.S. 125, 130 (2004). Plaintiffs usually cannot satisfy these prudential criteria. See id. (explaining third party standing is exception, not rule). But see Craig v. Boren, 429 U.S. 190, 195 (1976) ("[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.").

110. Compare *City of Philadelphia*, 644 F.2d at 199, 203 (reasoning implication of right of action in favor of United States would be contrary to congressional intent and would impermissibly expand executive branch's power to impose burdens on states), with Pennsylvania v. Porter, 659 F.2d 306, 316 (3d Cir. 1981) (en banc) (per curiam) (reasoning separation of powers concerns at issue in litigation involving United States are not present when state seeks to enforce Fourteenth Amendment in federal court).

111. See, e.g., Woolhandler & Collins, supra note 61, at 510–13 (citing scholarship). There is little analytical benefit to cordoning off substitute standing from the problem of implied public rights of action. See, e.g., David P. Currie, Misunderstanding Standing, 1981 Sup. Ct. Rev. 41, 43 ("Whether the answer is labeled 'standing' or 'cause of action,' the question is whether the statute or Constitution implicitly authorizes the plaintiff to sue.").

112. See, e.g., Georgia v. Tenn. Copper Co., 206 U.S. 230, 236–37 (1907) (permitting state to sue to enjoin interstate air pollution).

113. See Merrill, Tort, supra note 54, at 9 (discussing sovereign enforcement of public rights).

address through its police power.[114] Even so, the *Mellon* rule that a state cannot espouse its citizens' constitutional rights against the federal government still stands, although it has come under increasing fire, as the recent Affordable Care Act litigation suggests.[115]

Although the dominant view is that the United States has limited or no authority to invoke the parens patriae right of action on behalf of citizens' private rights, dissent exists. A line of cases from the 1960s and 1970s invoked *Debs* to permit the United States to enforce statutory and constitutional prohibitions against segregation and consumer fraud.[116] Defenders of these precedents rightly wonder why what is good for the states is not good for the United States.[117]

To make crystals out of this mud would be no mean task.[118] The jurisprudence of implied public rights of action suggests a background understanding, ascendant during some periods more than others, that federal courts have authority to develop public rights and the means of their enforcement when public litigants sue.

B. *The Incentives and Structures of Public and Private Enforcement*

To the extent that judicial retrenchment from implied private rights of action reflects the Powellian concern about private enforcement discretion,[119] the differences between public and private enforcement may explain the distinctive jurisprudence of implied public rights of action. This section explores these differences and compares federal and state enforcement.

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114. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 602 (1982).

115. See Katherine Mims Crocker, Note, Securing Sovereign State Standing, 97 Va. L. Rev. 2051, 2088–100 (2011) (exploring arguments for and against state standing in Affordable Care Act litigation).

116. See, e.g., United States v. Brand Jewelers, Inc., 318 F. Supp. 1293, 1299–300 (S.D.N.Y. 1970) (recognizing nonstatutory right of action to sue retail sales company engaging in unfair consumer practices); United States v. City of Shreveport, 210 F. Supp. 36, 37 (W.D. La. 1962) (recognizing nonstatutory right to sue to remove obstruction to interstate commerce arising from segregation of public facilities), aff'd, 316 F.2d 928 (5th Cir. 1963).

117. See, e.g., Larry W. Yackle, A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae, 92 Nw. U. L. Rev. 111, 141 (1997) ("[T]he United States should enjoy the benefits that *parens patriae* status confers on individual states, absent some convincing reason to think otherwise.").

118. Cf. Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 578 (1988) (distinguishing between "mud" rules, which are "fuzzy, ambiguous rules," and "crystal" rules, which "seem to be perfectly clear, open and shut, demarcations of entitlements").

119. See supra note 37 and accompanying text (discussing concerns that private litigation will cause overdeterrence, inconsistent enforcement, and interference with prosecutorial discretion).

Notwithstanding its recognized advantages,[120] private enforcement has potential pathologies. The "overenforcement theorem" posits that private enforcers—for example, class action attorneys who litigate large-scale securities claims—will sue too often in order to collect fines.[121] The social costs of private overenforcement include overdeterrence of socially desirable conduct, the filing of frivolous, but potentially lucrative, nuisance suits, and the "judicial, legal, and clerical" costs of running a judicial system, including overseeing settlement and evaluating remedial claims.[122] Moreover, private litigation, which is decentralized and not subject to political checks, may be inconsistent with the enforcement policies of public agencies.[123]

Trusting public enforcers with implied rights of action is a different matter. Political accountability, not to mention expertise and the lack of

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120. Private litigation is a direct, if not always efficient, means of delivering compensation to injured parties. Moreover, permitting the beneficiaries of a substantive norm to sue may help in enforcing the rule of law. If, for example, one thinks the Securities and Exchange Commission (SEC) is a "regulatory flop," not a "top cop," then securities class action litigation seems necessary to supplement SEC underenforcement. Cf. Jill E. Fisch, Top Cop or Regulatory Flop? The SEC at 75, 95 Va. L. Rev. 785, 803–15 (2009) (discussing debate over SEC's effectiveness). Private enforcement may also be appropriate even without agency failure. Injured parties will often have better information than public regulators about the source and scope of legal violations. They may be more willing to pursue novel theories of liability and thus to develop the law. See Stephenson, supra note 3, at 107–13 (discussing these potential benefits of private enforcement); see also Jonathan R. Hay & Andrei Shleifer, Private Enforcement of Public Laws: A Theory of Legal Reform, 88 Am. Econ. Rev. (Papers & Proc.) 398, 399–400 (1998) (describing need for robust private enforcement in jurisdictions where public enforcement is weak).

121. See William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. Legal Stud. 1, 15 (1975) (setting forth overenforcement theorem in which private enforcement will overdeter when fines are set above social costs of illegal activities); see also Steven Shavell, Foundations of Economic Analysis of Law 483–84 (2004) (noting factors leading to overenforcement). It may be that some of these inefficiencies can be solved through better institutional design, but the current system of judicially enforceable private rights of action does not display the necessary features. See Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 J. Legal Stud. 1, 14 (1974) (suggesting market system for rewarding enforcers as potential means to achieve optimal law enforcement); David Friedman, Efficient Institutions for the Private Enforcement of Law, 13 J. Legal Stud. 379, 380 (1984) (arguing inefficiency in particular private enforcement institutions can be eliminated through minor institutional changes); Nuno Garoupa, A Note on Private Enforcement and Type-I Error, 17 Int'l Rev. L. & Econ. 423, 423 (1997) (arguing system of sanctions or subsidies applied when criminal or non-offender is released would reduce risk of overenforcement). Of course, underdeterrence is also possible in a regime of exclusive private enforcement, for example if the bounty is not set at an appropriate level. Cf. A. Mitchell Polinsky, Private Versus Public Enforcement of Fines, 9 J. Legal Stud. 105, 107 (1980) (modeling conditions under which private enforcement will lead to underenforcement).

122. See Tamar Frankel, Implied Rights of Action, 67 Va. L. Rev. 553, 584 (1981) (discussing "increased enforcement costs" of "increased number of cases" in securities litigation context).

123. See Rose, Reforming Securities, supra note 37, at 1329–30 (discussing potential costs of private enforcement).

personal financial incentives, distinguishes the United States as a public enforcer from private litigants. As the Court put it in *Alden v. Maine*:

> A suit which is commenced and prosecuted . . . by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3, differs in kind from the suit of an individual . . . . Suits brought by the United States itself require the exercise of political responsibility . . . , a control which is absent from a broad delegation to private persons to sue . . . .[124]

These features of public enforcement help explain why "[p]rosecutorial discretion is an integral part of the American system of government."[125] Unlike private litigants, public officials can (and do) coordinate enforcement strategies and can (and do) dial deterrence levels up and down in response to changing circumstances,[126] as well as, more controversially, political pressure and interest-group lobbying.[127] Charged with promoting the public interest, they bring expertise to bear upon the decision whether to sue.[128] One former Securities and Exchange Commission (SEC) Commissioner reports, for example, that "the agency consistently sought to avoid instituting an enforcement action if it did not in good faith believe that the action would likely prevail on the merits."[129] An additional check lies in resource constraints on the Department of Justice (DOJ) and federal agencies, which, if nothing else, mitigate the risk that implication of a public right of action will lead to overdeterrence.[130]

The differences between federal and private enforcement can be overstated. Political control has its limits. Congress can deploy structural constraints ex ante and oversight ex post to constrain agency behavior, but bureaucratic officials can compete with their political overseers for control of enforcement and policymaking programs.[131] The White House

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124. 527 U.S. 706, 755–56 (1999).

125. Stephenson, supra note 3, at 119.

126. See, e.g., Rose, Reforming Securities, supra note 37, at 1329–30 (explaining agency officials can and do calibrate enforcement levels).

127. See Mary Olson, Substitution in Regulatory Agencies: FDA Enforcement Alternatives, 12 J.L. Econ. & Org. 376, 376–78, 404–05 (1996) (explaining how agencies react to changes in regulated industries, political environment, and consumers); John T. Scholz & Feng Heng Wei, Regulatory Enforcement in a Federalist System, 80 Am. Pol. Sci. Rev. 1249, 1250 (1986) (reviewing effect of political and interest-group pressures on agencies).

128. See, e.g., Rose, Reforming Securities, supra note 37, at 1329–30 (discussing advantages of public enforcement).

129. Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, 107 Harv. L. Rev. 961, 970 (1994).

130. See, e.g., Morrison, supra note 50, at 608 (noting public budget constraints on enforcement).

131. For discussions of the competition among political and bureaucratic officials for control of administrative lawmaking, see, for example, Jonathan R. Macey, Organizational Design and Political Control of Administrative Agencies, 8 J.L. Econ. & Org. 93, 99–108

and its political appointees have limited time and resources to police frontline decisions by federal attorneys.[132] Moreover, the literature modeling public enforcement usually assumes that public officials care about only deterrence.[133] But recent studies suggest that public enforcers may seek retributive compensation as well, much as a private litigant might.[134]

While federal enforcement generally corresponds to the economic models of public enforcement, state enforcement of federal law combines public and private features.[135] Like private parties, state officials provide an alternative source of enforcement resources to compensate for federal agency slack.[136] But unlike private parties, state officials may be influenced by federal agencies.[137] And to the extent that state agencies participate in cooperative federalism programs, they have special expertise in discerning and addressing enforcement gaps.[138]

(1992) (discussing impact of agency design upon agency function and allegiance to political principals); Matthew D. McCubbins et al., Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 435–40 (1989) (discussing ability of Congress to control agency action through agency structure); Terry M. Moe, Control and Feedback in Economic Regulation: The Case of the NLRB, 79 Am. Pol. Sci. Rev. 1094, 1100–02 (1985) (discussing political efforts to control NLRB decisionmaking); Pablo T. Spiller & Emerson H. Tiller, Decision Costs and the Strategic Design of Administrative Process and Judicial Review, 26 J. Legal Stud. 347, 359–63 (1997) (modeling congressional control over agencies).

132. See Tara Leigh Grove, Standing as an Article II Nondelegation Doctrine, 11 U. Pa. J. Const. L. 781, 802 (2009) [hereinafter Grove, Standing as Nondelegation] (noting resource constraints as hindrance to centralized White House control).

133. See, e.g., Ian Ayres & John Braithwaite, Responsive Regulation 21–27 (1992) (discussing and challenging simple deterrence model).

134. See Max Minzner, Why Agencies Punish, 53 Wm. & Mary L. Rev. 853, 862–64 (2012) ("Agencies might impose punishment to the extent that they believe the violator deserves it, not to achieve some broader social end." (emphasis omitted)). To be sure, federal public officials have political motives for bringing enforcement actions. But, as Tara Grove has argued, there are legal and political constraints that operate on executive branch litigation that do not apply when private parties sue. See Grove, Standing as Nondelegation, supra note 132, at 797–802.

135. See Lemos, State Enforcement, supra note 16, at 707 (theorizing state enforcement is in some ways hybrid of public and private enforcement as conventionally modeled in literature).

136. See generally Jessica Bulman-Pozen, Federalism as a Safeguard of the Separation of Powers, 112 Colum. L. Rev. 459 (2012) (arguing federalism safeguards separation of powers by providing multiple potential sources of regulatory implementation and enforcement).

137. See Neal D. Woods, Serving Two Masters? State Implementation of Federal Regulatory Policy, 32 Pub. Admin. Q. 571, 584–87 (2008) (reporting study showing influence of EPA over state enforcement).

138. See, e.g., Josh Bendor & Miles Farmer, Note, Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes, 122 Yale L.J. 1280, 1282 (2013) ("[S]tate agency implementation of federal statutes—cooperative federalism—is an integral part of our administrative state in fields ranging from environmental law to health care to education." (footnote omitted)).

Moreover, state officials, unlike private parties, are tasked with protecting the public interest and are politically accountable for failure to do so.[139]

At the same time, suits by state attorneys general may display some of the potential pathologies of private enforcement. Money may drive the decision to sue because state treasuries may reap the benefits of a damages award.[140] And the political ambition of state attorneys general may also skew their enforcement priorities toward more, rather than more efficient, enforcement.[141]

For now, suffice it to say that there are significant differences between public and private enforcement that suggest implied public rights of action should be treated differently than their private counterparts. As this Article discusses in Parts III and IV, this distinction is especially important when it comes to implying public rights of action in institutional and administrative cases.

C. *Considering Threshold Objections: The Problem of Judicial Authority*

The public/private distinction can be pushed too far, of course. This section considers threshold objections to the claim, implicit in Parts III and IV, that federal courts have authority to imply rights of action in some cases.

1. *The* Erie *Objection.* — There is a rich scholarly debate on the status of federal common law in general. The common starting point is familiar (if not uncontested): "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[142] It does not, however, necessarily follow that implication of a right of action from a legislative policy is illegitimate judicial lawmaking *tout court*. For most of this nation's history, the traditional view was that federal courts could elaborate the remedial implications of statutes and the Constitution in a common law mode.[143]

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139. See Gillian E. Metzger, Federalism and Federal Agency Reform, 111 Colum. L. Rev. 1, 71 (2011) [hereinafter Metzger, Federal Agency Reform] ("What does differentiate the states from private litigants is their political accountability.").

140. See Nuno Garoupa & Daniel Klerman, Optimal Law Enforcement with a Rent-Seeking Government, 4 Am. L. & Econ. Rev. 116, 121–28 (2002) (modeling inefficiencies that arise from enforcement by partial or complete rent-seeking government); Lemos, State Enforcement, supra note 16, at 730–36 (discussing financial incentives for state attorneys general to sue).

141. See Lemos, State Enforcement, supra note 16, at 729 (arguing "elected status" of state attorneys general "gives them incentives to *act*, and to act in public ways").

142. City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981). But see Weinberg, supra note 26, at 805 ("[T]here are no fundamental constraints on the fashioning of federal rules of decision.").

143. "Common law mode" simply means a process of implying remedies based upon "reasoning from precedent and by analogy," with statutes providing a predicate for the common law process not constrained by the express terms of the statute. Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 726 (2012) [hereinafter Monaghan, Avoiding Avoidance].

In one view, however, *Erie*'s statement that there is "no federal general common law"[144] imposes significant limits on judicial authority to imply rights of action. In this revisionist view, which George Brown has labeled the "new *Erie* doctrine,"[145] federal courts have little or no authority to imply private *or* public rights of action.

This Article's aim is not to explore the general debate on the legitimacy of federal common law. That would take a separate article, particularly because the constitutional text and original understanding do not dispose of the question. To the extent those materials are indeterminate, the question becomes one of convention and a considered judgment about institutional competence.

Revisionists can point to the Court's recent retrenchment from implied private rights of action in some cases, particularly those involving statutory suits between private parties, as powerful support for their position.[146] But *Erie* was not understood by anyone to preclude the practice of implying rights of action until recently. And there is wisdom to Justice John Paul Stevens's opinion that the two-hundred-year tradition of implied private rights of action belies a wholesale objection based upon the separation of powers.[147]

Against the revisionists, many jurists and scholars have argued that implication of a private right of action, where consistent with background understandings of judicial remedial authority, is presumptively consistent with legislative policies.[148] They have defended the view that federal common law is appropriate "to facilitate the implementation" of federal law, which is consistent with the traditional conception of judicial authority to imply private rights of action.[149] We have "in fact never confined lawmaking to fully representative bodies," defenders of federal common law argue, and we never will.[150]

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144. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

145. See Brown, supra note 17, at 617–18 (describing revisionist interpretation of *Erie* as offering "powerful support" for "highly limited" role of federal courts in "nonconstitutional litigation").

146. See Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 53 (1985) [hereinafter Merrill, Common Law Powers] (arguing for limited remedial competence on federalism and separation of powers grounds); Martin H. Redish, Federal Common Law and American Political Theory: A Response to Professor Weinberg, 83 Nw. U. L. Rev. 853, 859 (1989) (arguing implying rights of action violates Rules of Decision Act).

147. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375–76 (1982) (concluding separation of powers objection to implied private rights of action fails on historical grounds).

148. See, e.g., Field, supra note 11, at 887–90 (arguing courts have authority to develop common law rights of action); Craig Green, Repressing *Erie*'s Myth, 96 Calif. L. Rev. 595, 645–46 (2008) (same); Weinberg, supra note 26, at 840 (same).

149. Larry Kramer, The Lawmaking Power of the Federal Courts, 12 Pace L. Rev. 263, 289 (1992).

150. Id. at 272.

The cases provide grist for either mill. Even revisionists are willing to imply private rights of action in a common law mode in some cases.[151] And while the Court is wont to assert that federal common law is limited to a few contexts, its practice has been less consistent than its rhetoric.[152]

Even so, Congress often designs enforcement mechanisms in comprehensive detail, and courts share enforcement responsibilities with administrative agencies. Legislative silence regarding a particular remedy for a particular substantive norm may be tantamount to legislative preclusion of that remedy. A simple presumption that rights imply remedies in all cases would therefore pose serious separation of powers problems.[153] Although there is authority to the contrary,[154] it is error to conclude that the grants of jurisdiction over disputes involving the United States by themselves justify implication of public rights of action from legislative policies. According to the doctrine, federal courts may not create substantive federal common law simply because the United States is a claimant.[155] There is no reason to treat state litigation differently.[156] Accordingly, if judicial implication of private rights of action is *tout court* inconsistent with the Constitution, or, as some revisionists have argued, the Rules of Decision Act, then there seems little reason to think implication of public rights of action is legitimate. But given that implied

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151. See, e.g., Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 642–43 (2002) (Scalia, J.) (holding private parties can challenge state action as inconsistent with federal law without specific statutory authorization).

152. See Daniel J. Meltzer, The Supreme Court's Judicial Passivity, 2002 Sup. Ct. Rev. 343, 362–78 [hereinafter Meltzer, Judicial Passivity] (discussing role of active judicial lawmaking in preemption cases); Gillian E. Metzger, Embracing Administrative Common Law, 80 Geo. Wash. L. Rev. 1293, 1298 (2012) (noting "dominance of administrative common law, notwithstanding periodic Supreme Court rejection of the common law approach"); Craig Allen Nard, Legal Forms and the Common Law of Patents, 90 B.U. L. Rev. 51, 53 (2010) ("[T]he common law has been the dominant legal force in the development of U.S. patent law for over two hundred years.").

153. See Stewart & Sunstein, supra note 1, at 1221 (arguing against wholesale presumption in favor of implied private rights of action).

154. See, e.g., United States v. Hill, 694 F.2d 258, 267–69 (D.C. Cir. 1982) (reasoning statutory grant of jurisdiction over suits brought by United States supports public right of action).

155. See, e.g., infra note 198 (discussing limits on federal common law in suits involving United States).

156. Under current law, the presence of the United States as a party does not warrant creation of a federal rule of decision in every case. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979) (adopting state law as federal rule of decision). Judicial authority to decide interstate disputes by reference to federal common law follows from the Article III grant of jurisdiction and the obvious problems with adjudicating those disputes by reference to the law of one of the litigants, concerns that are not present in the mine run of cases involving implied state rights of action. See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1323 (1996) ("Because the states generally lack legislative competence to establish rules of decision to govern disputes among themselves, federalism does not require the Supreme Court to apply state law to such disputes.").

rights of action have been accepted for two centuries, revisionists have a heavy burden to carry a wholesale objection to the practice.

2. *The Default Rule Alternative.* — The remaining question is whether the game is worth the candle. Even if federal courts have authority to imply rights of action, should they refrain from doing so when a public litigant sues? The problem of implied rights of action is a problem of how to treat legislative silence. On one view, the solution is to treat legislative silence as precluding an implied right of action, on the theory that a clear statement rule will force an explicit congressional decision.[157] With respect to private litigants, the "question whether to provide a private right of action is unlikely to involve one-sided political demand for legislative correction" of judicial mistakes.[158] Therefore, a default rule is unlikely to force congressional clarification in that context.

The same might not be true with respect to public rights of action. The White House may significantly influence the legislative process, although the degree of that influence varies with circumstances.[159] And federal agencies and the DOJ also have access to Congress, and may influence the legislative process, including by assisting with legislative drafting.[160] State lobbies may be weaker, particularly because state concerns may be more variegated and diffuse. But although the literature on the political safeguards of federalism has offered reasons to doubt the extent

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157. See, e.g., Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment) (arguing courts should presume congressional silence equals congressional prohibition of private enforcement). In other words, courts should adopt what Einer Elhauge has called a "preference-eliciting statutory default rule" designed to trigger a legislative response clarifying the matter. Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 Colum. L. Rev. 2162, 2165 (2002) [hereinafter Elhauge, Preference-Eliciting]. As Elhauge explains, a preference-eliciting rule is likely to "maximiz[e] political satisfaction" only when several conditions are met, including that "significant differential odds of legislative correction exist." Id. at 2166. These odds usually exist when it is likely that a strong political coalition will form on one side of the issue. See id. at 2177–78 (describing political dynamics that will lead to legislative correction).

158. Einer Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, 2055 n.67 (2002).

159. See, e.g., Andrew W. Barrett & Matthew Eshbaugh-Soha, Presidential Success on the Substance of Legislation, 60 Pol. Res. Q. 100, 107–09 (2007) (reporting results of study of 191 bills that suggests presidential success varies with several factors, including whether government is unified, degree of congressional gridlock, President's approval ratings, and whether President is seeking legislation at beginning or end of tenure); Glen S. Kurtz, Tactical Maneuvering on Omnibus Bills in Congress, 45 Am. J. Pol. Sci. 210, 212 (2001) ("In congressional committees, presidential drafts are less likely to move forward than legislation pushed by the given committee leaders."); Wayne P. Steger, Presidential Policy Initiation and the Politics of Agenda Control, 24 Congress & Presidency 17, 18 (1997) (discussing how President may influence congressional policies by initiating policies and setting agendas).

160. See Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 588 & n.32 (2002) (discussing sources of legislative drafting).

of state influence in Congress,[161] there is anecdotal evidence that states have successfully lobbied for federal rights of action.[162] Perhaps, then, implied private rights of action should be broader than implied public rights of action.

The potential influence of executive and state lobbyists does not, however, justify adoption of a default rule against implication. For one, this rule would be inconsistent with the jurisprudential tradition in which courts recognize the limits of Congress's ability to specify necessary public remedies in regulatory statutes.[163] Moreover, denying a right of action may hamstring public enforcement in the interim between a judicial decision and congressional action.[164] Finally, in some cases the problem calling for an implied right of action would not be foreseeable, and there is little service in a blanket presumption against implication in those circumstances.[165] Rather than "announce [a] rule" that "would . . . seriously obstruct congressional purposes,"[166] the better course would be to permit implication of a public right of action to deter, detect, and correct violations of federal law.

That said, an important *retail* objection to implied public rights of action still holds. In some instances, implication of a right of action is inconsistent with legislative policies. That is particularly true in statutory cases, where Congress controls the scope of primary rights and duties and often answers the enforcement question.

III. IMPLIED STATUTORY RIGHTS OF ACTION

This Part considers the authority of federal courts to imply statutory rights of action in favor of the United States and the states. It builds upon Part II by arguing that treating public litigants like private ones in all statutory cases is error. It then offers a more nuanced approach that treats public litigants like private ones in corporate and substitute litigation, while treating them differently when it comes to enforcing federal law in institutional and administrative cases.

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161. See, e.g., Roderick M. Hills, Jr., Against Preemption: How Federalism Can Improve the National Legislative Process, 82 N.Y.U. L. Rev. 1, 28 (2007) (arguing "pro-preemption groups are more likely to succeed in getting a floor vote in Congress on imposing federal preemption than groups opposing federal preemption").

162. See Amy Widman & Prentiss Cox, State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws, 33 Cardozo L. Rev. 53, 55–57 (2011) (canvassing state efforts to secure enforcement authority).

163. See supra Part II.A (surveying jurisprudence of implied public rights of action).

164. See Elhauge, Preference-Eliciting, supra note 157, at 2179–81 (discussing interim costs as factor to be considered in deciding on approach to statutory interpretation).

165. See id. (describing limited circumstances in which statutory preference-eliciting rules are "merited").

166. Meltzer, Judicial Passivity, supra note 152, at 388.

A. *The Flaws of the Unitary Approach*

In statutory cases, it is commonplace that federal courts should imply public rights of action on the same terms as they imply private rights of action.[167] This unitary approach significantly limits implied public rights of action. Under current law, unless there is clear evidence Congress specifically intended "to create not just a private right but also a private remedy," a federal court may not imply one from a statute.[168] Under this rule, outcomes turn on narrow textual distinctions between rights-creating language, which supports implied private rights of action, and duty-creating language, which does not.[169]

The unitary approach also embraces what George Flint has labeled the "specificity myth"[170]: When Congress enumerates "express provisions for enforcing [statutory] duties," it is "highly improbable" that Congress intended other enforcement mechanisms.[171] Applied to public litigation, the "strong presumption"[172] against implied statutory rights of action could bar a public right to sue even when a government seeks to vindicate a "private right" against pecuniary loss. The specificity myth also constricts the remedies available to a public litigant suing under an established right of action.

Less obviously, the unitary approach leads to the denial of implied public rights of action to vindicate anything but corporate interests. Administrative, institutional, and substitute interests do not qualify as predicates for the implication of a public right of action under the unitary theory.[173] The reason is straightforward: These interests do not

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167. See, e.g., Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ., 615 F.3d 622, 630 (6th Cir. 2010) (applying jurisprudence of private rights of action to claim of public right of action); Barnacle Marine Mgmt. Inc. v. Vulcan Materials Co. (In re Barnacle Marine Mgmt. Inc.), 233 F.3d 865, 870 (5th Cir. 2000) (same); N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth., 30 F.3d 403, 421 n.34 (3d Cir. 1994) (same).

168. Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

169. A hypothetical statute that says "no one shall suffer discrimination on the basis of sex" may support an implied private right of action, while one that says "sexual discrimination is prohibited" may not. Compare Cannon v. Univ. of Chi., 441 U.S. 677, 690–93 (1979) (implying right of action), with *Sandoval*, 532 U.S. at 289 (refusing to imply right of action). This hypothetical is based upon a similar one in Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 785–86 (5th ed. 2003) [hereinafter Fallon et al., Hart and Wechsler's Fifth Edition].

170. George Lee Flint, Jr., ERISA: Extracontractual Damages Mandated for Benefit Claims Actions, 36 Ariz. L. Rev. 611, 638 (1994).

171. Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979).

172. Olmstead v. Pruco Life Ins. Co. of N.J., 283 F.3d 429, 432 (2d Cir. 2002) (quoting W. Allis Mem'l Hosp., Inc. v. Bowen, 852 F.2d 251, 254 (7th Cir. 1988)) (internal quotation marks omitted).

173. See, e.g., Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin., 573 F.3d 548, 551–52 (7th Cir. 2009) (refusing to imply right of action to vindicate administrative interest), rev'd en banc, 603 F.3d 365 (7th Cir. 2010); United States v. Parish of St. Bernard, 756 F.2d 1116, 1121–23 (5th Cir. 1985) (same); United States v. FMC Corp., 717

involve private rights protected by rights-creating language in favor of public litigants and thus cannot serve as predicates for implied rights of action.

On that understanding, the unitary theory cannot explain the case law. In a significant number of statutory cases, federal courts treat claims of implied public rights of action differently from private rights.[174] Either these decisions are mistaken, or the unitary approach is.

Indeed, the jurisprudence regarding public rights in public litigation has long been more complex.[175] The separation of powers problem concerning the breadth of judicial authority to imply rights of action is intertwined not only with the substantive interests at stake in a case, but also with the characteristics of the litigant that seeks to vindicate them. There undoubtedly is a jurisprudential tradition favoring legislative control over the vindication of public rights through *private* enforcement, although even this tradition admits exceptions. But the lessons from that convention cannot be transposed to public enforcement.

That is not to say, however, that federal courts should presumptively supply a public right of action in all statutory cases. Rather, when a public litigant sues in what amounts to a private capacity in corporate and substitute cases, courts should treat the public litigant like a private litigant. Conversely, a broader implication doctrine is appropriate to vindicate public rights in institutional and administrative cases when a public litigant sues, even if a private party could not claim an implied right of action to vindicate the same interests.

B. *Like a Private Litigant*

1. *Corporate Interests.* — When the United States' or a state's corporate interests are all that are at stake, there should be no reason for special judicial remedial activity. Consider, for example, the recently decided *United States v. Tug Sundial*, in which the federal government unsuccessfully invoked the right-remedy principle in an attempt to recover monetary relief for damage to government property.[176] The right-remedy principle no longer controls private actions, the district court reasoned, and therefore should not control public actions either.[177] Under the court's logic, a government litigant is certainly entitled to no more judicial solicitude than a private litigant.

Nor should a government's corporate interests distinguish it from a private litigant under the regulatory understanding of implied rights of

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F.2d 775, 782–83 (3d Cir. 1983) (same). For an earlier, and particularly clear, example, see Georgia v. Wenger, 94 F. Supp. 976, 981–83 (E.D. Ill. 1950).

174. See, e.g., infra notes 262–265 (providing example).

175. See supra Part II.A (surveying jurisprudence of implied public rights of action).

176. 861 F. Supp. 2d 1208, 1213–17 (D. Or. 2012) (holding statute does not imply in personam remedy).

177. Id. at 1217.

action. In form, corporate capacity suits are indistinguishable from the classic private beneficiary suit where a private litigant sues under a statute that creates a right for her benefit. The regulatory justification for implying rights of action in favor of beneficiaries is that creation of a "victim compensation hedge" will enlist private litigants, who may be better situated to detect violations and to decide whether enforcement is cost-justified, in the vindication of legislative policies.[178] In particular, this hedge is appropriate where other enforcement mechanisms are inadequate to achieve a cost-justified level of enforcement and private litigation will promote the rule of law "without costing more than its incremental benefits."[179] As Richard Stewart and Cass Sunstein have argued, these criteria are likely to be satisfied where private rights "create an entitlement in the plaintiff and a corresponding duty in the defendant," as in criminal or regulatory statutes that prohibit spillovers or "forced wealth transfers."[180]

Those same criteria may be met when a government claims an implied public right of action to protect a corporate interest. In *Wyandotte Transportation Co. v. United States*, for example, the federal government sought to recoup the cost of removing a sunken vessel from the Mississippi River under the Rivers and Harbors Act, which expressly imposed criminal penalties upon the intentional or negligent sinking of a vessel in the "navigable channels" of the United States.[181] Jurists and scholars have taken *Wyandotte* to stand for a broad implication doctrine when the United States sues, one that would support implied public rights of action to vindicate institutional, administrative, and substitute interests.[182] But that is a category mistake. Finding that the United States was a "beneficiary" of the duty imposed upon vessel owners under the Rivers and Harbors Act, the Court implied a damages remedy to provide the government with a "satisfactory remedy for the pecuniary injury" it had suffered to its corporate interests.[183] Thus, *Wyandotte* supports the implication of a public right of action to protect corporate interests on terms that apply to private litigants.

Where the regulatory criteria justifying implication of a right of action as a victim compensation hedge are not met, there is no reason to

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178. See Stewart & Sunstein, supra note 1, at 1296–307 (discussing rationale for victim compensation hedge).

179. Id. at 1296.

180. Id. at 1302.

181. 389 U.S. 191, 196–97, 202 (1967).

182. See, e.g., United States v. City of Philadelphia, 644 F.2d 187, 216 n.14 (3d Cir. 1980) (Gibbons, J., dissenting from denial of rehearing en banc) (reasoning under *Wyandotte* that "United States has an implied statutory right of action when there is an overall statutory scheme and no other effective remedy exists"); Houck, supra note 3, at 151 n.527 (citing *Wyandotte* for broad proposition that "implied 'public' rights of action are more easily found than are 'private' ones").

183. *Wyandotte*, 389 U.S. at 201–04.

think an implied public right of action to vindicate corporate interests will be any more consistent with legislative policies than an implied private right of action. Consider first suits by the states. In *Astra USA, Inc. v. Santa Clara County*, for example, several California counties and county-run hospitals claimed a federal common law right of action to enforce the Medicaid Drug Rebate Program's ceiling upon the prices that drug manufacturers could charge certain health care providers for covered drugs.[184] The Court held that if (as the plaintiffs conceded) the Medicaid pricing provisions did not create a compensatory right of action, the plaintiffs could not sue under federal common law as third party beneficiaries of pricing agreements between the federal government and the manufacturers.[185] Thus, the Court approached the counties' claim exactly as it would have approached similarly situated private parties' claims.[186] No principle of justice demands robust federal remedies for states' corporate interests, which states and their subdivisions may vindicate as a matter of course in their own courts.

When the United States sues to protect its corporate interests, the principle is the same. Unlike the states, the executive branch has a constitutional duty to "take Care that the Laws be faithfully executed."[187] On one view, Article II supports what Jack Goldsmith and John Manning have called the "completion power," namely, "the President's authority to prescribe incidental details needed to carry into execution a legislative scheme."[188] The antebellum common law cases recognizing the United States' right to sue without specific statutory authorization to protect contract and property interests can, as Henry Monaghan has explained, be read in completion power terms.[189] *Debs*, moreover, can be read as a gloss on Article II that would support public rights of action when Congress has not acted, and perhaps even when it has.[190]

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184. 131 S. Ct. 1342, 1347 (2011).

185. Id. at 1347–49.

186. See also Romero-Barcelo v. Brown, 643 F.2d 835, 848–49 (1st Cir. 1981) (treating public right of action like private right of action), rev'd on other grounds sub nom. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); City of Evansville v. Ky. Liquid Recycling, Inc., 604 F.2d 1008, 1011–12 (7th Cir. 1979) (same), cited with approval in Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 18 n.28 (1981); New York v. Gutierrez, No. 08-CV-2503 (CPS)(RLM), 2008 WL 5000493, at *9 (E.D.N.Y. Nov. 20, 2008) (same); New York v. DeLyser, 759 F. Supp. 982, 986 (W.D.N.Y. 1991) (same).

187. U.S. Const. art. II, § 3.

188. Jack Goldsmith & John F. Manning, The President's Completion Power, 115 Yale L.J. 2280, 2282 (2006).

189. See Monaghan, Protective Power, supra note 64, at 58 (reading cases to support executive power to fill in details of federal administration).

190. *Debs* reasoned that the "obligations" which the United States "is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, [are] often . . . sufficient to give it a standing" in federal court even when it "has no pecuniary interest in the remedy sought." In re Debs, 158 U.S. 564, 584–85 (1895). The executive's decision to fulfill those "obligations" by bringing a lawsuit might

But to extend implication doctrine that far would be inconsistent with the trend toward greater congressional elaboration of the means of enforcement of statutory policies.[191] The case law, moreover, takes the early common law cases[192] as predicates for Article III authority to create federal common law governing the "rights and duties" of the United States in property and contract disputes.[193] The tradition of implied public rights of action in favor of the United States is not consistent enough to support the claim that Article II provides a default presumption in favor of public rights of action to vindicate corporate interests.

Even so, the completion power analysis suggests that the distinction between the United States' corporate interests on the one hand, and its administrative interests on the other, is not so sharp.[194] The categories

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be taken to be peculiarly within the Article II power to execute the laws. If so, then congressional limits upon executive discretion might contravene Article II. Cf. Yackle, supra note 117, at 130 ("Even statutes expressly *negating* executive suits to enforce the Fourteenth Amendment may not be effective.").

191. In *Debs,* the Court created not only remedial, but also primary, law at the executive's behest. See 158 U.S. at 584. When the executive made a similar request in the famous *Pentagon Papers Case*, it elicited a telling criticism from Justice Thurgood Marshall: "It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, . . . [b]ut convenience and political considerations . . . do not justify a basic departure from the principles of our system of government." N.Y. Times Co. v. United States, 403 U.S. 713, 742–43 (1971) (Marshall, J., concurring).

192. See, e.g., Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850) (permitting United States to sue to vindicate proprietary interests without specific statutory authorization); Dugan v. United States, 16 U.S. (3 Wheat.) 172, 181 (1818) (same).

193. Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943) ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."); see Fallon et al., Hart and Wechsler's Sixth Edition, supra note 84, at 617–20 (discussing conventional wisdom regarding *Clearfield*).

194. Whenever the United States acts, in some sense it acts in a sovereign capacity, i.e., as a government seeking to implement the law. Where courts invoke it in the abstract, the governmental-proprietary distinction has proven problematic. Cf. Gillian Hadfield, Of Sovereignty and Contract: Damages for Breach of Contract by Government, 8 S. Cal. Interdisc. L.J. 467, 470 (1999) (critiquing distinction between "proprietary" and "sovereign" interests of government); Wells & Hellerstein, supra note 24, at 1073–75 (discussing criticisms of governmental-proprietary distinction). The contextual approach here is different. The distinction drawn here looks to the degree of fit between the United States' claim of an implied right of action and the administrative goals of a particular statutory scheme. For example, when a public litigant claims that, as a beneficiary of a particular federal law, it has a right to a remedy to redress a pecuniary loss, the suit is a corporate capacity suit. In such a case, the public litigant has no more of a claim to an adjudicatory remedy than a private party does. By contrast, when a public litigant claims that it is tasked as an agent of Congress with implementing a particular regulatory scheme, and argues that implication of a right of action is necessary to achieve the demand for effective regulation, the suit is an administrative capacity suit. The distinction between the private and public capacities of the United States or the states is therefore manageable because it begins with interpreting the underlying legislative scheme in light of the two background understandings of judicial authority to imply a right of action. Cf. Myriam E. Gilles, Representational Standing: *U.S. ex rel. Stevens* and the Future of Public Law Litigation, 89

should not be collapsed, however, because they bear upon the existence *vel non* of the regulatory demand for implying a public right of action. To the extent that a federal suit to protect the United States' corporate interests has little or no connection to deterrent goals or to a specific delegation of authority, in both form and function it resembles a claim that a private corporation might bring.[195] As the federal courts have become more circumspect in implying private rights of action, it is unsurprising that they have pulled back from implying public rights of action to vindicate corporate interests. But that does not entail a rejection of judicial authority to vindicate administrative interests. Treating corporate interests like private rights is consistent with the federal common law of the rights and obligations of the United States. Under *Clearfield Trust Co. v. United States* and its progeny, federal courts may craft common law rules to govern the substantive rights and obligations of the United States in proprietary and contractual controversies.[196] *Clearfield* may "confirm . . . that the United States needs no specific statutory authorization to bring suits of a kind that private citizens could also bring,"[197] but that rather cuts in favor of the view that when the United States claims an implied right of action in a corporate capacity, it should be treated like a private citizen.[198]

Calif. L. Rev. 315, 344 (2001) ("Claims based on . . . sovereign injuries do not, in any direct sense, seek to redress diminution of the federal treasury."); Herz, supra note 24, at 959–60 (distinguishing between litigant as beneficiary of regulatory scheme and as administrator in determining when one federal agency can sue another).

195. *Wyandotte* furnishes a ready example. See supra note 183 and accompanying text (referring to damages remedy utilized by Court to compensate United States for "pecuniary injury").

196. 318 U.S. at 366–67; see also United States v. Little Lake Misere Land Co., 412 U.S. 580, 595–96 (1973) (explaining federal courts may craft federal common law in cases involving proprietary capacity of United States).

197. Fallon et al., Hart and Wechsler's Fifth Edition, supra note 169, at 789. In a significant sense, the *Clearfield* principle is orthogonal to the problem of implied public rights of action in statutory cases, where the only questions are whether, and to what extent, federal courts may imply rights to sue and remedies where Congress or the Constitution has created a substantive policy. See, e.g., Laurence H. Tribe, 1 American Constitutional Law 481 (3d ed. 2000) (noting distinction between implication to enforce substantive law and common law creation of substantive law); Paul J. Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 816 (1957) (suggesting implication of right of action differs from creation of substantive common law).

198. Limiting implied rights of action to vindicate corporate interests will not leave the United States bereft of garden-variety remedies. The federal government regularly sues under state law to protect its corporate interests, with courts reasoning that the demand for federal common law is weaker when only those interests are at stake. See, e.g., Davidson v. FDIC, 44 F.3d 246, 251 (5th Cir. 1995) (reasoning demand for federal law is greater when government acts in sovereign capacity). Government disputes involving garden-variety contracts for personal property and services are governed by the Contract Disputes Act, which gives the government a right to enforce those contracts. See 41 U.S.C. § 7103(a) (Supp. IV 2010) (providing for public right of action to enforce contracts).

That is not to say, however, that the Court has been right in recent years to pull back from implied private rights of action. It may be defensible to presume, as the Court now does, that Congress does not intend to authorize private enforcement when it does not do so explicitly, but that is because the Court has adhered to that presumption for at least a decade, most clearly since the early 2000s.[199] The alternative is not, as the revisionists would have it, freewheeling judicial policymaking. Traditionally, implication of private rights of action in a regulatory mode had always been tethered to a set of conventional rules of thumb for determining when the deterrent benefits of implying a private remedy would outweigh the costs and be consistent with legislative design.[200]

Given the muddled jurisprudence of implied public rights of action, Congress does not operate today against a baseline that suggests express authorization of public enforcement is always necessary where a public litigant sues. Here, as in the private rights context, it is undeniable that the trend toward legislative specificity raises the potential for separation of powers problems on a retail level. Courts can manage these problems in both private and public litigation using conventional heuristics, much

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Limiting corporate rights of action is also consistent with cases in which the Court has been hostile to federal common law involving the government's corporate interests. See O'Melveny & Myers v. FDIC, 512 U.S. 79, 85–89 (1994) (applying state law to FDIC claim and explaining "[o]ur cases have previously rejected 'more money' arguments remarkably similar to the one made here"); United States v. Standard Oil Co., 332 U.S. 301, 310–11 (1947) (refusing to imply public right of action to permit United States to sue for tortious interference with its military personnel); Ronald H. Rosenberg, The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers, 36 Conn. L. Rev. 425, 453 n.165 (2004) (discussing *O'Melveny* and explaining outcome might have been different had FDIC been litigating in "governmental capacity").

199. See Alexander v. Sandoval, 532 U.S. 275, 289–90 (2001) (holding no private right of action exists where statute fails to "manifest [congressional] intent to create a private remedy").

200. Stewart & Sunstein, supra note 1, at 1300–03; see also Cort v. Ash, 422 U.S. 66, 78 (1975). *Cort v. Ash* identifies four factors to determine when a right of action may be implied: whether (i) "the plaintiff [is] 'one of the class for whose especial benefit the statute was enacted'"; (ii) "there [is] any indication of legislative intent . . . to create . . . a remedy or to deny one"; (iii) it is "consistent with the [statute's] underlying purposes . . . to imply" a right of action; and (iv) the "cause of action [is] traditionally relegated to state law." Id. (emphasis omitted) (quoting Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)). This Article takes largely as given judicial retrenchment from implied private rights of action. But there are good reasons to think the Court has become far too wary of implied private rights of action, particularly in the last decade and a half, where it has tended to favor a clear statement rule against implying private rights to sue. See, e.g., Donald H. Zeigler, Rights, Rights of Action, and Remedies: An Integrated Approach, 76 Wash. L. Rev. 67, 138 (2001) (discussing alternative to clear statement rule that would factor in concerns about private enforcement). See generally J. Maria Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1141 (2012) ("[I]ntense focus on the pathologies of private enforcement mechanisms in isolation tends to discount across the board the structural role these mechanisms play within regulatory regimes in the American system.").

as the Court did in the 1970s under *Cort v. Ash* and *Cannon v. University of Chicago*.[201] On that understanding, courts should treat public litigants like private ones when implying rights of action.

2. *Substituting Public for Private Enforcement by Implication.* — Substitute suits should follow the same schema: Just as courts limit implied rights of action when private parties sue in a third party capacity, they should limit substitute rights of action for public litigants in the absence of statutory authorization. Within the American jurisprudential tradition, there is a convention that the form a right takes and the values it serves are tethered to particular beneficiaries and particular forms of enforcement. That is true even when the legislature expressly empowers a public litigant to bring suits that undoubtedly will benefit private parties. Here *United States v. Raines*[202] is instructive. In *Raines*, the Court held that Congress could empower the federal executive to sue to prevent Georgia from violating the constitutional rights of citizens seeking to register African American voters. But the Court reasoned that Congress had authorized the government to vindicate the public interest in realizing the rule of constitutional law, not to vindicate citizens' private constitutional rights.[203]

The Court's hesitancy to transmute a private right into a public one tracks the rule against third party standing in private litigation. Precluding bystanders from litigating the claims of beneficiaries is thought to serve several objectives. It may encourage judicial restraint and improve judicial decisionmaking, because beneficiaries "usually will be the best proponents of their own rights."[204] It is potentially unfair to bind beneficiaries to adverse judgments issued in bystander suits, particularly given the risk of inadequate representation. Finally, limiting third party standing promotes self-determination. A third party suit may lead to "the adjudication of rights which [rights holders] may not wish to assert."[205]

These latter two concerns and the separation of powers intersect. From the earliest common law cases, a right has been understood to imply *some* remedy to protect the right's beneficiaries. A right without a remedy of any kind is not a right at all.[206] But a right is not conventionally

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201. Cf. Kramer, supra note 149, at 290 n.91 (arguing for return to *Cort* approach to implying private rights of action).

202. 362 U.S. 17 (1960).

203. Id. at 27.

204. Singleton v. Wulff, 428 U.S. 106, 114 (1976) (Blackmun, J.).

205. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 80 (1978). Lea Brilmayer has argued these three values underlie all standing doctrine. Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 310–15 (1979).

206. The W. Maid, 257 U.S. 419, 433 (1922) ("Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."). See generally Vázquez, supra note 65, at 1733 n.230 (discussing "sanctionist view of law" within American legal tradition).

thought to imply a remedy in favor of someone whose interests the legislature did not purport to protect. The precise authority for judicial implication of third party rights of action is, therefore, obscure.[207]

Moreover, implication of a third party right of action may lead to litigation that extinguishes the right the legislature created. For example, a judgment obtained by a public litigant in a substitute capacity is preclusive "against its citizens" for the same reasons that aggregate litigation may bind represented persons.[208] For aggregate treatment to achieve the economies of scale and consistency of results that purportedly justify it, it is necessary to preclude relitigation of the same claims in subsequent individual trials.[209] But while the Federal Rules of Civil Procedure prescribe mechanisms to ensure adequate representation in class actions, no such mechanisms apply to substitute suits.[210] As a result, substitute litigation may wrest control of private rights from an individual beneficiary without the procedures that protect a beneficiary's right to her day in court.

One might argue that the solution is better policing of the adequacy of representation in substitute litigation. It is not enough, of course, to assume the government will always be a capable representative of its citizens' rights.[211] In theory, courts might police the adequacy of representation either at the front end through standing doctrine or at the back end by relaxing or eliminating the preclusive effect of substitute suits.[212] But federal courts have shown no willingness to question whether the United States or the states will adequately represent their citizens' private rights. Justice William Brennan's concurrence in *Snapp* suggests why: An inquiry into whether a government will adequately represent its citizens seems too readily to lead to excessive entanglement of the judicial branch with

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207. See Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 310–15 (1984) [hereinafter Monaghan, Third Party Standing] (raising possibility third party standing is explicable on regulatory basis and questioning whether courts have authority to develop private attorney general standing on their own motion).

208. See City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340–41 (1958) ("[T]he taxpayers of Tacoma, . . . in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.").

209. See, e.g., Richard L. Marcus, Edward F. Sherman & Howard M. Erichson, Complex Litigation: Cases and Materials on Advanced Civil Procedure 9–11 (5th ed. 2010) (discussing virtues of aggregate litigation).

210. See, e.g., Am. Law Inst., Principles of the Law of Aggregate Litigation § 1.02 reporters' notes (2010) (explaining parens patriae suits are not limited by class action procedures to ensure adequate representation).

211. See, e.g., Richard A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925, 940–41 (2001) (critiquing state antitrust enforcement). For a discussion of the divergent perspectives on the quality of state antitrust enforcement, see Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L.J. 673, 694–96 (2003).

212. Margaret H. Lemos, Aggregate Litigation Goes Public: Representative Suits by State Attorneys General, 126 Harv. L. Rev. 486, 542–48 (2012).

matters of political discretion.[213] Even if courts were willing to police adequate representation, fairness to potential defendants demands some bar on relitigation of the same substantive claims. At the least, unless and until Congress directs the creation of procedural mechanisms to police substitute litigation, courts should not presume they are authorized broadly to imply substitute rights of action in favor of public litigants.

Another possibility would be to limit substitute rights to sue to suits for injunctive remedies, thus leaving open the possibility of a subsequent suit for compensatory relief by individuals.[214] That would obviate some concerns, but still would leave open the possibility of a government mishandling a claim for structural relief. Even if implied rights of action were limited to injunctive relief, moreover, the problem of identifying judicial authority to substitute public for private enforcement would still remain. To unpack these points, this Article looks first to litigation involving the United States and then to substitute suits by states.

a. *The United States.* — The concerns about judicial authority to create substitute rights of action are traditionally marshaled when courts deny the United States an implied right to substitute public for private enforcement.[215] The DOJ rarely seeks to espouse the private rights of U.S. citizens based upon an implied statutory public right of action.[216] As a result, the jurisprudence is focused on those cases in which the executive branch seeks to vindicate U.S. citizens' constitutional rights. Therefore, cases involving constitutional challenges provide the most complete discussion of the problem of substitute litigation by the United States. In this context, the definitive modern statement is *United States v. City of Philadelphia*, where the federal government sued Philadelphia to enjoin racially discriminatory and abusive police practices under 42 U.S.C. §§ 241 and 242 and the Fourteenth Amendment.[217] The Third Circuit held that §§ 241 and 242 and the Fourteenth Amendment do not create a public right in favor of the United States.[218] Much of the court's analysis

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213. See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 612 (1982) (Brennan, J., concurring) ("As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention.").

214. See Yackle, supra note 117, at 168–72 (discussing potential limitations to parens patriae suits).

215. See, e.g., United States v. City of Philadelphia, 644 F.2d 187, 199, 201 (3d Cir. 1980) (refusing to imply substitute right of action in favor of United States); United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979) (same); United States v. Solomon, 563 F.2d 1121, 1123 (4th Cir. 1977) (same).

216. But cf. United States v. Bongiorno, 106 F.3d 1027, 1029 (1st Cir. 1997) (refusing, on statutory grounds, to permit United States to sue to recover child support payment owed to private party).

217. *City of Philadelphia*, 644 F.2d at 189–90.

218. Id. at 194.

sounded in the separation of powers and federalism.[219] But the court of appeals also gestured toward the right to one's day in court and the principle of self-determination. Given that one of the "purposes of the legislative scheme," including §§ 241 and 242, was "to permit the *victims* of constitutional violations to obtain redress," it would do violence to legislative intent to imply a public right of action that could supplant the victims' private one.[220] This reasoning would apply equally, if not more, to a case involving private rights that Congress, rather than the Constitution, has created.[221]

These objections may ring hollow to anyone sympathetic to the substantive rights enshrined in the Fourteenth Amendment.[222] Given the Supreme Court's apparent hostility to private litigation, it may seem strange to speak of self-determination and the risk of preclusion in a case like *City of Philadelphia*.[223] Thus, while the Third Circuit held in *City of Philadelphia* that the United States has no parens patriae right to sue to vindicate its citizens' constitutional rights, the court of appeals later held in *Pennsylvania v. Porter* that a state has an implied parens patriae right of action under § 1983 and the Fourteenth Amendment.[224] According to the Third Circuit, the horizontal separation of powers constraints that operate when the executive seeks a right of action Congress has not authorized do not apply when a state seeks the same.[225] But that misses the separation of powers question of *judicial* authority to shape enforcement design.

Implying substitute rights of action is subject to the objection that federal courts should not have discretion to recognize third party rights of action without an express legislative warrant.[226] In some private rights cases—particularly where a private defendant to an enforcement action

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219. Congress had repeatedly rejected proposals to create the right of action the United States requested, which would have expanded the federal government's ability to sue state officials and municipalities for constitutional violations. Id. at 197.

220. Id. at 198 (emphasis added).

221. Cf. Davis v. Passman, 442 U.S. 228, 241 (1979) ("[T]he judiciary is clearly discernible as the primary means through which these rights may be enforced.").

222. One possible impetus for this reaction is the premise that federal courts have a special responsibility for elaborating constitutional remedies. As applied in statutory cases, the concerns of the Third Circuit in *City of Philadelphia* have greater bite.

223. See Yackle, supra note 117, at 111 (arguing for parens patriae enforcement of Fourteenth Amendment rights by United States); see also Gilles & Friedman, supra note 14, at 623 (arguing for expanded use of state parens patriae litigation as substitute for class actions).

224. Pennsylvania v. Porter, 659 F.2d 306, 319 (3d Cir. 1981) (en banc) (per curiam).

225. Id. at 316.

226. Cf. Monaghan, Third Party Standing, supra note 207, at 316 ("[T]raditional limits on the use of private attorneys general suggest that, absent congressional sanction or necessary implication from the Constitution, jus tertii standing is problematic.").

raises what seems like a third party right as a defense[227]—a court may protect a party's own rights through recognition of third party standing.[228] Where that is not the case, as the cases involving private third party standing instruct, implication of a third party right of action may be inconsistent with legislative intent.[229]

b. *States.* — That implication of a third party right of action may be inconsistent with legislative intent can be illustrated by turning to state litigation, because most modern state parens patriae suits cannot be understood in first party terms. Pulled from its common law roots in the Court's authority to resolve interstate disputes,[230] the parens patriae standing doctrine has become a basis for implying state rights of action to enforce private rights. The cases reveal three modes of analysis. In some decisions, the common law standing rule substitutes for analysis of congressional intent. The Supreme Court's decision in *Snapp* can be understood that way: The Court held that Puerto Rico could sue to enforce federal labor and immigration laws on behalf of its citizens without asking whether Congress intended private enforcement, much less parens patriae enforcement.[231] In a second set of cases, the federal courts have been generous in finding evidence that Congress intended to authorize a parens patriae suit. In *Massachusetts v. Bull HN Information Systems, Inc.*, for example, the district court held that the Age Discrimination in Employment Act authorizes a parens patriae suit by defining a "person aggrieved" under the statute to include "legal representatives."[232] Citing only state law and *Snapp*'s doctrine of parens patriae standing, the court reasoned that "legal representatives" includes states suing in a repre-

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227. See, e.g., Richard H. Fallon, Jr., Commentary, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1360 (2000) ("[A]ccording to this analysis a doctor challenging anti-abortion legislation need not rely directly on her patients' rights, but can instead invoke a personal right not to be sanctioned except pursuant to a constitutionally valid rule of law.").

228. See id. at 1359–62 (arguing some third party suits should be understood in first party terms); Monaghan, Third Party Standing, supra note 207, at 282 (same).

229. On the black letter law, the prudential ban on third party standing in private litigation is subject to several exceptions. Treating public litigation like private litigation would significantly restrict substitute suits even under a prudential doctrine, because public litigants would rarely be able to show an Article III injury when suing in a substitute capacity. See City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (Stevens, J.) (noting exceptions); Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984) (discussing exceptions to ban on third party standing when "practical obstacles" would bar litigation of third party's rights or there is risk of chilling constitutionally protected activity).

230. See, e.g., Georgia v. Tenn. Copper Co., 206 U.S. 230, 236–37 (1907) (recognizing public right against public nuisances).

231. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 608–10 (1982); see Lemos, State Enforcement, supra note 16, at 711 n.61 (reading *Snapp* in this way).

232. 16 F. Supp. 2d 90, 103 (D. Mass. 1998).

sentative capacity.[233] In the third set of cases, federal courts have permitted a state to sue as parens patriae after identifying specific textual provisions that imply states can sue in a representative capacity. In *EEOC v. Federal Express Corp.*, for example, the district court permitted a parens patriae suit to enforce Title VII, given that the statute's "standing provision" defines a "person" that may sue to include "governments."[234]

These divergent modes of analysis reflect conflicting signals in the Supreme Court's jurisprudence. In *Georgia v. Pennsylvania Railway Co.*, for example, the Court held that Georgia could bring a parens patriae claim under federal antitrust law for injunctive relief against railroad companies that had allegedly harmed the state's economy by conspiring to fix prices in favor of northern shippers.[235] The Court's analysis of the standing issue suggests a presumption in favor of a parens patriae right to sue, which Congress can overcome by denying the right.[236] But when Hawaii sued in a later case to recover damages to its general economy, the Supreme Court in *Hawaii v. Standard Oil Co.* insisted upon a "clear expression of a congressional purpose" to authorize the suit.[237] Finding none, it dismissed the suit.[238]

Of these two competing approaches, *Hawaii* has the better view. It is not clear on what basis a court may imply substitute rights of action, other than the premise that "particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties."[239] But if the relationship between a citizen and her government suffices to support an implied public right of action when a state claims one, it is difficult to see why the same is not true of the United States.

That is especially true because state parens patriae suits are particularly likely to present many of the same problems as private class action enforcement. For example, state attorneys may tax the federal judicial system in the pursuit of large financial rewards. In some cases, the office of the state attorney general may keep any money judgment it obtains.

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233. Id. The court's analysis is at least hasty: A longstanding presumption holds that the statutory term "person" does not include the sovereign, Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 709–10 (2003), and the term "legal representative" seems insufficient to overcome that presumption.

234. 268 F. Supp. 2d 192, 197 (E.D.N.Y. 2003).

235. 324 U.S. 439, 445 (1945).

236. See id. at 447 (suggesting state can sue in parens patriae capacity unless Congress has specified otherwise).

237. 405 U.S. 251, 264 (1972). Congress expressly authorized parens patriae suits to enforce federal antitrust laws in 1976. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394–96 (codified as amended at 15 U.S.C. § 15c–15h (2012)).

238. *Hawaii*, 405 U.S. at 264.

239. United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 557 (1996) (footnotes omitted).

Moreover, state attorneys general sometimes retain private counsel to litigate on the state's behalf. Thus, as in the case of private enforcement, financial incentives may play an important role in the decision to sue, which can lead to excessive litigation and overdeterrence.[240]

Moreover, the political ambitions of state attorneys general may also skew their enforcement priorities. In forty-three states the attorney general is an elected official and operates relatively autonomously from the governor and the legislature.[241] The office attracts progressively ambitious politicians.[242] Aggressively pursuing litigation as a means of policymaking is one way for a state attorney general to build political capital.[243] Attorneys general can build capital not only where they succeed—as in, for example, state consumer protection litigation, which is often at issue in parens patriae litigation[244]—but also where they fail—as in the state attorney general challenges to the Affordable Care Act.[245] Like private enforcement, state enforcement presents the risk of overdeterrence and interference with national policymaking.[246]

Accordingly, the better approach is to treat the states, no less than the United States, like private litigants and to disfavor substitute rights of action.[247] Remedial demands counsel in favor of private enforcement

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240. See Lemos, State Enforcement, supra note 16, at 730–36 (discussing financial incentives for state attorneys general to sue).

241. See Colin Provost, When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General, 40 Publius 597, 599, 613 n.1 (2009) (describing various systems for selecting state attorneys general).

242. See id. at 597–99 ("Among state AGs starting service between 1988 and 2003 for whom we can clearly observe a decision to run for higher office, 73 out of 136 (fifty-four percent) ran for governor or senator."). See generally Joseph Schlesinger, Ambition and Politics: Political Careers in the United States (1966) (discussing progressive ambition).

243. See Cornell W. Clayton, Law, Politics, and the New Federalism: State Attorneys General as National Policymakers, 56 Rev. Pol. 525, 531, 537–38 (1994) (discussing state attorney general litigation in light of political ambitions of officeholders).

244. See Bradford Mank, Should States Have Greater Standing Rights than Ordinary Citizens?: *Massachusetts v. EPA*'s New Standing Test for States, 49 Wm. & Mary L. Rev. 1701, 1780 (2008) (predicting that in wake of *Massachusetts v. EPA* "states and state AGs may file more parens patriae suits in general, including mass tort claims, consumer protection suits, or natural resource damages claims").

245. See, e.g., Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 269–72 (4th Cir. 2011) (holding Virginia lacks standing to challenge Affordable Care Act).

246. Admittedly, the risks are not as significant. State attorneys general may coordinate enforcement decisions with one another and the federal government. And, as in the case of federal enforcement, resource constraints minimize the risks of overdeterrence. A recent study of state attorney general enforcement suggests that state litigation to enforce federal law is not a threat to flood federal courts with litigation, although the data set was limited to suits under express rights of action, many of which required coordination with the federal government. See Widman & Cox, supra note 162, at 81–87 (studying concurrent public enforcement of federal consumer law by state attorneys general).

247. The process of distinguishing a substitute suit from the other types of suits begins with interpreting the underlying substantive mandate in light of the background un-

rather than potentially preclusive public enforcement of private rights.[248]

C. *Vindicating Public Rights in a Common Law Mode*

The distinction between private rights, which protect personal entitlements, and public rights, which protect collective interests, is a persistent feature of American law. Traditionally, the doctrine did not support judicial authority to imply private rights of action to enforce the collective interests protected by public rights, such as administrative and institutional interests. This section discusses judicial authority to imply public rights of action to vindicate those interests.

The enforcement of administrative and institutional interests typically requires flexibility and calibration of enforcement levels, lest litigation lead to overdeterrence. Such collective entitlements are regularly overbroad for several reasons. Their violation typically does not involve the stigma attached to encroachments upon fundamental private rights. Legislative specificity is difficult with respect to collective goals that impinge upon many competing interests. That is particularly true for policy problems where changed circumstances will significantly alter the balance of costs and benefits. As a result, public rights require careful regulatory planning for their implementation and enforcement.[249]

Taken together, these features of public rights suggest that private prosecutorial discretion may be a significant problem. A license to enforce overbroad public rights may lead private litigants, who do not internalize all the social costs of judicial enforcement, "to roam the country in search of . . . wrongdoing."[250] But the problem runs deeper. Public rights protect a range of social interests, not all of which will correspond

derstandings of judicial implication authority. See supra note 194 (distinguishing corporate suits from administrative suits with reference to background understandings of judicial implication authority). This process of reasoning from the text and purpose in light of background understandings is exemplified by the Third Circuit's *City of Philadelphia* decision, which considered the United States' regulatory demand for a substitute suit in light of the substantive preference for private enforcement reflected in the Fourteenth Amendment and the accompanying enforcement scheme created by Congress. See supra notes 217–220 and accompanying text (discussing *City of Philadelphia*).

248. This Article considers state parens patriae authority to sue the federal government in Part IV.C, infra.

249. See, e.g., Stephenson, supra note 3, at 117–19 (discussing potential for private enforcement actions to disrupt public enforcement); Stewart & Sunstein, supra note 1, at 1301–02 (discussing problems of private enforcement and reasons for creation of broad regulatory statutes, including lack of stigma associated with regulatory violations and changing circumstances).

250. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 487 (1982).

to a private party's "special interests."[251] As a result, private enforcement patterns are likely to be biased toward particular aspects of public policy.

To the extent that the commentary criticizes judicial power to imply *private* rights of action to vindicate public rights—as it almost always does—it is consistent with this Article's framework. But *public* rights of action are a different matter. Political accountability, expertise, the lack of personal financial incentives, and centralization—not to mention resource constraints—meaningfully distinguish public from private enforcement. And the separation of powers considerations involved in implying rights of action cannot be divorced from an assessment of the substantive values at stake in light of the characteristics of the litigant who seeks to enforce them.

1. *Institutional Interests.* — Institutional interests are far more common in constitutional than in statutory litigation, and much of the analysis can await exploration of constitutional remedies. It is worth beginning here with a common problem, which also applies to implied public rights of action to vindicate administrative interests. This problem concerns whether, and to what extent, federal courts may imply rights of action for injunctive relief against unlawful government action. Although the tradition of nonstatutory review of federal official action has largely been supplanted by the Administrative Procedure Act and other statutes,[252] implied rights of action remain an important method of enforcing statutory policies against state officials. For decades, federal courts have implied a private right to sue state officials for injunctive relief under the Supremacy Clause. David Sloss has memorably labeled these cases as "*Shaw* preemption suits" after a Supreme Court case that supports the practice.[253] *Shaw* preemption is rooted in the Supremacy Clause and the federal courts' equitable authority; as *Ex parte Young* does

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251. See Grove, Standing as Nondelegation, supra note 132, at 816–17 (arguing one reason to limit private enforcement is that private incentives to sue will distort quality of enforcement).

252. See, e.g., Jonathan R. Siegel, Suing the President: Nonstatutory Review Revisited, 97 Colum. L. Rev. 1612, 1613 (1997) (discussing nonstatutory judicial review).

253. David Sloss, Constitutional Remedies for Statutory Violations, 89 Iowa L. Rev. 355, 357 & n.6 (2004) (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)). The future of *Shaw* preemption claims is in doubt following last Term's *Douglas v. Independent Living Center of Southern California, Inc.*, in which all nine Justices apparently took seriously the Solicitor General's suggestion that plaintiffs who are not facing imminent enforcement actions should be remitted to whatever remedies the legislature has provided. See 132 S. Ct. 1204, 1210 (2012) (noting decision "may require respondents now to proceed by seeking review of the agency determination under the Administrative Procedure Act (APA), rather than in an action against California under the Supremacy Clause" (citation omitted)); id. at 1214 (Roberts, C.J., dissenting) (stating "there is no private right of action under the Supremacy Clause to enforce" federal Medicaid provisions); Brief for United States as Amicus Curiae Supporting Petitioner at 11–16, *Douglas*, 132 S. Ct. 1204 (No. 09-958), 2011 WL 2132705, at *11–*16 ("The language of Section 1396a(a)(30)(A) therefore calls for interpretation and evaluation by the responsible agency, rather than private judicial enforcement.").

for constitutional claims,[254] *Shaw* permits a private party to enforce preemptive statutory law against state violations.[255] But the Court has repeatedly stated that the Supremacy Clause "is not a source of any federal rights."[256] And, on one view, the availability of *Ex parte Young* relief turns upon the threat of an enforcement action and the presence of a federal defense.[257] In recent years, some jurists have questioned *Shaw* preemption claims on these grounds, particularly where private parties who would not be potential defendants in enforcement suits claim a right of action to enforce regulatory statutes.[258] Many public rights cases similarly do not fit an adjudicatory mold, and instead present systemic concerns, as the federal government's preemption claim in *Arizona v. United States*, for example, shows.[259]

Federal courts might hesitate before implying private rights to injunctive relief under broad regulatory statutes out of concern for overenforcement and interference with centralized policymaking. Those concerns have less purchase when a public litigant sues to vindicate institutional or administrative interests.[260] There is no good reason why the United States and its agencies should be subject to the vagaries of fifty states' laws when they sue to protect nationally uniform policies from state interference. For similar reasons, the Court has appropriately implied a public right of action in favor of states suing other states for statutory violations under the Supremacy Clause.[261]

With this background in mind, this Article turns to a few considerations regarding institutional interests that are specific to the statutory context. There is confusion in the modern case law about the scope and

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254. 209 U.S. 123, 148 (1908) (holding private party could seek injunctive relief against state enforcement action that allegedly violated Fourteenth Amendment).

255. See Sloss, supra note 253, at 379 (discussing scope of *Shaw* preemption right of action).

256. Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 613 (1979). This cuts directly against the notion that *Shaw* supports creation of federal rights of action under the Supremacy Clause.

257. See Michael G. Collins, "Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983, 77 Geo. L.J. 1493, 1530 (1989) (reading *Ex parte Young* in this way). This reading of *Ex parte Young* would not support implication of a private right of action under the Supremacy Clause whenever the beneficiary of a federal regulatory scheme sues, but rather would limit it to cases where the beneficiary is potentially subject to state enforcement actions. That would exclude, for instance, beneficiaries of federal public benefits programs.

258. See, e.g., *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (arguing *Ex parte Young* right of action is narrower than usually assumed).

259. 132 S. Ct. 2492 (2012). The United States was not, of course, a potential enforcement defendant under the state law it challenged in *Arizona*. Individuals were. Therefore, the United States' preemption claim did not fit an adjudicatory mold.

260. See supra Part II.B (describing different incentives and structures of public and private enforcement).

261. See, e.g., Maryland v. Louisiana, 451 U.S. 725, 746–52 (1981) (implying public right of action under Supremacy Clause and Natural Gas Act).

source of implied public rights of action to protect institutional interests. For one, the cases conflate suits in which the United States claims a beneficiary interest as a sovereign with those in which it sues to enforce federal law that creates only a private right for another party. When the government sues to enforce a statute that creates both a public and a private right, it is wholly unnecessary—and simply misleading—to lodge the government's implied right to sue in a "quasi-sovereign standing"[262] based in the parens patriae doctrine. In *United States v. B.C. Enterprises, Inc.*, for example, the executive branch sued several towing companies that had allegedly sold vehicles owned by active duty members of the armed forces in violation of the Servicemembers Civil Relief Act (SCRA).[263] The Act prohibits a lien holder from foreclosing on the property of an active servicemember without a prior court order.[264] Although the Act did not expressly create a private right of action, much less a public one, the court held that the government could sue to enforce a statute that protected its "entitle[ment] to [military] personnel who are unfettered by the problems of the loss or disappearance of a substantial asset."[265] Regardless of whether the SCRA implied a private right of action, the court was correct to imply a public right of action to vindicate the government's institutional entitlement to an effective military.

When states claim implied rights of action to vindicate institutional interests, federal courts often address the claims based upon the jurisprudence of implied private rights of action. The Eleventh Circuit's decision in *Florida Department of Business Regulation v. Zachy's Wine & Liquor, Inc.*,[266] is of particular interest. The Webb-Kenyon Act protects state regulation of liquor by prohibiting importation of liquor from one state to another when the liquor "is intended . . . to be received, possessed, sold, or in any manner used . . . in violation" of the receiving state's laws.[267] Florida claimed that a state right to sue for federal injunctive

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262. United States v. B.C. Enters., Inc., 696 F. Supp. 2d 593, 597 (N.D. Va. 2010) (quoting 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.11 (3d. ed. 2009)), aff'd, 447 F. App'x 468 (4th Cir. 2011) (per curiam); see supra Part III.B.2 (discussing rights of action under parens patriae doctrine).

263. *B.C. Enters.*, 696 F. Supp. 2d at 594–95.

264. 50 U.S.C. app. § 537(a)(1) (2006).

265. *B.C. Enters.*, 696 F. Supp. 2d at 598. The Veterans' Benefits Act of 2010 amended the SCRA to create an express public right of action. Veterans' Benefit Act of 2010, Pub. L. No. 111-275, § 802, 124 Stat. 2864, 2877 (codified at 50 U.S.C. app. § 597(a) (Supp. IV 2010)). On appeal in *B.C. Enterprises*, the Fourth Circuit held the amendment "recodif[ied] the government's pre-existing right to sue on behalf of servicemembers." *United States v. B.C. Enters., Inc.*, 447 F. App'x 468. For other cases reaching similar conclusions as to a government's right of action, see also Fed. Home Loan Bank Bd. v. Empie, 778 F.2d 1447, 1450–51 (10th Cir. 1985); United States v. Maryland, 636 F.2d 73, 75 (4th Cir. 1980) (per curiam).

266. 125 F.3d 1399 (11th Cir. 1997).

267. 27 U.S.C. § 122 (2006).

relief was necessary to achieve the Act's purposes. Rejecting pre-*Erie* precedent that seemed to support that argument, the court of appeals reasoned under the private rights model that although the Act "was enacted for the benefit of the states," there was no clear evidence that "Congress intended to create a cause of action."[268] The state's claim to require a federal forum to vindicate its police powers was unusual, to be sure. But it seems strange to reason, as the court of appeals did, that the state's claim was inconsistent with principles of federalism "because states have historically taken the lead in the regulation of alcoholic beverages."[269] When federal law protects a historic state function, and when a state thinks a federal forum will support its interests, federalism *supports* an implied state right of action. To look to the jurisprudence of private rights of action, which is grounded in the notion that federalism cuts against implication, seems odd indeed.

Only a few cases seem to consider federalism when determining whether to imply a state right of action. Consider, for example, state litigation against the federal government under the Armed Forces Reserve Act (AFRA) to prevent the closure of military bases within the states under the Defense Base Closure and Realignment Act of 1990. AFRA precludes the Department of Defense from reallocating a National Guard unit "located entirely within a State . . . without the approval of its governor," but does not expressly create a public right to sue.[270] Nevertheless, the district court in *Gregoire v. Rumsfeld* inferred a state right of action to sue, citing the "historical function of the state militia" and the governor's state constitutional power "as commander-in-chief of the military in the state."[271] The court's reasoning is only suggestive of a federalism-based approach to implication doctrine, however; it ultimately dismissed the Governor's claim on other grounds.[272]

One might think of cases like *Zachy's* and *Gregoire* as examples of the new "New Federalism." Scholars have begun to theorize about federalism as a problem of overlapping and mutually supportive policymaking networks rather than of separate spheres.[273] To the extent federal

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268. *Zachy's*, 125 F.3d at 1403 (citing West Virginia v. Adams Express Co., 219 F. 794, 801 (4th Cir. 1915)) (holding state was entitled to injunctive relief under Webb-Kenyon Act, but rejecting such relief in this case because jurisdictional basis was "unclear").

269. Id. at 1405 n.8.

270. 32 U.S.C. § 104(c) (2006).

271. 463 F. Supp. 2d 1209, 1214 (W.D. Wash. 2006) (internal quotation marks omitted).

272. Id. at 1222–25. Another decision that may be explained in federalism terms is *Washington, Department of Revenue v. www.dirtcheapcig.com, Inc.*, in which the district court held that states have an implied right of action to enforce the Jenkins Act, a criminal statute that protects state taxation authority by requiring interstate vendors of cigarettes to register with and report sales to the states. 260 F. Supp. 2d 1048, 1054–56 (W.D. Wash. 2003). Under a private rights model, there was no warrant for implying a right to sue.

273. See generally Robert A. Schapiro, Polyphonic Federalism (2009) [hereinafter Schapiro, Polyphonic Federalism]; Jessica Bulman-Pozen & Heather K. Gerken,

statutory law protects a state's institutional interests, the concerns of the new *Erie* doctrine do not apply.

This is equally true where a state sues the federal government under a statute that protects state regulatory authority. Under one view, *Mellon*, which denied a state an implied right of action to enforce the Tenth Amendment against the United States,[274] would preclude a state from suing the federal government to vindicate an institutional interest. But this reading of *Mellon* has been undermined by *Massachusetts v. EPA*, which seemed to premise "special solicitude" for state standing on the fact that the Clean Air Act had preempted state regulatory authority.[275] Although the right of action there was express, the Court's reasoning suggests some interesting possibilities for implied state rights of action in favor of challenging preemption.[276]

As Abbe Gluck puts it, the Court's recent "federalist revival"[277] treats "the states as the 'other'" sovereign, with an "entirely separate" sphere of influence.[278] Neither Tenth and Eleventh Amendment case law nor the federalism canons of construction address the problem of a state's claim

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Uncooperative Federalism, 118 Yale L.J. 1256 (2009); Heather K. Gerken, The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4 (2010); Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534 (2011); Gillian E. Metzger, Administrative Law as the New Federalism, 57 Duke L.J. 2023 (2008); Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663 (2001).

274. Massachusetts v. Mellon, 262 U.S. 447, 486 (1923).

275. 549 U.S. 497, 519–21 (2007). However, special solicitude should not have been based upon the state's standing as a property owner. As this Article has shown, garden-variety property interests do not provide a basis for distinguishing a public from a private litigant. See supra Part III.B.1 (discussing implication of rights of action in order to vindicate corporate interests).

276. *Massachussets v. EPA* seemed to reason that the EPA's refusal to act harmed the state's sovereign interests in regulating under the Clean Air Act. 549 U.S. at 519 (suggesting state's "surrender[] [of] certain sovereign prerogatives" factored into "special solicitude" for states in standing analysis); see also Metzger, Federal Agency Reform, supra note 139, at 66–67 (stating *Massachusetts v. EPA* noted "possibility of preemption" as reason for special solicitude). Building upon this idea, Jonathan Remy Nash, for example, has argued that states might have implied rights of action to challenge federal regulatory action that preempts state authority without providing a national regulatory solution. Jonathan Remy Nash, Null Preemption, 85 Notre Dame L. Rev. 1015, 1076 (2010). For further discussion of the harms from null preemption, see generally R. Seth Davis, Note, Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPAct, 108 Colum. L. Rev. 404, 440–50 (2008) [hereinafter Davis, Conditional Preemption].

277. See Vicki C. Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2213 (1998) (coining phrase "Federalist Revival").

278. Gluck, supra note 273, at 554.

to enforce or implement federal law.[279] It may be necessary to rethink the federalism canons of statutory construction to support implication.

When it comes to institutional interests, the calculus for implying a public right of action differs from the considerations that apply to private rights of action. The concerns that animate the new *Erie* doctrine may support implication of a public right of action and the pragmatic justifications for limiting private enforcement either do not apply or are significantly attenuated.

2. *Administrative Interests.* — Although modern courts have generally denied implied public rights of action when treating governments like private corporations,[280] they have (without explanation) approached administrative suits differently.[281] Courts have presumed that Congress intends federal agencies to have the "means to ensure compliance with" their decisions,[282] and, more broadly, "to enforce Congress' will."[283] For instance, under the *Nash-Finch* doctrine, the National Labor Relations Board (NLRB), "'though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the purposes of the [National Labor Relations Act].'"[284] This apparent impulse to make federal administration effective also leads courts to

279. See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (discussing federalism canon); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (discussing presumption against preemption); Davis, Conditional Preemption, supra note 276, at 404–05 (discussing Tenth Amendment and related case law).

280. See supra Part III.B.1 (discussing implication of public rights of action in order to vindicate corporate interests).

281. Compare United States v. Tug Sundial, 861 F. Supp. 2d 1208, 1217 (D. Or. 2012) (denying claim of implied public right of action to compensate United States for damage to federal property), with NLRB v. Arizona, No. CV 11–00913–PHX–FJM, 2011 WL 4852312, at *6 (D. Ariz. Oct. 13, 2011) (holding NLRB has implied public right of action to implement NLRA).

282. United States v. Santee Sioux Tribe, 135 F.3d 558, 562 (8th Cir. 1998); see also *Arizona*, 2011 WL 485312, at *6 (citing NLRB v. Nash-Finch Co., 404 U.S. 138, 142–44 (1971)) (holding NLRB has implied public right of action to implement NLRA on basis of preemption). For example, courts have implied public rights of action to enable federal agencies to enforce their administrative subpoenas based solely upon 28 U.S.C. § 1345, which gives the district courts jurisdiction over civil actions by the United States. See Doe v. Ashcroft, 334 F. Supp. 2d 471, 497 (S.D.N.Y. 2004) (citing United States v. Hill, 694 F.2d 258, 263 (D.C. Cir. 1982)), vacated on other grounds sub nom. Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006) (per curiam).

283. FDIC v. Mallen, 661 F. Supp. 1003, 1010 (N.D. Iowa 1987) (citing United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960); United States v. Oswego Barge Corp. (In re Oswego Barge Corp.), 673 F.2d 47, 49 (2d Cir. 1982)); see also United States v. Outboard Marine Corp., 549 F. Supp. 1036, 1040 (N.D. Ill. 1982) (recognizing implied injunctive remedy to enforce Refuse Act).

284. *Nash-Finch*, 404 U.S. at 142; see also NLRB v. Cal. Horse Racing Bd., 940 F.2d 536, 541 n.5 (9th Cir. 1991) (noting circuit cases upholding district courts' authority "to decide whether state law has been preempted"). The NLRB has express authority to pursue other forms of enforcement. See 29 U.S.C. § 160 (2006) (empowering NLRB "to prevent any person from engaging in any unfair labor practice . . . affecting commerce" through complaints, petitions to courts for enforcement of orders, and injunctions).

imply equitable remedies when federal agencies sue,[285] as recent litigation involving the Food and Drug Administration (FDA),[286] the Federal Trade Commission,[287] and the Securities and Exchange Commission[288] attests. In some cases, solicitude for public enforcement of regulatory programs may also surface when state agencies sue to enforce the terms of a federal program they are administering. As this Article has shown, there is a historical warrant for this judicial remedial activity.[289]

To be sure, when Congress creates detailed enforcement mechanisms for a regulatory program, that is important—and in some cases, dispositive—evidence that the recognition of implied rights of action would contravene the congressional scheme.[290] But, as Justice Stevens put it, "rules are meant to be obeyed," and in some cases implied public rights of action are an appropriate means of achieving that result.[291] When an executive branch agency claims an implied power, it must show that power is "directly and closely tied" to a "specific statutory mandate."[292]

a. *Federal Executive Agencies.* — The same rule should hold when an executive official, or a state agency acting as a delegate of federal authority, claims an implied right to sue or an implied remedy to vindicate an administrative interest. To see why, it is helpful to begin with the struc-

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285. See Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, . . . 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'" (quoting Clark v. Smith, 38 U.S. (13 Pet.) 195, 203 (1839))); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (holding when "public interest is involved" in enforcement action brought by federal agency, court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake").

286. See, e.g., United States v. Rx Depot, Inc., 438 F.3d 1052, 1058 (10th Cir. 2006) (holding FDCA authorizes FDA to sue for restitution and disgorgement); United States v. Lane Labs-USA Inc., 427 F.3d 219, 223 (3d Cir. 2005) (same).

287. See, e.g., FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (reasoning "court's authority to exercise full equitable powers is especially appropriate" when agency sues under statutory provision that "plays an important role" in regulatory program).

288. Compare SEC v. DiBella, 587 F.3d 553, 568–69 (2d Cir. 2009) (holding, based upon purposive interpretation, SEC can pursue civil penalties against aiders and abettors under Investment Advisers Act), with SEC v. Bolla, 550 F. Supp. 2d 54, 62–63 (D.D.C. 2008) (holding, based upon Supreme Court cases denying aiding and abetting liability in private litigation, SEC cannot recover against aiders and abettors under Investment Advisers Act).

289. See supra Part II.A.4 (discussing substitute suits where states seek to vindicate private rights of citizens, including under federal programs they administer).

290. See, e.g., Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13–18 (1981) (taking "unusually elaborate enforcement provisions" as evidence Congress did not intend to create "additional judicial remedies for private citizens").

291. Id. at 24 (Stevens, J., concurring in the judgment in part and dissenting in part).

292. See, e.g., ICC v. Am. Trucking Ass'ns, 467 U.S. 354, 367 (1984).

ture and incentives of public enforcement. By statute, the U.S. Attorney General is responsible for most litigation involving the United States and its agencies.[293] Centralized control of litigation in the DOJ creates political accountability for enforcement policy and permits the department to sift through cases and to coordinate enforcement strategies through policy guidance manuals and the use of internal reviews.[294] Although the DOJ usually controls litigation strategy, its attorneys consult with policy specialists in the executive branch throughout the course of a case.[295] The White House has also long been actively involved in coordinating public enforcement policy.[296] And Congress may use legislation, oversight hearings, and appropriations determinations to influence the executive branch's enforcement decisions.[297] Of course, mission creep and overzealousness in enforcement decisions are possible, and, if left unchecked, may lead to overenforcement. Even so, political accountability, expertise, the lack of personal financial incentives, and centralization meaningfully distinguish federal enforcement from private enforcement. Concerns over inconsistent enforcement are beside the point when federal officials sue. And the concern regarding overenforcement has far less purchase. Resource constraints on the DOJ and federal agencies, as well as the different incentives of public enforcers, mitigate the risk of overenforcement.

Now consider the doctrine, beginning with administrative remedies. When a federal agency exercises its own authority to craft administrative enforcement mechanisms, federal courts defer as a matter of course.[298]

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293. 28 U.S.C. § 516 (2006).

294. See Grove, Standing as Nondelegation, supra note 132, at 813–17 (contrasting coordination of executive enforcement to private enforcement).

295. More generally, the existence of informal agency coordination of implementation and enforcement strategies, although difficult to measure, further distinguishes public from private enforcement. Cf. Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1133, 1156 (2012) (discussing informal aspects of interagency coordination of regulation).

296. See Theodore C. Hirt, Current Issues Involving the Defense of Congressional and Administrative Agency Programs, 52 Admin. L. Rev. 1377, 1380 (2000) (discussing White House's centralization of litigating authority in DOJ); Susan M. Olson, Challenges to the Gatekeeper: The Debate over Federal Litigating Authority, Judicature, Aug.–Sept. 1984, at 71, 72–73 (noting under federal law DOJ is "gatekeeper to the courts for federal officials and agencies").

297. Neal Devins & Michael Herz, The Battle that Never Was: Congress, the White House, and Agency Litigation Authority, Law & Contemp. Probs., Winter 1998, at 205, 212.

298. ICC v. Am. Trucking Ass'ns, 467 U.S. 354, 355–56 (1984) (deferring when administrative remedy was "closely and directly related" to statutory power); see La. Pub. Serv. Comm'n v. FERC, 174 F.3d 218, 224–25 (D.C. Cir. 1999) (holding agency's "remedial decision [may be vacated] only if it constitutes an abuse of discretion"); Nat'l Treasury Emps. Union v. FLRA, 910 F.2d 964, 966–67 (D.C. Cir. 1990) (en banc) (holding agency's remedial decisions were subject to "particularly narrow" judicial review).

One is apt to think of judicial deference to an agency's exercise of its own remedial powers as presenting a categorically different question than the scope of judicial authority to imply judicial remedies in aid of public enforcement. But why? When an agency claims that an implied right of action is an appropriate adjunct to its implementation powers, the court must consider many of the same concerns about congressional intent, protection of private rights, and administrative overreaching that it would consider when reviewing an agency's remedial decisions.[299] It is unsurprising that even when exercising its own remedial authority, the Court has given serious consideration to an agency's views of the remedial demands of regulatory programs. Consider *ICC v. Transcon Lines*, where the ICC requested injunctive relief under a statute authorizing it to "bring civil actions to enforce" the Interstate Commerce Act and its regulations.[300] The Court unanimously held that "[a]lthough the ICC's authority to determine proper remedies for violations under the Act is not without limits, its judgment that a particular remedy is an appropriate exercise of its enforcement authority under [the statute] is entitled to some deference."[301] As long as the requested injunction was a "reasonable and necessary means to effect enforcement" and "protect[ed] the intended beneficiaries of the [agency's] violated regulations," it was an appropriate exercise of the Court's remedial authority at the behest of the agency.[302]

Of course, implication of a right of action seems to raise something like a concern about expanding agency jurisdiction.[303] But the underlying concern is mission creep, and an agency's view as to the remedial tools available for enforcement of its statutory mandate hardly

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299. Cf. Philip J. Weiser, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1752–53 (2001) [hereinafter Weiser, Federal Common Law] (linking concerns of new *Erie* doctrine to question of remedies available to agencies enforcing federal regulatory programs).

300. 513 U.S. 138, 145 (1995) (citing 49 U.S.C. § 11702(a)(4) (1990)).

301. Id. at 145–46.

302. Id. at 147.

303. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000), is widely understood to reflect this principle; there, the Court refused to defer to the FDA's determination that it had the authority to regulate tobacco products under the FDCA. See Abigail R. Moncrieff, Reincarnating the "Major Questions" Exception to *Chevron* Deference as a Doctrine of Noninterference (or Why *Massachusetts v. EPA* Got It Wrong), 60 Admin. L. Rev. 593, 601 (2008) (interpreting *Brown & Williamson Tobacco Corp.* as example of judicial reticence to defer to agency on major question of agency jurisdiction). The Court seemed to put the lid, for now at least, on a jurisdictional exception to *Chevron* deference in City of Arlington v. FCC, 133 S. Ct. 1863, 1868–69 (2013). But cf. id. at 1875 (Breyer, J., concurring in part and concurring in the judgment) ("[E]xistence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill . . . ."); id. at 1880 (Roberts, C.J., dissenting, joined by Kennedy & Alito, JJ.) (rejecting jurisdictional exception to *Chevron* deference but arguing Court must ensure Congress has delegated authority to agency to make interpretations with legal effect).

qualifies.[304] Federal courts give *Chevron* deference to an agency's views of what remedies that agency can provide through adjudication.[305] It is needless formalism for a court to refuse to take seriously an agency's claim that an implied right of action or remedy is necessary to effectuate the regulatory scheme.[306]

Thus, a strong presumption against implication is out of step with the courts' administrative law jurisprudence. A federal court should not ignore the agency's views when deciding whether to imply a public right of action or remedy from a statute that is ambiguous on the subject. *Transcon* supports at least respectful consideration of the agency's views under *Skidmore v. Swift & Co.*,[307] as do cases in the federal courts of appeals.[308] Even if an agency has not authoritatively interpreted a statute

304. In thinking about the danger of mission creep, Philip Weiser has helpfully distinguished between "vertical *Chevron*"—which "involves an agency's tactics to implement congressionally-assigned goals"—and "horizontal *Chevron*"—which involves "expand[ing] [the agency's] mandate." Weiser, Federal Common Law, supra note 299, at 1754–55. Deference on remedial questions involves the former. See id. ("[T]he vertical *Chevron* doctrine allows agencies to take action not specifically contemplated by their enabling legislation in order to implement their assigned mission.")

305. See Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 571 (2005) (describing "modern view" that statutory authority for regulatory enforcement may be implied).

306. Matthew Stephenson has forcefully argued that in the absence of clear congressional intent, federal courts should defer under *Chevron* to an agency's decision whether to imply a private right of action under a regulatory statute. Stephenson, supra note 3, at 149. The principal doctrinal response is that the Court's dictum in *Adams Fruit Co. v. Barrett* bars *Chevron* deference on "the scope of the judicial power vested by the statute." 494 U.S. 638, 650 (1990). If implication of a right of action expands federal question jurisdiction, see Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164–65 (2008) (reasoning implied rights of action may expand federal jurisdiction), then the *Adams Fruit* dictum might be an understandable limit on agency control of another branch's jurisdiction. Cf. Moncrieff, supra note 303, at 601 (noting Court's limiting of agencies' ability to depart from statutory intent in "implementing major policy changes"). But even if federal courts should assume Congress intends to shelter private enforcement from agency interference, it does not follow that courts should decline to take seriously agencies' views about public enforcement.

307. 323 U.S. 134, 140 (1944) (holding agency interpretations of governing statutes "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). In *Transcon*, taking account of the ICC's expert view, the Court assured itself that that an injunction would be "necessary to . . . effective enforcement." 513 U.S. at 146 ("[An injunctive] remedy appears to the ICC, and to us, necessary to the effective enforcement of its regulations.").

308. See, e.g., United States v. W. Elec. Co., 900 F.2d 283, 297 (D.C. Cir. 1990) (per curiam) (holding although agency's view is not due deference when agency "act[s] in a prosecutorial role," court must "seriously consider" agency's interpretation of law in that setting); Niagara Mohawk Power Corp. v. Fed. Power Comm'n, 379 F.2d 153, 159 (D.C. Cir. 1967) ("[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives.").

in a rulemaking, the federal courts should take seriously the agency's remedial view.

Moreover, when Congress has authorized a federal court, sitting in equity, to enforce an agency-administered statute, the court should presume it may afford any appropriate remedy and give at least *Skidmore* weight to the agency's view of what equitable remedies would be appropriate. This follows from the principle that "there is inherent in the Courts of Equity a jurisdiction to . . . give effect" to the "prohibitions contained in a regulatory enactment"[309] and from the judicial tradition of giving deference to agencies' appraisals of the "relation of remedy to policy."[310]

Nor should federal courts strain to read remedial provisions narrowly. Consider, for example, the question of civil liability for aiding and abetting violations of the securities laws. The Supreme Court has repeatedly refused to "extend" the implied private right of action under the Securities Exchange Act to encompass aiding and abetting liability.[311] Citing this case law, and prior to the Dodd-Frank Act's clarification of the question in favor of public enforcement,[312] some federal courts narrowly interpreted section 209(e) of the Investment Advisers Act, which authorizes the SEC to "bring an action . . . to impose . . . a civil penalty" upon a person violating the Act,[313] to exclude aiding and abetting liability.[314] Although these cases invoke the remedial restraint that is familiar from the Court's private rights jurisprudence,[315] their reasoning is wholly unsatisfactory. The Court has repeatedly recognized in the securities context that public enforcement "do[es] not present the dangers the Court [has] addressed" in its private rights jurisprudence, making those

309. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960) (quoting Clark v. Smith, 38 U.S. (13 Pet.) 195, 203 (1839)) (internal quotation marks omitted).

310. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

311. *Stoneridge*, 552 U.S. at 164–65 (declining to find private cause of action absent clear evidence of congressional intent); see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 180 (1994) (refusing to expand private right of action under securities laws).

312. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929N, 124 Stat. 1376, 1862 (2010) (codified at 15 U.S.C. § 80b-9 (2012)) (amending section to authorize agency enforcement against aiders and abettors).

313. 15 U.S.C. § 80b-9(e)(1).

314. See, e.g, SEC v. Bolla, 550 F. Supp. 2d 54, 59–60 (D.D.C. 2008) (relying on absence of clear congressional intent to hold monetary penalties beyond scope of provision at issue); see also SEC v. Gabelli, No. 08 CV. 3868(DAB), 2010 WL 1253603, at *11–*12 (S.D.N.Y. Mar. 17, 2010) (same), rev'd, 653 F.3d 49 (2d Cir. 2011), rev'd, 133 S. Ct. 1216 (2013).

315. See supra Part I.B (discussing judicial retrenchment from implied private rights of action).

decisions "inapplicable."[316] Reliance upon the SEC's prosecutorial discretion, and a more purposive interpretation, is warranted.[317]

Turning from implied remedies to implied public rights of action, the courts should not limit implied public rights of action to statutes that use rights-creating, rather than duty-creating, language. When Congress "formally confers" a private right, that is strong evidence it has concluded a "system of [private] entitlements is administrable."[318] By contrast, when the United States claims an implied public right to sue, the question is whether a system of public enforcement is administrable. This question cannot be answered by reference to a rule of construction designed with private entitlements in mind. Congress regularly authorizes public litigants to sue as administrators of a federal program. A singular focus upon rights-creating language does not admit that possibility and fails to give weight to an agency's estimation of the remedial demands of its own programs.

Not all federal statutes are agency-administered, of course. Under current law, deference would not be warranted when the DOJ sues on its own authority to enforce a federal statute, for example. Even so, there is lower court precedent that directs a court to "seriously consider" the DOJ's views on statutory enforcement,[319] and there is no reason to exclude its views on right of action questions from serious consideration.

In some cases, however, the available evidence may on balance cut against implication of a right of action. The Third Circuit's opinion in *United States v. FMC Corp.*[320] is representative. The United States claimed an implied right to sue to invalidate a patent,[321] alleging that the patent holder had violated a federal statute requiring the parties to a patent dispute to file with the Patent and Trademark Office any "agreement or understanding" made "in connection with or in contemplation of the termination" of a patent interference proceeding.[322] The court focused on whether the government was "the especial beneficiary" of the statute and emphasized that the statutory text "parallels duty-creating provisions

316. United States v. O'Hagan, 521 U.S. 642, 665 (1997) (quoting United States v. Naftalin, 441 U.S. 768, 774 n.6 (1979)) (internal quotation marks omitted); see also Margaret V. Sachs, Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934, 2001 U. Ill. L. Rev. 1025, 1046 (noting Supreme Court has found private actions present "especially grave threat of vexatiousness").

317. See SEC v. DiBella, 587 F.3d 553, 571–72 (2d Cir. 2009) (upholding SEC's construction of penalty provision to include aiders and abettors).

318. Stewart & Sunstein, supra note 1, at 1308.

319. See, e.g., United States v. W. Elec. Co., 900 F.2d 283, 297 (D.C. Cir. 1990) (per curiam) (holding although agency's view is not due deference when agency "act[s] in a prosecutorial role," court must "seriously consider" agency's interpretation of law in that setting).

320. 717 F.2d 775 (3d Cir. 1983).

321. Id. at 777.

322. 35 U.S.C. § 135(c) (1982) (current version at 35 U.S.C. § 135(c) (2006)).

from which the Court has consistently declined to infer rights of action."[323] That was error in light of the reasons for implying public rights of action to enforce administrative interests, but the court of appeals hit the mark when it looked to the legislative history, which counted against recognizing an implied right of action because it showed Congress had rejected additional enforcement mechanisms.[324]

b. *Independent Agencies.* — Independent agencies present their own conundrums. One might contend that agencies with independence from the President and the DOJ lack the requisite political accountability to allow a broad implication doctrine. On that reasoning, for example, *Nash-Finch* was wrongly decided: The NLRB's independence places it too far beyond the reach of political control to merit a broad doctrine of implied public rights of action, notwithstanding any expertise it might bring to bear upon the problem.[325]

This argument overstates the distinctions between executive and independent agencies. In the main, even independent agencies are subject to political controls in matters involving litigation. Congress can subject agency counsel to oversight, and counsel, in turn, are likely to "see themselves as 'vicar[s] of Congress.'"[326] The White House exerts influence on the setting of regulatory priorities by independent agencies through the Office of Management and Budget process.[327] Therefore, "at least in regard to litigation, viewing independent agencies as different from executive agencies is a mistake."[328] Congressional control distinguishes independent agencies from private parties for purposes of implication doctrine.

That said, there undoubtedly will be some disputes about enforcement policy between independent agencies and executive officials. In some cases, implication of a public right of action might draw the courts

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323. *FMC*, 717 F.2d at 783–84.

324. Id. at 787.

325. See supra note 284 and accompanying text (discussing *Nash-Finch* doctrine).

326. Devins & Herz, supra note 297, at 211 (alteration in original) (quoting Clean Air Act Implementation (Part 1): Hearings Before the Subcomm. on Health and the Env't of the H. Comm. on Energy and Commerce, 102d Cong. 254 (1991) (statement of E. Donald Elliot, General Counsel, Envtl. Prot. Agency)).

327. The executive Office of Management and Budget contains the Office of Information and Regulatory Affairs (OIRA). Under the terms of an executive order, OIRA reviews proposed rulemakings of executive agencies to weigh their costs and benefits and to consider them in light of the President's regulatory priorities. Although OIRA does not assert authority to review independent agency rulemakings, it has created a process for consultation between the White House and independent agencies. See generally Cass R. Sunstein, Commentary, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838 (2013) (describing role of OIRA within larger regulatory system).

328. Herz, supra note 24, at 954.

into intrabranch disputes over enforcement policy. Where that is the case, the Court has refused to imply a public right of action.[329]

c. *Cooperative Federalism and State Agencies.* — State agencies present yet a third conundrum. They are not subject to direct executive management, of course. At the same time, enforcement of federal law by state agencies shares many of the important features that distinguish federal agency enforcement from private litigation.

The Seventh Circuit's en banc decision in *Indiana Protection & Advocacy Services v. Indiana Family and Social Services Administration*[330] suggests courts should treat state enforcement similarly to federal enforcement when state agencies sue to enforce the terms of a federal program they are administering. The case involved the Protection and Advocacy for Individuals with Mental Illness Act of 1986 (PAIMI Act), a conditional spending program that directs states to establish protection and advocacy (P&A) agencies to advocate for persons with mental illness in exchange for federal funding.[331] The P&A agency may be either a state agency or a private entity.[332] By statute, the P&A agency is tasked with investigating abuse of the mentally ill and, to that end, "shall . . . have access" to medical records of mentally ill individuals.[333] Indiana Protection and Advocacy Services (IPAS), an independent state agency, sued the state and various state agencies and officials for declaratory and injunctive relief after they declined to provide records for two individuals.[334]

Given the federalism aspects of the case, it would not have been surprising for the court of appeals to deny the requested relief because the statutory text was "a long distance from the model of personal rights that was vital to the disposition in *Cannon*."[335] The en banc court nevertheless found an implied right to sue based on the "language, structure, and purpose" of the PAIMI Act.[336] Judge Richard Posner's concurrence was frankly purposivist. Reading the PAIMI Act to assign P&A agencies a unique role in implementing and enforcing the regulatory scheme, he reasoned that they should be able to "bring suits that are essential" to

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329. Consider, for example, *S & E Contractors, Inc. v. United States*, in which the Court held that the DOJ did not have implied authority to sue for judicial review of a decision of the Atomic Energy Commission regarding a dispute with a private contractor. 406 U.S. 1, 12–13 (1972). To imply a right of action in favor of the DOJ, the Court reasoned, would be to vest in the Attorney General "the power to overturn decisions of coordinate offices of the Executive Department." Id. at 12.

330. 603 F.3d 365 (2010) (en banc).

331. 42 U.S.C. §§ 10801(a)–(b), 10803(2)(A) (2006).

332. See id. § 10802(2) (adopting model of Developmental Disabilities Assistance and Bill of Rights Act (DDABRA)); see also id. §§ 15043–15044 (allowing state agencies or private entities to operate as agencies under DDABRA).

333. Id. § 10805(a)(4)(A)–(B).

334. *IPAS*, 603 F.3d at 369–70.

335. Id. at 390–91 (Easterbrook, C.J., dissenting).

336. Id. at 381 (majority opinion).

that protective role.[337] The P&A agency's request for injunctive relief was "nothing like" a private damages remedy, which is not subject to "prosecutorial discretion" and may thus "change the legislative deal dramatically."[338]

To the extent that state agencies participate in cooperative federalism programs, they may have special expertise in discerning and addressing enforcement gaps. Put differently, not all state enforcement—or, more precisely, state enforcers—is made equal. Given license to sue for class damages in a parens patriae consumer protection suit, state attorneys general may behave much like the private class counsel of Justice Powell's parade of horribles. But scholars have observed that state agency officials may operate much like federal agency officials. The metaphor of picket fence federalism captures the idea. Unlike state attorneys general, specialized "state agencies may be defined more by their subject-matter specialization—a feature they share with a federal agency—than by their affiliation with state government."[339] Where a state agency claims an implied public right of action pursuant to the delegated authority to implement federal regulatory programs, the concerns attendant upon state attorney general enforcement are less pressing. A decision to sue may reflect state agency expertise and commitment to the success of federal regulation. Accordingly, Judge Posner was right to distinguish a public from a private attorney general for purposes of implication doctrine in *IPAS*.[340] When implying state rights of action to enforce administrative interests, federal courts should not treat state agencies like private litigants.

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In short, the unitary approach's picture of implied public rights of action is incomplete. Where public litigants sue in a typically private capacity, courts should treat them like private litigants. But enforcement of institutional and administrative statutes presents a different problem, and calls for a distinct treatment of implied public rights of action in statutory cases.

IV. CONSTITUTIONAL REMEDIES FOR GOVERNMENTS

The same framework applies when the United States or a state sues to enforce the Constitution. Here, as in the case of statutory enforcement, the question is whether the public litigant is suing in a typically

337. Id. at 383–84 (Posner, J., concurring).

338. Id. at 385.

339. Lemos, State Enforcement, supra note 16, at 742.

340. By contrast, in some cases implication of a state right of action would be contrary to the regulatory scheme, particularly where it is clear Congress preferred private enforcement. See Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ., 615 F.3d 622, 630 (6th Cir. 2010) (denying implied public right of action based on evidence Congress intended private but not public enforcement of statute).

private or a typically public capacity. There is, however, a unique tradition of constitutional common law enforcement. This Part explores this tradition when courts imply constitutional remedies for governments.

A. *The Transformation of Constitutional Remedies for Governments*

The Constitution's text is sparse with respect to remedies. With the exception of the Suspension Clause, and arguably the Fifth Amendment's Takings Clause, the Constitution does not expressly address remedial questions. Instead, elaboration of constitutional remedies is left to legislative or judicial action. In the main, public litigants seek injunctive relief under the Constitution, often relying upon judicial action to supply it.

Under current law, many constitutional claims are vindicated through express statutory rights of action.[341] Even so, federal judicial action accounts for many constitutional remedies. The Constitution may be used as a shield to an enforcement action. More controversially, the Constitution may be used as a sword. Here, *Erie* has cast a fainter shadow than in statutory cases, as federal courts have recognized private rights of action based directly on the Constitution. Judicial authority to imply constitutional remedies, the Court has reasoned, is "anchored within [the] general 'arising under' jurisdiction."[342] In exercising its remedial authority, the Court has distinguished sharply between injunctive and damages relief. Since *Ex parte Young* in 1908,[343] implied private rights of action for prospective injunctions have generally been available to enforce constitutional rights. By contrast, the Court did not confirm judicial authority to imply damages remedies until 1971 with *Bivens*[344] and has backtracked since by developing official immunity defenses,[345] denying a *Bivens* right of action even in egregious cases of government abuse,[346] and holding that the existence of roughly comparable federal statutory or state tort remedies precludes *Bivens* relief.[347]

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341. See, e.g., 42 U.S.C. § 1983 (2006) (providing relief for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

342. Minneci v. Pollard, 132 S. Ct. 617, 621 (2012) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001)) (internal quotation marks omitted). This Article expresses no opinion on the question of whether, in the absence of the general federal question statute, 28 U.S.C. § 1331 (2006), Article III would support implied remedies.

343. 209 U.S. 123 (1908); see supra note 254 and accompanying text (discussing *Ex parte Young*).

344. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

345. See Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982) (explaining availability of immunity defense).

346. See United States v. Stanley, 483 U.S. 669, 678–84 (1987) (denying remedy for serviceman administered LSD through military experiments).

347. See *Minneci*, 132 S. Ct. at 625.

Constitutional remedies for private parties have given rise to a bevy of commentary.[348] In private rights cases involving constitutional interests, the judicial task is understood as one of translation. The common law system of remedies implemented the Constitution as a by-product of protecting private rights. Eventually, the common law system proved inadequate to that task. American understanding of constitutional rights expanded to encompass interests the common law did not protect.[349] And the common law system changed as well, in ways that undermined state court enforcement of some constitutional rights and altered the federal courts' understanding of the sources of private rights of action.[350] Translated into the modern context, the common law baseline supports an aspiration to provide a full remedy for claims of constitutional right. This aspiration is tempered, however, just as it was at the common law.[351] In all events, however, the system of constitutional remedies aims to ensure that the government remains subject to the rule of law.[352] Put differently, the system of constitutional remedies for private parties begins with an adjudicatory impulse and treats the regulatory function of remedies as a backstop where other enforcement mechanisms may be inadequate to ensure the rule of constitutional law.

That story does not explain the transformation that has occurred in the system of constitutional remedies for governments. In the

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348. The sources that have influenced this Article's treatment of constitutional remedial theory include Fallon et al., Hart and Wechsler's Sixth Edition, supra note 84; Michael L. Wells & Thomas A. Eaton, Constitutional Remedies: A Reference Guide to the United States Constitution 1–26 (2002); Bandes, supra note 34, at 303–04; Clark, Separation of Powers, supra note 3, at 1424; Walter E. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1779–91 (1991); Field, supra note 11, at 943; Al Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell v. Hood*, 117 U. Pa. L. Rev. 1 (1968); Levinson, Rights Essentialism, supra note 30, at 857; Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247 (1988); Merrill, Common Law Powers, supra note 146, at 1; Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 24 (1975); Morrison, supra note 50, at 589; Stewart & Sunstein, supra note 1, at 1200.

349. Perhaps the best known example is *Brown v. Board of Education*, which involved a claim of equal rights in the provision of public schooling. 347 U.S. 483, 493 (1954).

350. See Kian, supra note 18, at 150 (discussing emergence of state jury animosity toward claims of federal constitutional rights as well as solicitude for official immunity doctrines and rise of claims of new causes of action). *Erie*'s rejection of federal general common law forced federal courts to rethink the source of implied rights of action. As a result, courts increasingly began to look to positive law, rather than political morality, for the predicate for implication of a private right of action.

351. Consider, for example, official immunity doctrines. See Fallon & Meltzer, supra note 348, at 1781 (describing historic application of immunity doctrines).

352. Id. at 1787.

"polyphonic" administrative state of the twenty-first century,[353] it is easy to forget that the traditional image of federal and state governments operating in separate spheres was once reasonably accurate. In a world of dual sovereignty, intersovereign constitutional disputes would arise when one government, acting within its jurisdictional sphere, sought to regulate another government acting in a corporate capacity. The common law provided a mechanism—trespass actions against individual officers—for adjudicating the claims of intergovernmental immunity that arose when property rights were at stake, as in the case of *Osborn*.[354] Sovereigns could also raise sovereign immunity as a defense to a common law action, assuming it applied.[355] The common law contemplated constitutional litigation as an incident to public enforcement, with the United States or a state acting within its own sphere against individuals who might, in the proper case, raise the Constitution as a shield.[356]

This system hardly provided a public remedy for every constitutional wrong. Far from it, in fact; the sovereign interests protected by the Constitution were generally nonjusticiable when a government sued. On this view, reflected in the *Cherokee Nation* dictum and its progeny, constitutional litigation would consist primarily of disputes between private parties and governments.[357]

Under current law, however, constitutional litigation between governments is common, largely because of implied public rights of action.[358] For all the cases show, governments sue directly under the Constitution for injunctive relief most often. Thus, the problem of implied constitutional remedies for government mainly involves the

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353. Schapiro, Polyphonic Federalism, supra note 273, at 95 (defining "polyphonic federalism" as "interaction of multiple independent voices" that "facilitate[s] and structure[s] the interactions of state and federal governments").

354. See supra note 84 and accompanying text (discussing *Osborn*).

355. See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (1793) (opinion of Jay, C.J.) (holding State of Georgia not immune from suit).

356. Woolhandler & Collins, supra note 61, at 436 ("Requiring the state and federal governments to originate enforcement actions in their own . . . courts helped to maintain the vitality of the states as distinct political communities . . . .").

357. See id. at 419 (describing system whereby governments tested sovereignty by enforcing laws against individuals and defendant individuals could challenge government's exercise of power).

358. Congress has not expressly authorized a complete system of constitutional remedies for governments. Section 1983, the main font of affirmative constitutional remedies against states, authorizes suits only by a "citizen," which does not include a government, or a "person" harmed by unconstitutional state action, a term traditionally understood to exclude the United States and the states. Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 709–10 (2003). But see Pennsylvania v. Porter, 659 F.2d 306, 314–18 (3d Cir. 1981) (en banc) (per curiam) (holding state may sue under § 1983). The Adminstrative Procedure Act (APA) and the mandamus statute provide public remedies against federal administrative action, but do not encompass many constitutional disputes between the federal government on the one hand and states and cities on the other. See generally 5 U.S.C. § 704 (2012) (APA); 28 U.S.C. § 1361 (2006) (mandamus statute).

reach of *Ex parte Young*[359] and its doctrine of implied rights to injunctive relief.

Over the years, *Ex parte Young* has been read in regulatory terms: To hold the government accountable to the rule of constitutional law, a federal court may infer an injunctive remedy from the Constitution itself.[360] But there is a narrower, adjudicative reading of *Ex parte Young*, one that sees in that case nothing more than a right of action by a prospective defendant against an unlawful enforcement action.[361] On that adjudicatory account of judicial authority to imply private remedies in constitutional cases, most, perhaps even all, of the jurisprudence of implied constitutional remedies for governments is indefensible. That jurisprudence provides for the implication of public rights of action even where the government does not fit the mold of a prospective enforcement defendant.

This problem has received far less attention than implied private remedies. In the main, the scholarship on constitutional remedies for governments tends to defend an adjudicatory account on separation of powers grounds or as necessary to reinforce individual constitutional rights.[362] The primary challenges to the adjudicatory model have come from scholars interested in showing that federal courts may imply public rights of action to enforce private constitutional rights through substitute litigation.[363]

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359. 209 U.S. 123 (1908).

360. Vázquez, supra note 65, at 1800 (maintaining constitutional remedies are grounded in Supremacy Clause).

361. John Harrison has offered the strongest statement of this view. In his revisionist history, *Ex parte Young* involved a well-established common law antisuit injunction against prosecution. John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 990 (2008).

362. The seminal argument is Alexander Bickel's attack on state standing. See Bickel, Voting Rights, supra note 92, at 88–89 (arguing states cannot litigate constitutionality of federal legislation). His lesser-known discussion of United States standing also anticipates many of the current arguments. See Alexander M. Bickel, The Decade of School Desegregation: Progress and Prospects, 64 Colum. L. Rev. 193, 218–23 (1964) (calling inherent executive authority to sue to enjoin desegregation "quite a revolutionary change"); see also Hartnett, supra note 98, at 2253–54 (arguing executive's nonstatutory right to sue should be limited to protecting government's proprietary interests); Monaghan, Protective Power, supra note 64, at 65–66 (arguing President's "protective power" includes nonstatutory authority "to sue to protect the personnel and the property interests of the United States"); Stephen I. Vladeck, States' Rights and State Standing, 46 U. Rich. L. Rev. 845, 850 (2012) (arguing states do not have right to sue federal government in absence of "clear and concrete *federal* interest" in litigation); Kevin C. Walsh, The Ghost that Slayed the Mandate, 64 Stan. L. Rev. 55, 67–72 (2012) (arguing state challenge to constitutionality of federal legislation does not present justiciable case or controversy); Woolhandler & Collins, supra note 61, at 519 (arguing state standing to sue should be limited by private rights model).

363. See Bruce A. Ledewitz, The Power of the President to Enforce the Fourteenth Amendment, 52 Tenn. L. Rev. 605, 689 (1985) (arguing for "[p]residential enforcement of the Fourteenth Amendment"); Yackle, supra note 117, at 121–22 (discussing state and federal governments as potential plaintiffs in Fourteenth Amendment suits).

This Article takes a different view from both camps: The United States and the states may use the Constitution as a sword when public rights, such as their institutional interests, are in controversy, but not simply to substitute public for private enforcement of the constitutional guarantees of individual liberty, equality, and property.[364]

B. *Public Enforcement and Private Interests*

1. *Corporate Interests.* — Constitutional rules may benefit governments' corporate interests. Most often, this protection is a byproduct of the sovereignty-protecting features of the Constitution. For example, as the Court held in *New York v. United States*, the anticommandeering ban of the Tenth Amendment protected the New York legislature from being forced either to regulate radioactive waste pursuant to federal demands or to take title to (and thus proprietary liability for) in-state radioactive waste.[365] Sometimes, a constitutional norm that protects private proprietary activity will also protect a government's corporate activities. The Dormant Commerce Clause, for example, may shield a state as a market participant from another state's discriminatory commercial regulation, just as it shields private corporations.

There are obvious structural benefits to implying public rights of action on the same terms as private rights of action when it comes to corporate interests. In *Maryland v. Louisiana*, the Court permitted "plaintiff States, as major purchasers of natural gas," to sue Louisiana to enjoin its taxation of natural gas uses as preempted under the Supremacy Clause and the Dormant Commerce Clause.[366] The Louisiana tax was ultimately passed by natural gas producers on to consumers. By implying a public right of action to protect the plaintiff states against a forced wealth transfer, the Court enlisted them in protecting the national economy from balkanization.[367]

Of course, read exclusively as a charter of individual rights against governments, the Constitution might be taken to exclude even a government's corporate interests, and thus implied remedies in corporate suits, from its ambit. In Justice Antonin Scalia's view, for example, "the

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364. This Article has little to say about administrative interests under the Constitution because there are so few public rights that would fit within that category in constitutional litigation. The exception may be executive suits to vindicate executive policymaking in the area of foreign relations or national military crises, where Article II's specific enumeration of areas of special executive competence may be taken to imply a right to resort to the federal courts, at least in the absence of contrary legislation. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

365. 505 U.S. 144, 187–88 (1992).

366. 451 U.S. 725, 737 (1981).

367. See id. at 747–50 (rejecting Louisiana tax on natural gas as "substantial usurpation of the authority" of Federal Energy Regulatory Commission).

so-called 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain."[368] Accordingly, while stare decisis might compel adherence to Dormant Commerce Clause doctrine as conventionally understood from the antebellum period forward, the Court should not further expand its scope.[369] On that reasoning, the better reading might be to limit the self-executing Dormant Commerce Clause to the protection of private rights. After all, "the federal courts have never been plagued by a shortage of [Dormant Commerce Clause] suits brought by private parties."[370]

Inevitably, the appropriateness of a remedy will rightly be intertwined with an understanding of the substantive values at stake. One response, then, is simply to assert the importance of the federalism values reflected in the Dormant Commerce Clause and to point out the utility of public litigation to vindicate those values on a broad scale in a single suit. But the argument from utility alone proves too much; it might be thought useful, for example, for public litigants to be able to litigate any constitutional claim, including their citizens' claims, on the court's own motion. The more convincing response is that the Commerce Clause protects a structural, public interest in the free flow of commerce and not just a private right.[371] This interest can serve as the predicate for implication of a public right of action. And it is appropriate for courts to fashion public remedies to enforce this public interest in a common law mode.[372] The important point is that the Constitution supports implication to vindicate corporate interests where a public litigant fits the mode of a private litigant.

2. *Substitute Suits.* — Much of the argument in Part III.B.2 against substitute suits in statutory cases applies equally when the private right at issue arises from the Constitution. But here the question differs because the separation of powers concerns are weaker in light of the courts' special competence to elaborate the primary and remedial law of the Constitution. Implication of third party rights of action in favor of gov-

368. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., concurring).

369. See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part) (arguing Dormant Commerce Clause precedent should be confined to facts of established precedent). Thanks to Gillian Metzger for suggesting this point.

370. Wyoming v. Oklahoma, 502 U.S. 437, 461–62 (1992) (Scalia, J., dissenting).

371. See, e.g., Richard B. Collins, Economic Union as a Constitutional Value, 63 N.Y.U. L. Rev. 43, 64 (1988) ("[The] focus [of the Dormant Commerce Clause] is on those kinds of market interference that set state against state or that invade policy choices of other states or of the federal government.").

372. Cf. City of Hugo v. Nichols, 656 F.3d 1251, 1273 (10th Cir. 2011) (Matheson, J., dissenting) ("One leading commentator understood the dormant Commerce Clause to be exactly the sort of structural right that . . . [supports] political subdivision standing . . . ." (citing David J. Barron, Why (and When) Cities Have a Stake in Enforcing the Constitution, 115 Yale L.J. 2218, 2250 (2006))).

ernments might be understood as legitimate constitutional common law.[373]

But it turns the courts' role on its head to think that those parts of the grand charter that limit governments vis-à-vis individuals by creating private rights instead empower governments to control the rights of individuals. Implying a public right of action to substitute public for private enforcement of individual constitutional rights does not involve elaboration of the remedial implications of individual rights. Nor—and here is the key distinction between substitute and institutional claims—is it justified by the transformation of the federal system from one of separate institutional spheres to one of overlapping and often conflicting institutional claims. Even in this transformed system, private parties can, and should, be empowered to vindicate their private rights against the United States and the states, respectively.

Larry Yackle has offered the most compelling argument that "the United States needs no affirmative permission from Congress" to sue to enforce constitutional rights.[374] He suggests that Article II might support an executive power to execute the laws through implied public rights of action unless (and perhaps even if) Congress has legislated to the contrary. As evidence, he marshals judicial decisions implying a public right of action to vindicate regulatory norms under federal statutes.[375] But executive authority to substitute public for private enforcement of private rights is a far cry from judicial authority to imply public rights of action to vindicate administrative interests.

Nothing in the form of private constitutional rights suggests that their remedial implications include public enforcement. Conventionally, for example, the First, Fourth, and Fourteenth Amendments—all of which support implied private rights of action—are read to enshrine countermajoritarian personal entitlements against government action. To substitute public for private enforcement cuts against the grain of conventional understanding of the values these rights serve.

There is a function to this emphasis in implication doctrine upon the form a right takes. For one, as this Article has shown, public and private enforcement have different advantages and disadvantages. Channeling the enforcement of private entitlements to private parties serves several goals, including the adjudicatory aim of reaffirming the autonomy and dignity of individuals and the regulatory aim of putting enforcement discretion in the hands of the party best suited to detect and to deter violations. Conversely, placing public rights in the hands of

373. Cf. Monaghan, Third Party Standing, supra note 207, at 310–15 (discussing Supreme Court's authority to "license additional private attorneys general as a matter of constitutional common law").

374. Yackle, supra note 117, at 130.

375. Id. at 129–34.

public litigants protects these rights while limiting the risk of overenforcement.

Substituting public for private enforcement of private rights arbitrarily pulls a right from the remedial context its form implies. Scholars have only begun systematically to consider how different remedial contexts shape the "same" right differently.[376] Commentators who have begun that mapping project have focused on different forms of private enforcement. But public enforcement too is a distinct remedial context. And enforcing private constitutional rights through public litigation between governments reshapes what the Framers intended to be private entitlements into competing claims about which a government has the power to speak for its citizens.

On one view, transforming private rights into intergovernmental claims dilutes the rights. As Ann Woolhandler and Michael Collins put it, the traditional baseline of private remedies for private rights "reinforced the idea that a claim based on a fundamental individual right should not be overcome by a simple claim of general utility."[377] Understood as moral demands on government, individual rights and remedies should not yield to simple appeals to majoritarian values. Thus, to substitute public enforcement for a private right by implication is inconsistent with the substantive values implied by the form of the right.

One could understand the transformation differently. In his work on constitutional enforcement by cities, David Barron has argued that by "recast[ing] traditional private versus public contests as disputes that occur within the public sphere," city-versus-state suits "diminish the extent to which abstract appeals to majoritarian power, or democratic formalism, resolve more subtle questions of constitutional meaning."[378] The same might be said of implying public rights of action to sue in a substitute capacity.

Courts have sometimes been attentive to the potentially transformative effect of implying public rights of action to enforce private constitutional rights. Consider again the circuit court's rejection of the United States' *Bivens* claim in *City of Philadelphia*.[379] To permit the federal government to bring a "constitutional tort" against a state actor in a substitute

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376. See Jennifer E. Laurin, Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure, 110 Colum. L. Rev. 1002, 1014 (2010) (noting "changes wrought by an altered remedial context on constitutional doctrine"); Nancy Leong, Making Rights, 92 B.U. L. Rev. 405, 481 (2012) ("How and where courts make rights affects the contours of the rights they make.").

377. Woolhandler & Collins, supra note 61, at 445.

378. David J. Barron, The Promise of Cooley's City: Traces of Local Constitutionalism, 147 U. Pa. L. Rev. 487, 610 (1999) (arguing it might sometimes be appropriate to permit cities to sue parent states to vindicate traditionally private rights, such as First Amendment rights, and suggesting that more often than it seems, private rights also protect institutional interests).

379. See supra notes 217–221 and accompanying text (discussing *City of Philadelphia*).

capacity under *Bivens*, the Third Circuit reasoned, "would be to ignore, not merely to extend, the ratio decidendi" of *Bivens*.[380] Where a right takes the form of a private entitlement, it may imply a private remedy under the adjudicatory impulse of *Bivens*. But it runs counter to that impulse to transfer control of a private right from the beneficiary to a government litigant.[381]

Focusing upon the form of the right to limit the scope of implication doctrine is likely unavoidable. The alternative is a functionalist approach that looks beneath the form of a right to try to discern when the right may function as a private entitlement, in which case it may support an implied private right of action, or as a public right, in which case it may support an implied public right of action.[382] That seems a Herculean task that invites the kind of impenetrable line drawing characteristic of the Court's jurisprudence of parens patriae rights to sue and "quasi-sovereign" interests in private rights. Given these problems, it is unsurprising that the Court threw up its hands in *Snapp* and suggested that parens patriae standing is as broad as the police power.[383]

But surely the adjudicatory impulse of the right-remedy principle would be satisfied so long as implied public rights of action were limited to those instances where private parties would not have standing to protect their own rights? *City of Philadelphia*, after all, was the federal government's response to *Rizzo v. Goode*, in which the Court denied private parties standing to bring a similar challenge to abusive police practices.[384] In response, perhaps it is enough to say that a problem of the Court's own making does not suffice to show that private constitutional rights imply public remedies. That is not to celebrate retrenchment from *Bivens* and *Ex parte Young*. It is to say only that the solution lies in strengthening private enforcement of private rights.

All of these arguments apply equally to the states' claims of implied parens patriae rights to enforce the constitutional rights of private citizens. Here, however, the case for a federal constitutional common law of public enforcement is even less compelling than when the United States sues. State attorneys general may look to their own judicial systems and legislatures for rights to enforce constitutional norms. There is, to be

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380. United States v. City of Philadelphia, 644 F.2d 187, 199–200 (3d Cir. 1980) (interpreting *Bivens* to support private enforcement of private rights and, correspondingly, to undermine public enforcement of private rights).

381. The point can be pressed further by recalling that substitution of public for private enforcement may extinguish private rights through application of preclusion principles.

382. See Stewart & Sunstein, supra note 1, at 1245–46 (discussing functional approach to implication of rights of action).

383. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982).

384. *City of Philadelphia*, 644 F.2d at 207 (Gibbons, J., dissenting from denial of rehearing en banc) (citing Rizzo v. Goode, 423 U.S. 362 (1976)).

sure, something to be said for federal judicial involvement when the national charter is at stake. But that alone cannot justify reading private constitutional rights to imply state rights to sue, given that doing so can extinguish the substantive entitlements those rights create.[385]

Federal courts usually cite a different reason for declining to imply state parens patriae rights to sue when the states seek to vindicate their citizens' claims against the federal government. Under *Mellon*, states have no standing to sue the United States in a parens patriae capacity because the United States has a superior claim to parens patriae representation of its citizens.[386] There is wisdom in this bar on interposition. But it is not because states have no cognizable institutional rights against the United States. To see why, it is helpful to compare substitute litigation with cases in which states *do* have rights against the federal government.

C. *Institutional Interests: Sovereign Rights and Sovereign Remedies*

The Constitution protects two types of institutional interests. First, it creates intergovernmental immunities protecting a government and its officials from the taxation, regulation, and judicial process of another government. In the absence of an exception, for example, the United States is immune from suit in state courts, and the states are immune from suit in the courts of the United States. Conventionally, a government defendant may raise sovereign immunity as an answer to a lawsuit.[387] But in recent years, federal courts have implied public rights of action to federal injunctive relief against adjudicatory processes on the grounds of sovereign immunity.[388] There are other examples of implied public rights of action based on intergovernmental immunities. The United States, for example, may claim an implied right of action to vin-

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385. A common objection is that implication of a public right of action to enforce private rights of action is appropriate because it would ensure enforcement where private litigation may be lacking. See supra notes 222–225 and accompanying text (discussing this objection). That objection is tantamount to the claim that courts have authority to create third party rights of action for reasons of utility. This Article's framework cuts against that view. Focusing upon utility at the expense of the form a right takes makes the inquiry insensitive to legislative intent.

386. Massachusetts v. Mellon, 262 U.S. 447, 486 (1923) ("[I]t is the United States, and not the State, which represents [citizens] as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.").

387. See, e.g., Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) (holding sovereign immunity protects states from suits by Indian Tribes).

388. See R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 44 (1st Cir. 2002) ("[A]lthough sovereign immunity is generally asserted in a defensive posture, we believe that the peculiarities of raising the claim in an administrative proceeding make it appropriate to use immunity as a sword (rather than a shield) in an action for nonstatutory review."); United States v. Puerto Rico, 287 F.3d 212, 221 (1st Cir. 2002) (allowing federal government to bring suit in order to bar administrative proceeding on sovereign immunity grounds).

dicate its immunity from state taxation,[389] or a state may sue to enjoin implementation of federal legislation on the ground that it commandeers the machinery of the state in violation of the Tenth Amendment.[390]

Second, the Constitution also establishes jurisdictional rules allocating regulatory authority among the multiple governments in the federal system. These jurisdictional rules, such as the constraints upon Congress's commerce power, create institutional interests in constitutional enforcement to protect a government's appointed sphere of policymaking discretion. States, as the Court discussed in *Bond v. United States*, have "legal rights and interests" under the Tenth Amendment and the constitutional structure that are distinct from the rights of individual citizens.[391] Constitutional federalism thus has a dual structure. Ultimately, of course, it exists not for its own sake but for the sake of citizens. But to "secure[] to citizens the liberties that derive from the diffusion of sovereign power," the Constitution recognizes "rights" that belong to states as "beneficiaries of federalism."[392] Thus, while "[f]idelity to principles of federalism is not for the States *alone* to vindicate," it plays a role in the judicial enforcement of federalism.[393] Modern courts also have treated the Constitution's jurisdictional rules as creating institutional interests in the United States.[394]

Antebellum courts did not deny that governments qua governments are beneficiaries of the constitutional structure. In the Reconstruction Act cases, for example, the Court understood a state's "rights of sovereignty" as following from its "constitutional powers and privileges."[395] But it held that those rights could not be presented in a judicial "bill . . . for the judgment of the court."[396]

The antebellum understanding of an Article III "case" and the separation of powers constraints upon judicial authority explain the common law pattern of denying constitutional remedies for governments. The early Court's refusal to adjudicate "rights of sovereignty" reflected a private rights understanding of a case in which constitutional adjudication was an incident of resolving disputes between individuals.[397] But as

389. See North Dakota v. United States, 495 U.S. 423, 430–36 (1990) (plurality opinion) (reaching merits of immunity challenge in absence of express right of action).

390. See New York v. United States, 505 U.S. 144, 149 (1992) (reaching merits of Tenth Amendment challenge in absence of express right of action).

391. 131 S. Ct. 2355, 2363–64 (2011).

392. Id. at 2364 (internal quotation marks omitted).

393. Id. at 2364–66 (emphasis added).

394. See, e.g., United States v. Lewisburg Area Sch. Dist., 539 F.2d 301, 306 (3d Cir. 1976) ("It seems clear that the United States has sufficient interest in protecting [its constitutional] jurisdiction to apply to [a] federal court for [relief to enforce power over a federal enclave].").

395. Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 77 (1868).

396. Id.

397. Woolhandler & Collins, supra note 61, at 445–46.

the Court's understanding of a case has shifted to encompass a "law declaration" function, not just a "law adjudication" function,[398] the common law rule has become difficult to defend as an Article III limit.

Recognizing a public right of action in constitutional cases will not convert the Court into a Council of Revision, nor will it transform all constitutional controversies into pitched battles between warring governments. Nevertheless, that charge remains a common one. In *Virginia ex rel. Cuccinelli v. Sebelius*, for example, the Fourth Circuit warned that recognizing state standing to challenge the Affordable Care Act would be tantamount to unleashing a "roving constitutional watchdog" to hound the federal government.[399] But none of the predictions in the court's parade of horribles would come to pass if the doctrine permitted a state to sue to vindicate its institutional interests in governing. A state could not manufacture a right to sue in a case like *Flast v. Cohen*,[400] because challenges to federal spending under the Establishment and Free Exercise Clauses do not vindicate any state interest in governing. Nor would *United States v. Richardson*[401] come out differently if brought as *United States v. Virginia*, as a state has no institutional interest in the Central Intelligence Agency's financial reporting practices. The same principle would bar a state from bringing its own *Schlesinger v. Reservists Committee to Stop the War*;[402] whether the Incompatibility Clause bars members of Congress from being in the armed forces reserves has nothing to do with whether the Constitution protects a state's authority to regulate.[403]

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398. See Monaghan, Avoiding Avoidance, supra note 143, at 668–69 (discussing law declaration model of Supreme Court's role).

399. 656 F.3d 253, 272 (4th Cir. 2011).

400. 392 U.S. 83 (1968) (granting standing in private challenge to federal spending as violating Establishment and Free Exercise Clauses).

401. 418 U.S. 166 (1974) (denying standing to private party challenging CIA's financial reporting practices on constitutional grounds).

402. 418 U.S. 208 (1974) (denying standing to private party suing to enforce Incompatibility Clause).

403. The threshold problem with suits such as Virginia's challenge to the Affordable Care Act lies, if at all, not in whether there is a right of action, but rather in concerns about constitutional adverseness and the issuance of advisory opinions. It may be that some of these types of cases will not present concrete-enough facts to permit a court sensibly to evaluate the underlying constitutional claim. Cf. Walsh, supra note 362, at 70 ("[U]nderstanding the jurisdictional defect in advisory-opinion terms . . . better captures the jurisdictional problem with *Virginia v. Sebelius*."). This Article does not consider the potential statutory subject matter jurisdictional bar under the Declaratory Judgment Act to some state suits seeking a declaration that a state law is not preempted; it suffices to note that the reasons for that potential bar are basically the same reasons offered for denying an implied state right of action. See id. at 62–67 (discussing statutory subject matter jurisdictional limits on state suits challenging preemption under Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983), and general limits on declaratory judgments under Skelly Oil Co. v. Phillips Petrol. Co., 339 U.S. 667 (1950)).

By contrast, a government's institutional interests represent the right of a political community to self-governance. Government institutions are the mechanism through which a community realizes that public right, which does not belong to any particular citizen.[404] Not all structural provisions, however, shield the public rights of these political communities. Accordingly, not all structural provisions—much less all individual rights provisions—support implied constitutional remedies for governments.

To explain the contemporary pattern of implied public rights of action, it is not enough, of course, to show that the Constitution protects institutional interests in which governments have a particular stake. Even granting that, one could still think Congress, not the courts, should control constitutional remedies for governments.[405] That is particularly true under an adjudicatory understanding of judicial authority to imply constitutional remedies.

For example, if, as some have argued, *Ex parte Young* stands for nothing more than equitable authority to offer an anticipatory remedy to a potential enforcement defendant,[406] the scope of implied constitutional remedies for governments is fairly narrow. It would cover only some claims premised upon intergovernmental immunities. When a government sues as a regulated party subject to a potential enforcement action, it is in much the same position as a private litigant seeking anticipatory relief. And because a government can act only through its officials, it is not difficult to extend that analogy to anticipatory suits by public officials to foreclose enforcement action.

There are several structural benefits to implying public rights of action to anticipatory relief. As the direct beneficiary of constitutional protections, the government is best suited to litigate its claims of intergovernmental immunity from taxation or regulation.[407] In some cases, a government may be the only litigant with standing to raise a claim of immunity. Anticipatory actions serve several well-recognized benefits.

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404. Cf. David J. Barron, Why (and When) Cities Have a Stake in Enforcing the Constitution, 115 Yale L.J. 2218, 2241 (2006) [hereinafter Barron, Cities] ("[P]recisely because cities are independent governments, representing separate democratic communities, it seems wrong to characterize their interest in constitutional enforcement as simply a generalized interest in ensuring compliance with the law.").

405. Henry Monaghan seems to suggest as much when he argues that the Court's law declaration function extends to intergovernmental litigation but later looks to Congress for the design of public rights enforcement. See Monaghan, Who and When, supra note 92, at 1368, 1392–93 ("Absent a congressional determination that suits in which the plaintiff does not allege any injury should be entertained by the federal courts, . . . [t]he basis for refusing relief is merely the discretion inherent in the law of remedies.").

406. See supra notes 359–361 and accompanying text (discussing reach of *Ex parte Young*).

407. This Article makes no sharp distinction between an implied public right of action in favor of an official suing in her official capacity and an implied public right of action that government attorneys would bring in the government's name.

They permit regulated parties to determine ex ante whether their conduct is sanctionable. They save private parties from the anxiety that would accompany taking a certain action in anticipation of potential prosecution. Moreover, they may contribute to the development of constitutional law by encouraging relatively encompassing pronouncements as to its content.[408] To the extent the Court has recognized sovereign dignity as a constitutional value, there's another justification for implying a public right of action: Permitting a public litigant to use the Constitution as a sword against the risk of unconstitutional prosecution protects a government from the indignity of being hauled before a tribunal as a defendant.

Of course, it might be argued that even this narrow implication doctrine would go too far. For one, implied rights to anticipatory relief might be appropriate only when a potential defendant would otherwise be deprived of the right—in other words, only when anticipatory relief would be constitutionally compelled. On that understanding, it would be necessary for the claimant to show that raising the defense during an enforcement action would be an insufficient remedy.[409] It is not difficult to see how raising a defense might be an insufficient remedy when a private party is facing the threat of prosecution. In some cases, "the penalties are so multiplicitous or severe or the burdens of defense so disproportionately high that the remedy of defense would not be adequate."[410] But those concerns might not apply when a public litigant is the potential victim of a constitutional wrong. As a practical matter, a government litigant will rarely be similarly burdened by the threat of penalties or the cost of litigation. Unsurprisingly, there are few instances in which a court has implied that a constitutional remedy for a public litigant is constitutionally compelled.[411]

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408. For a discussion of the benefits of anticipatory actions, see Daniel J. Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2560 (1998) [hereinafter Meltzer, Remedies]. Roe v. Wade, 410 U.S. 113 (1973), for example, was an anticipatory action. See Meltzer, Remedies, supra, at 2561. It is not difficult to see the potential breadth of a judgment in an anticipatory action as a vice, however. See John Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies, 86 Geo. L.J. 2513, 2522–23 (1998) (arguing for congressional control of availability of "additional enforcement" of Constitution beyond "nullification" of unconstitutional action). But cf. Tara Leigh Grove, The Structural Case for Vertical Maximalism, 95 Cornell L. Rev. 1, 3 (2009) ("[T]he current Court cannot effectively perform that constitutional responsibility unless it issues broad decisions that govern a wide range of cases in the lower courts.").

409. See, e.g., David L. Shapiro, *Ex Parte Young* and the Uses of History, 67 N.Y.U. Ann. Surv. Am. L. 69, 78–79 (2011) (discussing understanding of *Ex parte Young* that requires claimant to establish "not only that he had a valid defense to such prosecution but that, for some reason, the ability to raise that defense if and when prosecuted was not itself sufficient to afford protection").

410. Meltzer, Remedies, supra note 408, at 2563.

411. But see R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 44 (1st Cir. 2002) (suggesting anticipatory remedy to protect sovereign immunity from administrative adjudication may be constitutionally compelled).

This emphasis on constitutional compulsion and the adjudicatory impulse for implied remedies is misplaced. Channeling intersovereign disputes about constitutional immunities into the federal courts seems to be a perfectly sensible approach to American federalism. On the nationalist side of the ledger,[412] federal judicial enforcement of the United States' constitutional immunities tends toward a desirable, and otherwise potentially unachievable, uniformity of treatment. From a federalist perspective, there are clear benefits to permitting the states to sue in federal courts to stop the federal government from taking unconstitutional enforcement actions. Doing so also avoids difficult questions of state judicial authority to control the actions of federal officials. And permitting one state to sue another in federal court on a claim of constitutional immunity ensures a neutral forum for the resolution of such disputes. When it comes to intergovernmental immunities, then, the utility of implied public rights of action is clear and there are no serious separation of powers or other structural problems.

The argument in favor of implied public rights of action to vindicate intergovernmental immunities already tells us something about implying rights of action to realize rules that allocate policymaking authority among governments. Ultimately, there is something artificial to the analogy between a government's constitutional immunities and the private rights of citizens. Take, for example, the Tenth Amendment ban on federal commandeering of the state legislature or executive. As *New York v. United States* describes it,[413] the anticommandeering ban on forcing state legislative action is roughly equivalent to a ban on compelling corporate speech, a kind of liberty interest of the state.[414] To force the state legislature to speak the words of Congress would be to invade the freedom of state action and to confuse lines of political accountability. But this understanding of a state's anticommandeering right is awkward. *New York* makes clear that the state is not at liberty to waive the anticommandeering ban. Rather, it is forced to be free, lest state officials surrender the benefits of federalism to federal officials.

It is not a large leap from that understanding to seeing a government's jurisdictional interests in similar terms. Protecting a government's policymaking prerogatives similarly realizes the benefits of structural constitutional norms protecting state and national power for the polity.[415]

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412. Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1197 (1988) (discussing "nationalist" strains of jurisprudence favoring national, as opposed to state, interests).

413. 505 U.S. 144, 156–57 (1992).

414. Cf. David Fagundes, State Actors as First Amendment Speakers, 100 Nw. U. L. Rev. 1637, 1686–87 (2006) (connecting issue of state speech rights with anticommandeering ban).

415. See Barron, Cities, supra note 404, at 2241 (arguing it is "wrong to characterize [city] interest in constitutional enforcement as simply a generalized interest in ensuring

Implication of a public right of action to vindicate these interests serves important structural goals.

Strangely, federal courts have assumed without comment that the United States may sue without specific statutory authorization to protect its policymaking prerogatives. And the question never arose in *Arizona v. United States*, even though at the same time the United States was relying in that case on an implied public right of action under the Supremacy Clause,[416] it was suggesting to the Court in another case that the Supremacy Clause does not support implied private rights of action.[417]

What explains this unexplained assumption? It is not an analogy to private standing. Until recently, there was a conflict among the lower courts as to whether, and to what extent, private parties could raise claims based on the institutional interests of governments. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*,[418] a New Deal case, the Court appeared to take the view that private parties lacked standing to raise that type of claim affirmatively. "[A]bsent the states or their officers," the *Tennessee Electric* Court opined, a private party has no right to litigate a state's claim that federal action would violate the structural principles of federalism reflected in the Tenth Amendment.[419] By parity of reasoning, the institutional interests of the states belong to the states, and they control the right to raise those interests affirmatively in litigation. In *Bond v. United States*, decided just over two years ago, the Court made clear that a private defendant to a federal criminal prosecution could raise a federalism-based defense, notwithstanding the *Tennessee Electric* dictum.[420] But whether a private party may raise a federalism claim as a sword remains an open question.

Much of the answer to why the United States may affirmatively litigate its jurisdictional claims lies in the peculiar history of implied public rights of action. Begin with *Debs*, where the Court founded the government's implied right to sue, in part, in the notion that the striking union had arrogated to itself the government's power to regulate interstate

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compliance with the law" because cities have "special interest in constitutional enforcement").

416. See Complaint at 3–4, United States v. Arizona, 703 F. Supp. 2d. 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), aff'd, 641 F.3d 339 (9th Cir. 2011), aff'd in part, rev'd in part, 132 S. Ct. 2492 (2012), available at http://www.justice.gov/opa/documents/az-complaint.pdf (on file with the *Columbia Law Review*) (arguing Arizona immigration law "is invalid under the Supremacy Clause of the United States Constitution and must be struck down").

417. See Brief for the United States as Amicus Curiae Supporting Petitioner at 16–32, Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204 (2012) (No. 09-958), 2011 WL 2132705, at *16–*32 (arguing Medicaid providers and beneficiaries have no private right of action to enforce federal statute against state officials).

418. 306 U.S. 118 (1939).

419. Id. at 144.

420. 131 S. Ct. 2355, 2363 (2011).

commerce.[421] Given modern understandings of state action doctrine,[422] that notion likely seems strange now, and was strange even then.[423] But *Debs*'s other proposition stuck: The national community, suing through the Attorney General, may vindicate its constitutional authority to make policy in a national domain. Thus, in *Sanitary District v. United States*, the Court implied a right of action in favor of the United States in what scholars would now label a preemption dispute.[424] There, a municipal sewer system had made decisions about the discharge of pollutants into navigable waters that, in the Court's view, were committed to the United States under the Commerce Clause and the foreign relations power, giving rise to a right of action to vindicate both interests.[425] Thus understood, *Debs* and *Sanitary District*, not *Ex parte Young*, are the ancestors of *Arizona v. United States* and the Obama Administration's litigation to vindicate the federal government's institutional interest in making federal policy.[426]

What differentiates the United States from a private party when it comes to implying a right of action to vindicate a jurisdictional claim? One possibility, of course, is that Article II implies a public right of action to vindicate institutional interests. As this Article has shown, however, the case for Article II exceptionalism is easily overstated. Except perhaps for those areas in which the President possesses a special constitutional competency, Article II simply does not compel an executive right of action.[427] Instead, constitutional common law supplies the public right of action.

There are several reasons to prefer the United States over a private party when it comes to implying constitutional remedies for public rights that protect jurisdictional interests. For one, the United States is the "real contestant" when it comes to the vindication of its public right to gov-

421. See supra note 102 (describing *Debs* and subsequent cases where Supreme Court found United States had implied right to sue to protect general welfare).

422. Private parties are almost never found to be state actors for purposes of applying the Constitution. See, e.g., Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 505 (1985) (asking "why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government").

423. See The Civil Rights Cases, 109 U.S. 3, 17 (1883) ("[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals . . . ."). But cf. United States v. Guest, 383 U.S. 745, 769 (1966) (Harlan, J., concurring in part and dissenting in part) (arguing *Debs* was proper on theory "that the Commerce Clause gives the Federal Government standing to sue" to enjoin public nuisances).

424. Sanitary Dist. v. United States, 266 U.S. 405 (1925).

425. Id. at 425.

426. This point is rarely recognized. But see United States v. South Carolina, 840 F. Supp. 2d 898, 911 (D.S.C. 2011) (recognizing right of United States to challenge state laws as preempted emerges from cases such as *Sanitary District*), modified in part, 906 F. Supp. 2d 463 (D.S.C. 2012).

427. See supra note 364 (discussing implied rights of action under Article II).

ern.[428] Institutional interests have long been understood as public rights. To be sure, in some cases, such as *Bond*, private parties may vindicate institutional interests as a byproduct of protecting private rights. The valid rule requirement, which bars enforcement of invalid public laws against private rights, requires nothing less.[429] But when private rights are not at stake, enforcement of institutional interests is presumptively for governments alone.

The question is whether enforcement should be limited to government battles in the political process. When it comes to the United States, the answer has long been no.[430] In those cases where judicial implication is appropriate in a regulatory mode to vindicate institutional interests under the Constitution, favoring the federal government's control over institutional interests makes sense for many of the same functional reasons discussed with respect to implying rights of action in the context of statutory enforcement.[431] The United States, as represented by the DOJ, is uniquely well suited to represent the institutional interests at stake and will be a capable advocate in doing so, subject to political accountability through the President and Congress.

Specific statutory authorization should not be necessary for the DOJ to protect national supremacy through recourse to the courts. Here, the federal common law concerning the rights of the United States is instructive. In the absence of a federal rule of decision, those rights would be governed by state law, which may discriminate against or unduly burden national interests.[432] Moreover, the utility of uniformity may sometimes justify national treatment of national issues. To be sure, Congress has somewhat mitigated these concerns by authorizing the United States to bring any civil claim, even those arising under state law, in federal court.[433] But that has not sufficed to preclude federal common law making, even when only the United States' corporate interests are at stake.[434] One need not unthinkingly privilege constitutional claims over

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428. Monaghan, Who and When, supra note 92, at 1368; see also Louis L. Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, 1041 (1968) (declaring Congress and President to be "true litigants" in controversy involving President's removal powers).

429. See Bond v. United States, 131 S. Ct. 2355, 2367 (2011) (Ginsburg, J., concurring) (discussing valid rule requirement); Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3 (same).

430. See supra note 425 and accompanying text (discussing *Sanitary District*).

431. See supra Part III.C.2 (discussing judicial authority to imply public rights of action to vindicate administrative and institutional interests).

432. See supra note 193 and accompanying text (discussing federal common law in cases involving United States' rights).

433. 28 U.S.C. § 1345 (2006).

434. See supra note 196 and accompanying text (noting federal courts may fashion common law governing Unites States' rights in proprietary and contractual controversies).

nonconstitutional claims[435] to recognize the greater possibility of state discrimination and the utility of uniformity when it comes to the United States' right to sue in its own courts to vindicate its own interests in governing.

The picture of state rights of action is rather different. The obligatory citation here is *Mellon*, which denied Massachusetts not only a right to espouse the private rights of its citizens, but also a right to vindicate its institutional claim to decide those matters the Constitution assigns to it and not to the national government.[436] *Mellon* has long been a puzzling precedent for several reasons. One rarely noticed puzzle is that several years earlier the Court held in *Missouri v. Holland* that a state has an implied right of action to bring an institutional claim against the federal government under the Tenth Amendment.[437] *Mellon* is irreconcilable with *Holland*.[438]

Holland might be consigned to the dustbin, but the Court has backtracked from *Mellon* in the last eight decades. For one, *Mellon* now seems a prudential doctrine that Congress can waive, as *Massachusetts v. EPA* suggests.[439] More importantly, the Court has implied state rights of action to sue the federal government to vindicate claims of a right to decide a particular policy matter. In some of these cases, such as *South Carolina v. Katzenbach*, the Court has managed a half-hearted attempt to distinguish *Mellon*.[440] In others, such as *Perpich v. Department of Defense*,[441] it has said nothing about *Mellon* at all. Yet the parade of horribles that Alexander Bickel predicted following *Katzenbach*—a flood of lawsuits in the Court's

435. See Michael Coenen, Constitutional Privileging, 99 Va. L. Rev. 683, 684 (2013) (discussing principle that constitutional law should be privileged over nonconstitutional law).

436. Massachusetts v. Mellon, 262 U.S. 447, 479–80 (1923).

437. 252 U.S. 416, 430–31 (1920).

438. Both cases involved the same claim of exclusive jurisdiction to regulate. Therefore, *Mellon*'s half-hearted attempt to distinguish *Holland* as involving "quasi-sovereign" rights makes no sense. See *Mellon*, 262 U.S. at 482 (describing *Holland* as involving "invasion . . . of the quasi-sovereign right of the State to regulate the taking of wild game within its borders"). Contemporary observers thought *Holland* abrogated the *Cherokee Nation* dictum upon which *Mellon* relied. See Edward S. Corwin, The Spending Power of Congress—Apropos the Maternity Act, 36 Harv. L. Rev. 548, 549 n.5 (1922) (reading *Holland* to reject nineteenth-century limits on adjudication of states' institutional claims). And occasionally scholars have noted the inconsistency between the two decisions. See, e.g., Currie, Constitution, supra note 90, at 125.

439. 549 U.S. 497, 519–21 (2007) (reading Clean Air Act to support state standing notwithstanding *Mellon*).

440. 383 U.S. 301, 324 (1966) (distinguishing *Mellon* as involving private rights, not institutional interests), abrogated by Shelby County v. Holder, 133 S. Ct. 2612 (2013).

441. 496 U.S. 334 (1990) (reaching merits of state challenge to federal regulation of National Guard).

original jurisdiction pitting the United States against the states in contests over private constitutional rights—has hardly come to pass.[442]

Nevertheless, Bickel's account of *Mellon* remains the dominant understanding of implied public rights of action in favor of states. Scholars distinguish the more recent cases by drawing a line between a state's "general" institutional rights and its "specific" institutional rights. General rights involve claims based upon the Tenth Amendment principle that matters not committed to the national government are committed to the states or to the people. Specific rights involve claims based upon other constitutional provisions, such as the Militia Clause of Article I, Section 8 at issue in *Perpich*,[443] that arguably commit specific matters to the states rather than to the national government. Only "specific" institutional interests imply public remedies, or so the argument goes.[444]

The first functional justification for this distinction looks to the bar on parens patriae litigation. In this view, if states could litigate "general" institutional rights, then that bar would be nothing but a pleading requirement, and states could litigate any of their citizens' private rights against the federal government.[445] Not so. Only rules that allocate jurisdiction to the benefit of states as political communities would give rise to cognizable institutional claims, because only these rules would implicate the state's own institutional interests under the Constitution.

The second justification looks to the "systemic federalism principle that the federal and state governments act[] primarily on the people directly rather than upon each other."[446] To imply a right of action in favor of a state—or, by parity of reasoning, a right to sue in favor of the United States—would run counter to that principle of dual sovereignty. Under this view, limiting governments to enforcement actions and constitutional claims to enforcement defenses would reify the separate spheres of state and federal authority. The problem is that the modern world is one of overlapping, not separate, spheres. In this world, permitting intergovernmental litigation over institutional interests may be necessary to achieve the competitive checks and balances the Framers envisioned

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442. See Bickel, Voting Rights, supra note 92, at 89 (arguing recognizing state standing would lead to frequent litigation in Court's original jurisdiction over constitutionality of federal legislation).

443. *Perpich*, 496 U.S. at 337.

444. See, e.g., Vladeck, supra note 362, at 860 (reasoning states may sue federal government to vindicate specific institutional interests, such as interest in regulating voting recognized under Constitution); Woolhandler & Collins, supra note 61, at 492 (arguing rights under specific constitutional provisions are states' own and thus can support states' right to sue).

445. See, e.g., Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 269, 271 (4th Cir. 2011) (reasoning general state standing could serve "as a smokescreen" for parens patriae litigation).

446. Woolhandler & Collins, supra note 61, at 439.

would follow from a world of dual sovereignty. State suits against the federal government are a form of "uncooperative federalism" that may substitute for the structural check of state autonomy that passed away with the death of dual sovereignty.[447] Similarly, the right of the United States to sue states on institutional grounds translates constitutional commitments to national authority into a world where states may burden federal policymaking without bringing an enforcement action.

One response might be to turn this reasoning on its head. If power is now plural and overlapping, rather than singular and separate, then there is something nostalgic in a government's claim to regulate to the exclusion of another government. That is particularly true of state claims against the federal government.[448] As a matter of substantive law, this criticism has some force. But so long as questions of jurisdictional allocation remain justiciable, implying public remedies to realize the Constitution's scheme places control of institutional interests in the hands of the real contestants.

Another justification looks to the political safeguards of federalism. This justification admits a distinction between the states and the United States. While the states have a voice in the national political process through the Senate and other "built-in restraints . . . [that provide for] state participation in federal governmental action,"[449] the United States does not have the same voice in each of the fifty states. Accordingly, special solicitude for the United States might be warranted even if states should be barred from using the Constitution as a sword unless they are in the position of "regulated" parties that have immunities from particular enforcement actions. But this argument proves too much. If disputes over states' institutional interests are political questions, then neither states nor individuals should have rights or judicial remedies based upon them. Nothing in the political safeguards of federalism can justify the distinction between "general" and "specific" federalism claims that defenders of *Mellon* seek to draw.

A final objection to intergovernmental litigation of institutional interests is that such litigation will inevitably lead to the dilution of private rights. If so, then intergovernmental litigation should be limited to those cases in which it is absolutely necessary to vindicate the right. This Article has considered this objection where it has force as a limit on substitute suits. But here it has no purchase. The valid rule requirement

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447. Cf. Bulman-Pozen & Gerken, supra note 273, at 1263 ("[S]tates playing the role of federal servant can also resist federal mandates . . . .").

448. See Robert A. Schapiro, Judicial Federalism and the Challenges of State Constitutional Contestation, 115 Penn St. L. Rev. 983, 1003 (2011) [hereinafter Schapiro, Judicial Federalism] ("Special solicitude for states in suing the federal government does not fit well into [the] pluralist outlook.").

449. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985); see Schapiro, Judicial Federalism, supra note 448, at 1004 ("[F]ederalism principles seem especially odd entrance tickets into federal court.").

enshrines a private right against enforcement actions predicated upon invalid laws, and thus protects individual liberty and property interests.[450] Permitting a political community to litigate the allocation of jurisdiction among the governments in the federal system does not dilute those interests. Rather, it leads courts to measure the validity of a claim of authority by reference to the relevant consideration, namely, a political community's jurisdictional interests.[451]

CONCLUSION

To think that government powers, rather than rights, imply public remedies may seem paradoxical. It is not. The adjudicatory function of implied private rights of action can neither justify nor limit the regulatory function of implied public rights of action. Implied public rights of action differ from their private counterparts in terms of remedial tradition and principles, as well as the instrumental concerns that animate remedial law. An implication doctrine founded in the public capacities of governments reflects the appropriate role of public enforcement in the federal system. When a public litigant sues in what amounts to a private capacity, courts should treat it like a private litigant. Conversely, when a public litigant sues in a uniquely public capacity, a broader implication doctrine is appropriate.

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450. See, e.g., Bond v. United States, 131 S. Ct. 2355, 2367 (2011) (Ginsburg, J., concurring) (discussing valid rule requirement prohibiting government from enforcing invalid law against defendant).

451. Much of what this Article has argued is applicable to city suits against their parent states. The law concerning city standing is a mess. This Article's framework suggests that the reasoning of a case like *IPAS*, see supra text accompanying notes 330–338, applies here. Where states have given cities the capacity to sue, and federal law gives cities institutional interests against state action, federal courts should imply rights of action to enforce those interests. As David Barron has argued, permitting city suits against states "to preserve [a city's] own policymaking powers" under federal law would "affirm the stake that all of us have in a constitutional structure that preserves room for the vigorous practice of local politics." Barron, Cities, supra note 404, at 2249.