Procedural Retrenchment and the States

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Although not always headline grabbing, the Roberts Court has been highly interested in civil procedure. According to critics, the Court has undercut access to justice and private enforcement through its decisions on pleading, class actions, summary judgment, arbitration, standing, personal jurisdiction, and international law.

While I have much sympathy for the Court’s critics, the current discourse too often ignores the states. Rather than bemoaning the Roberts Court’s decisions to limit court access—and despairing further developments in the age of Trump—we instead might productively focus on the options open to state courts and public enforcement. Many of the aforementioned decisions are not binding on state courts, and many states have declined to follow their reasoning. This Article documents state courts deviating from Twombly and Iqbal on pleading; the Celotex trilogy on summary judgment; Wal-Mart v. Dukes on class actions; and Supreme Court decisions on standing and international law. Similarly, many of the Court’s highly criticized procedural decisions do not apply to public enforcement, and many public suits have proceeded where private litigation would have failed. This Article documents successful state-enforcement actions when class actions could not be certified, when individual claims would be sent to arbitration, and when private plaintiffs would lack Article III standing.

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In sum, this Article evaluates state court and state-enforcement responses to the Roberts Court’s procedural decisions, and it suggests further interventions by state courts and public enforcers that could offset the regression in federal court access. At the same time, this analysis also illuminates serious challenges for those efforts, and it offers reasons to be cautious about state procedure and enforcement. Leveling down to state actors may not completely escape the political forces that have shaped federal procedure, and it may exacerbate some of the political economies that have undermined private enforcement and private rights to date.
INTRODUCTION

Although not always headline grabbing, the Roberts Court has been highly interested in civil procedure.¹ And, at least in some quarters, it has been seen as brutally effective in pursuing substantive values through its civil procedure decision-making.² In the words of Dean Erwin Chemerinsky:

One crucial aspect of the Roberts Court’s decision making has been its systematically closing the courthouse doors to those suing corporations, to those suing the government, to criminal defendants, and to plaintiffs in general. Taken together, these separate decisions have had a great cumulative impact in denying access to the courts to those who claim that their rights have been violated. The Roberts Court often has been able to achieve substantive results favored by conservatives through these procedural devices.³

According to critics such as Chemerinsky, the Roberts Court has undercut access to justice and private enforcement through a host of decisions relating to pleading, class actions, summary judgment, arbitration, standing, personal jurisdiction, and international law.⁴ These decisions are consistent with the recent history of “plaintiphobia” in the Supreme Court.⁵ And the election of Donald Trump does not bode well for reversals in these areas.⁶

While I have much sympathy for these normative critiques, we should not read the Supreme Court’s decisions on private federal litigation for more than they are worth. Many of the Court’s procedural decisions leave open important opportunities in the states. Consider the following examples from state courts:

- *Twombly* and *Iqbal* introduced “plausibility pleading” into federal procedure, but judges in nineteen states expressly rejected this new pleading standard—not to mention other state judges who have rejected the *Celotex* trilogy on summary judgment, *Wal-Mart v. Dukes* on class actions, and others;⁷
- The Supreme Court tightened restrictions on Article III

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². See infra Part I (collecting sources).
⁴. See infra Part I (collecting cases). Access to justice refers to the ability of individuals or groups to seek and obtain a remedy through institutions of law. See generally DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004). Private enforcement refers to a subset of civil cases in which “government responds to a perception of unremedied systemic problems by creating or modifying a regulatory regime and relying in whole or in part on private actors as enforcers.” Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 639–40 (2013). These concepts often (though not always) run together. See infra note 453.
⁵. See Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014) (discussing decisions of the Roberts and Rehnquist Courts that are adverse to plaintiff interests).
⁷. See infra Part II.A.
standing, but state courts with looser standing rules have heard claims under Section 1983, the Americans with Disabilities Act (ADA), and other federal laws when there would have been no standing in federal court, and

- Medellín v. Texas declined to require evidentiary hearings for habeas petitioners claiming violations of the Vienna Convention on Consular Relations, but courts in at least two states, as a matter of state law, have ordered such hearings to vindicate the United States’ international law commitments.

Or, consider the following examples of state public enforcement:

- A federal district court denied class certification in a suit against H & R Block regarding Refund Anticipation Loans (RALs), but the decision mentioned that public enforcement was available—and a state later sued H & R Block over its RALs program;

- In various decisions, the Supreme Court has made it more difficult for individuals who signed arbitration clauses to vindicate their rights in court, but public enforcers have succeeded with court actions despite arbitration clauses; and

- A federal court in California recently relied on Dukes to deny certification for an employment class action, but it allowed the named plaintiff to proceed on behalf of employees for “private attorney general” claims under California law.

The aforementioned examples are not to suggest that the states stand in complete opposition to the Supreme Court—far from it. Instead, this Article identifies potential state responses to the apparent regression in federal court access, and it evaluates the extent to which state courts and public enforcers have engaged in these responses to date. If state courts and public enforcement are not the battlegrounds of the “litigation state,” they will be soon. These developments also connect with recent interest in the states as counterweights to a unified federal government after the 2016 election.

8. See infra Part II.B.

9. See infra Part II.C.

10. See infra notes 313–314 and accompanying text.

11. See infra Part III.B.

12. See infra notes 352–356 and accompanying text. In note 295, I explain why I label this private suit as “public enforcement.”

13. This also does not suggest that state courts and public enforcers can replace everything lost to the Supreme Court’s procedural decisions. See infra Parts II.E, III.F & IV.B.


This Article thus aims to reorient the conversation away from an exclusive focus on federal procedure and toward other avenues for access to justice and private enforcement. While this approach departs from a federal court focus, it is consistent with two other themes in the literature. First, this Article takes seriously the emphasis on public, precedential court adjudication. The alternatives discussed below are court-based. Second, this Article takes seriously the central role of litigation in the American regulatory state. The discussion here addresses the enforcement of public and private laws alike.

In so doing, this study pursues a series of interrelated goals. Proponents of court access and private enforcement, and their allies in the states, might see in this Article a roadmap for further interventions if they feel stymied by the federal courts. Their opponents, too, might follow the same map to locate future confrontations. Thus, these procedural developments raise the stakes for state courts and state enforcement. My effort to identify potential responses outside of the federal courts also provides a baseline against which we can evaluate judicial and political actors: is the Roberts Court an outlier, or are its views consistent with a broader plaintiphobia? Even when the Court lacks de jure authority, do its decisions have de facto sway?

While this review surfaces opportunities for state courts and state enforcement, it also highlights their formal and functional limits—and it connects those opportunities and limits to procedural politics. Only a careful study of the Supreme Court’s procedural jurisprudence reveals where doctrinal limits end and practical limits begin. Or, to put it another way, sometimes it is the Supreme Court that impairs court access and private enforcement, but other times the problems come from resource constraints, preemption, or politics. More generally, thinking clearly about the potential role for states raises questions about the political economy of procedural federalism—and, as explained below, such shifts to state courts and state enforcement may come with unintended risks.

Filling out this analysis, Part I of this Article briefly describes the major procedural decisions of the Roberts Court. Part II documents state court responses to those decisions, and Part III explores state public enforcement. Many of these areas have been unexplored by scholars, and this Article is the first to pull them together in one place. Based on these inquiries, Part IV offers

17. See, e.g., Farhang, supra note 14; Burbank et al., supra note 4.
18. See, e.g., infra Part IV.B (discussing selection of state judges and executive enforcers).
some conclusions in light of the values of federalism and the politics of procedure.

In short, this Article calls for new attention on state court and public-enforcement responses to federal procedural retrenchment. Such responses are multifarious and have the potential to be effective. But this Article also illuminates serious challenges facing those efforts, and it suggests reasons to be cautious about the politics of state procedure and enforcement.

I. PROCEDURAL RETRENCHMENT IN THE ROBERTS COURT

A central theme of this Article is that analyses of the Supreme Court’s civil procedure decisions have been too focused on the federal courts, to the exclusion of state courts and public enforcement. Before exploring that claim further, it is helpful to review the decisions at the core of this critique. Many of these decisions are widely known, so this Section only briefly surveys the major civil procedure decisions of the Roberts Court21 and offers a sample of the criticism these decisions have engendered.

Pleading. To lawyers and law students, the most well-known procedural decisions of the Roberts Court are Bell Atlantic v. Twombly22 and Ashcroft v. Iqbal.23 Prior to 2007, the federal courts employed a system of “notice pleading” under which plaintiffs were required to plead only enough facts to put defendants on notice of the claims against them.24 Twombly and Iqbal reoriented federal pleading around “plausibility.” Plaintiffs are now required to plead facts that show a “plausible” claim and a “reasonable” possibility of success.25

This is not the place to adjudicate the intense empirical debate about the effects of Twombly and Iqbal,26 but two facts seem clear. First, Twombly and Iqbal announced a change as a matter of doctrine.27 Second, this doctrinal change precipitated substantial criticism, particularly from those focused on private enforcement and access to justice. Scholars have referred to these decisions as “attacks on American democracy,”28 “subversions of law to achieve the

21. One issue not addressed here is statutory preemption of state substantive law. I exclude those decisions as “substantive,” though they have significant consequences for jurisdiction and court access. Cf. infra Part II.E (discussing subject-matter jurisdiction and removal).
25. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 556.
27. See, e.g., Kevin M. Clermont, Three Myths About Twombly-Iqbal, 45 Wake Forest L. Rev. 1337, 1371 (2010) (“The change in pleading, unless somehow undone, represents a truly major development in modern procedure.”).
restrictive ends of societal elites,”

29 “threaten[ing] to undermine civil rights enforcement, compromise court access, and incentivize unethical conduct,”

30 and “mark[ing] a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth.”

31 One scholar chose Iqbal for a symposium entitled “The Worst Supreme Court Case Ever?”

32 I could go on.

Summary Judgment. To the extent that Twombly and Iqbal have a parallel in summary judgment, it would be the Rehnquist Court’s decisions in the Celotex trilogy.

34 Like Twombly and Iqbal, the Celotex trilogy made the law friendlier to pretrial disposition and provoked backlash among commentators.

35 The Roberts Court has engaged with summary judgment as well. Although known primarily for its treatment of video evidence, Scott v. Harris may have consequences for the law of summary judgment.

36 The Supreme Court explained in Scott that the non-moving party is not entitled to traditional summary judgment deference if its position “blatantly contradicts” the record.

37 Professor Wolff has explained that this language represents a change in the prevailing federal standard with the potential to “erode the pathway to trial for plaintiffs in every type of dispute.”


32. Steve Subrin, Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness, 12 N.Y.U. L.J. 571, 573 (2012) (appearing in a symposium titled “The Worst Supreme Court Case Ever?”). Professor Subrin’s essay began: “Ashcroft v. Iqbal is an embarrassment to the American Judicial System in which a majority of the Supreme Court chose to reject the rule of law.” Id. at 571 (footnote omitted).


37. Id. at 372.

The effects of *Scott* are seemingly less severe than *Twombly* and *Iqbal*. But at least according to Wolff, “the parallels are ominous.”

*Class Actions.* The Supreme Court has also retreated in class action law. Though perhaps properly understood as a Title VII decision, the Roberts Court’s best-known class action ruling came in *Wal-Mart v. Dukes*. The *Dukes* majority required that a putative class establish the capacity to generate “common answers,” not just “common questions.” The decision raised the evidentiary burden on plaintiffs to affirmatively establish this commonality, demanding “convincing” facts where they were not demanded before. Two years later, the Roberts Court called for a similar “rigorous analysis” of Rule 23’s predominance requirement in *Comcast Corporation v. Behrend*.

Criticism of *Dukes* and *Behrend* has been widespread as well. Class actions have facilitated access to justice and private enforcement, especially for low-value claims. In this light, scholars have explained that *Dukes* limits “access to courts” and creates “new impediments” to private enforcement; “compromises employees’ access to justice”; “undermines the rights of workplace discrimination victims”; and demonstrates “the Court’s willingness of late to place policy above principle in ways that restrict access to justice.”

39. Compare id. at 1365–67 (collecting federal cases applying *Scott*), with supra notes 22–33 (discussing *Twombly* and *Iqbal*).
40. Wolff, supra note 38, at 1385.
42. 564 U.S. 338 (2011).
43. *Id.* at 350. I focus here on *Dukes*’s effect on “commonality.” See FED. R. CIV. P. 23(a)(2).
44. *Dukes*, 564 U.S. at 359.
45. 133 S. Ct. 1426, 1432 (2013).
47. See generally Burbank et al., supra note 4 (discussing private enforcement and connecting it to, *inter alia*, class actions).
Arbitration. The rise of arbitration predates the Roberts Court, but the Roberts Court has been particularly aggressive in promoting it; allocating more issues to arbitrators and fewer to courts; preempting state laws that create obstacles to arbitration; and limiting exceptions designed to ensure the effective vindication of substantive rights. The Roberts Court’s arbitration decisions have been particularly hostile to aggregate dispute resolution. AT&T v. Concepcion held that the Federal Arbitration Act (FAA) preempted a state law that treated certain class action waivers as unconscionable. American Express v. Italian Colors later refused to invalidate an arbitration agreement with a class-arbitration waiver even if class resolution was the only economically viable way to “effectively vindicate” a federal right.

Here again, criticism has been sharp. Dissenting from Italian Colors, Justice Kagan remarked that “[i]n the hands of today’s majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.” Scholars have been similarly critical. Judith Resnik observed that the Court’s arbitration jurisprudence “strips individuals of access to courts to enforce state and federal rights, strips the public of its rights of audience to observe state-empowered decision makers imposing legally binding decisions, and strips the courts of their obligation to respond to alleged injuries.” Other scholars have explained that Concepcion and Italian Colors “operate to dismantle entire fields of law, including laws against fraud, deception, predatory conduct, antitrust violations, and employment discrimination,” and they “erode substantive law from the
books, with the consequent erosion of both the private compensatory goals and public deterrent objectives of that law.”

_Standing._ Although standing doctrine in recent years has “fragmented,” with respect to private disputes the Roberts Court’s main contribution has been to limit Congress’s ability to confer Article III standing on litigants. In a measured opinion, _Spokeo v. Robins_ reaffirmed that “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” In particular, the Court explained that Congress could not provide standing for a “bare procedural violation” or a deprivation that is not sufficiently “concrete.” Whatever these phrases mean, the result cannot be that “a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.”

Leading up to _Spokeo_, one critic asked “whether the conservative wing of the Roberts Court will respect our Constitution’s guarantee of access to courts or subvert it, leaving Americans without legal recourse when corporations violate federal rights.” Reveling in its less-devastating-than-expected outcome, another wrote that _Spokeo_ “was supposed to be one of those cases that lets the Supreme Court’s conservatives gut class action rules without most people noticing.” And still, critics have worried that _Spokeo_’s contribution to standing


64. By private disputes, I mean to exclude suits by or against government actors, such as decisions on national security, the First Amendment, and equal protection. See id. at 1071–89 (collecting cases).

65. See, e.g., _Summers v. Earth Island Inst._, 555 U.S. 488, 497 (2009) (“[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”). As explained below, although this message addresses Congress, it is best viewed as a limit on federal courts. See infra notes 219–227 and accompanying text; see also Zachary D. Clopton, _Justiciability, Federalism, and the Administrative State_, 103 CORNELL L. REV. (forthcoming 2018) (elaborating on this interpretation and its consequences for policymaking).


67. _Spokeo_, 136 S. Ct. at 1549.

68. _Id._ The Court seems more willing to find Congress-created standing when a state is bringing suit. See, e.g., _Massachusetts v. EPA_, 549 U.S. 497 (2007); see also Fallon, supra note 63.


70. Mark Joseph Stern, _SCOTUS Misses an Opportunity to Gut Class Actions and Consumer Privacy Laws_, SLATE (May 16, 2016, 12:56 PM), http://www.slate.com/blogs/the_slateist/2016/05/16/spokeo_v_robins_spares_class_actions_and_consumer_privacy.html [https://perma.cc/4MDQ-S7V4].
law “seems to be serving no purpose other than to constitutionalize a deregulatory agenda.”

More generally, critics have argued that the Supreme Court’s standing doctrine represents “an insupportable judicial contraction of the legislative power,” and that it “mak[es] it more difficult to implement federal laws.” Standing doctrine is a particular barrier to private enforcement, as critics have argued that its current incarnation “effectively preclude[s] Congress from pushing private enforcement of public law to its outermost limits.” For its part, the Roberts Court seems to treat these criticisms as consistent with its goals. Speaking for the Court, Justice Kennedy remarked that “[i]n an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so.”

**Personal Jurisdiction.** The Roberts Court also has taken up constitutional limits on personal jurisdiction. In *Goodyear Dunlop Tires v. Brown* and *Daimler v. Bauman*, the Court reined in some lower court decisions that stretched “general jurisdiction” to non-home-state corporations. The Court also held tight to limits on “specific jurisdiction.” In *J. McIntyre v. NICASTRO*, a divided Court held that New Jersey could not assert personal jurisdiction over a foreign manufacturer of a machine that harmed a New Jersey resident. And most recently in *Bristol-Myers Squibb v. Superior Court*, the Court rejected California jurisdiction over claims by noncitizens against an out-of-state drug company, and in so doing, seemingly altered the theoretical basis of specific jurisdiction—if not more.

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77. 564 U.S. 915 (2011).
78. 134 S. Ct. 746 (2014).
80. 564 U.S. 873 (2011); *see also* Walden v. Fiore, 134 S. Ct. 1115 (2014) (articulating further limits on specific jurisdiction).
Commenters have noted that the aforementioned general-jurisdiction decisions reflect the Court’s “restrictive ethos.” Similarly, they claim that the specific-jurisdiction decisions “[l]imit [c]onsumers’ [a]ccess to [j]udicial [r]emedies” and represent “yet another procedural stop sign, one posted at the very genesis of the case.” More generally, critics of personal jurisdiction law have worried that these cases “provide[] a blueprint” for foreign corporations to avoid US courts.

International Law Cases. Although some of the aforementioned decisions have consequences for international litigation, I want to address separately those decisions that focus on international law claims. First, in Kiobel v. Royal Dutch Petroleum, the Supreme Court limited the scope of the Alien Tort Statute (ATS) to cases that “touch and concern the territory of the United States.” Second, in a series of decisions regarding the Vienna Convention on Consular Relations, the Supreme Court held—contrary to the International Court of Justice—that Vienna Convention claims raised in habeas proceedings are subject to state procedural default rules.

These cases too were criticized for keeping deserving plaintiffs out of court. Scholars have noted that “Kiobel presents a barrier to those seeking access to judicial remedies for businesses’ involvement in human rights abuses outside the United States,” and now “parties with claims implicating

90. Kiobel, 569 U.S. at 125.
93. See Breed, 523 U.S. at 375–76; Medellin, 552 U.S. at 517.
international law will have more difficulty gaining access to domestic United States courts to litigate.”

Summary. Returning to Dean Chemerinsky’s observation, it appears to many commentators that the Roberts Court is “systematically closing the courthouse doors.” This claim applies to each of the topics addressed here: pleading; summary judgment; class actions; arbitration; standing; personal jurisdiction; and international law. In most of these areas, this claim is probably accurate. Scholars have correctly identified ways that these procedural doctrines impede court access and private enforcement—at least within the federal courts. When we account for state courts and public suits, however, the story becomes more complex.

II.

CIVIL PROCEDURE IN STATE COURTS

In a 1977 article for the Harvard Law Review, Justice William Brennan argued that state courts should use state constitutions to protect individual rights where the Burger Court had cut them back. Though the record was mixed, some state courts took Justice Brennan up on this suggestion.

Although I do not endorse this strategy with the vigor of Justice Brennan, this Section observes that state courts similarly have the authority to use state law to deviate from the Roberts Court’s approach to civil procedure. This Section teases out these doctrinal pathways and examines the extent to which state courts have taken advantage of such opportunities to date. Regardless of whether these opportunities are welcome, this Section shows that dismayed advocates of private enforcement and court access may find receptive audiences if they look outside of the federal courts.

97. Chemerinsky, supra note 3.
98. Cf. infra Part II–III (observing alternatives to federal procedure).
A. Federal Rules in State Courts

One major category of Supreme Court decisions arises out of the Federal Rules of Civil Procedure. Stephen Burbank and Sean Farhang have argued that the Supreme Court is the primary locus for ideological retrenchment against private enforcement of federal claims.\(^{102}\) Theodore Eisenberg and Kevin Clermont found “plaintiphobia” in Supreme Court decisional law.\(^{103}\) These authors, and many others, have emphasized the pernicious consequences of the Supreme Court’s interpretations of the Federal Rules.\(^{104}\)

This Section begins with an unexceptional claim: the Federal Rules of Civil Procedure are federal rules of civil procedure.\(^{105}\) They do not apply directly in state courts,\(^{106}\) and they cannot under current law.\(^{107}\) States thus remain free to reject Supreme Court decisions interpreting federal procedural rules, even if state rules are patterned on the federal ones.\(^{108}\) This Section explores whether states have deviated from federal rules with respect to pleading, summary judgment, and class actions.

1. Pleading

Given their salience, I begin with Twombly and Iqbal. Although many investigations into pleading regimes divide the world into “fact pleading” and

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102. BURBANK & FARHANG, supra note 19, at 3. Burbank and Farhang emphasized that this effect is driven by the jurisprudence of the Supreme Court, rather than its rulemaking. Id.

103. Eisenberg & Clermont, supra note 5.

104. See supra notes 28–33, 35, 38, 46–51 (citing sources). This is not to suggest that these authors find the Federal Rules to be the exclusive source of such retrenchment. See, e.g., BURBANK & FARHANG, supra note 19, at 144–45 (referring to decisions about standing, private rights of action, attorney’s fees, damages, and arbitration).

105. FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . .”).

106. Even in so-called “Reverse Erie” cases, state courts applying federal procedural doctrines to federally created rights are not applying the Federal Rules of their own force. See, e.g., STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 12.7 (2016) (collecting examples of states mirroring and not mirroring federal pleading standards for Section 1983 claims in state courts).


“notice pleading” jurisdictions,109 the effect of Twombly and Iqbal is more nuanced. Under the new regime, in order to defeat a motion to dismiss, the plaintiff must establish the “plausibility” of an entitlement to relief in federal court.110

Because plausibility pleading is (supposedly) grounded in Federal Rule of Civil Procedure 8, the Supreme Court has not required it for state courts. And although some states have voluntarily adopted this standard,111 courts in nineteen states have expressly rejected plausibility pleading: Alabama;112 Arizona;113 Delaware;114 Georgia;115 Iowa;116 Kansas;117 Minnesota;118 Montana;119 Nevada;120 New Mexico;121 New York;122 North Carolina;123 Ohio,124

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110. See supra notes 22–25, 27 and accompanying text; see also Clermont, supra note 27, at 1348–50 (suggesting “fact pleading” as a preferable alternative to “plausibility pleading”).


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Oklahoma; Tennessee; Texas; Vermont; Washington, and West Virginia. For good measure, the local courts of Guam and the Northern Mariana Islands have rejected plausibility pleading too. Suits in these courts may survive a motion to dismiss even if they would not pass muster in federal court. For example, according to the Washington Supreme Court: “The Supreme Court’s plausibility standard is predicated on policy determinations specific to the federal trial courts. . . . Neither party has shown these policy determinations hold sufficiently true in the Washington trial courts to warrant such a drastic change in court procedure.” Indeed, multiple state courts have applied liberal state pleading standards to federal claims (such as Section 1983 claims) rather than testing them for plausibility.

Table A—State Pleading Standards

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*State court rejected plausibility

2. Summary Judgment

The effects of *Scott v. Harris*’s approach to summary judgment in state courts are more difficult to discern. As explained above, *Scott* seemed to erase the typical summary judgment deference if plaintiff’s position “blatantly contradicts” the record. Since *Scott*, many state courts addressing state law claims have interpreted their summary judgment rules to include a new

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136. *See infra* Appendix 1 citing each state’s standard and any responses to *Twombly* and *Iqbal*.  
138. *See 550 U.S. 372, 380 (2007); see also supra* notes 36–40 and accompanying text; Wolff, *supra* note 38, at 1353 (collecting federal cases and explaining that “developments in the lower federal courts reveal that the uncertainty introduced by the opinion is already eroding this core feature of the summary judgment standard”).  
139. For purposes of this study, I exclude federal claims in state court that might receive federal treatment based on preemption or “Reverse Erie.” *See Felder v. Casey*, 487 U.S. 131 (1988) (requiring the state court to apply federal procedure to Section 1983 suit); *see also Slowikowska v. San Diego*
category of “blatantly contradicting” versions of events. In other words, many state courts have followed Scott as persuasive authority. Though there are some cases in which state courts have found Scott inapposite, I was unable to locate any state court decisions expressly rejecting Scott’s “blatantly contradicts” approach. I cannot rule out state courts implicitly rejecting Scott, but it is noteworthy that while many state courts have cited it approvingly, none has announced to litigants and future courts that it should not apply.

Sheriff’s Dep’t, D066597, 2015 WL 7307867, at *6 (Cal. Ct. App. Nov. 20, 2015) (citing Scott for the “blatantly contradicts” test in a Section 1983 case in state court but not specifying whether it was applying federal or state procedure).


See, e.g., Duckworth, 10 So. 3d at 438 (citing Scott approvingly but finding it not dispositive).


One additional difficulty in ascertaining the effects of Scott is that the Court in Scott was not explicit about how its opinion modified the deference afforded to plaintiffs in summary judgment.
Some state courts, however, rejected the Supreme Court’s earlier changes to summary judgment from the *Celotex* decision.\(^{145}\) There has not been a comprehensive study of state summary judgment practice in the wake of *Celotex*,\(^{146}\) but my research reveals that fourteen states reject *Celotex* in whole or in part:\(^{147}\) Connecticut;\(^ {148}\) Florida;\(^ {149}\) Georgia;\(^ {150}\) Indiana;\(^ {151}\) Kentucky;\(^ {152}\) and noting some similarities and distinct differences.

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147. The degree to which these courts “reject” *Celotex* varies, in part depending on the existing summary judgment standard of the state before *Celotex*.


152. See *Steelvest, Inc. v. Scansteel Serv. Ctr.*, Inc., 807 S.W.2d 476, 481–82 (Ky. 1991) (comparing Kentucky and federal approaches to summary judgment and noting “some similarities and many obvious differences”).
Missouri; New Mexico; New York; North Carolina; Oklahoma; Oregon; Texas; Utah and Virginia. Another four states—Alabama,}

153. See ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 380 (Mo. 1993) (en banc) (highlighting different roles of summary judgment in Missouri and federal practice in light of Missouri’s fact-pleading requirements); see also Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576, 591 n.7 (Mo. 2006) (en banc) (Wolff, C.J., concurring) (“Federal courts have often been overly aggressive in granting summary judgment under the Celotex trilogy of United States Supreme Court decisions. This, fortunately, has not been the case in Missouri courts although the standard stated is basically the same.”).

154. See Romero v. Philip Morris Inc., 242 P.3d 280, 287–88 (N.M. 2010) (“New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits . . . . We continue to refuse to loosen the reins of summary judgment . . . .”).


158. See Jones v. Gen. Motors Corp., 939 P.2d 608, 615–16 (Or. 1997) (observing that Oregon did not adopt the Celotex trilogy).


160. See Orvis v. Johnson, 177 P.3d 600, 603–04 (Utah 2008) (“While [Celotex] has been the law in the federal courts for over two decades now, it is not Utah law.”); Harline v. Barker, 912 P.2d 433, 445 n.13 (Utah 1996) (“This court has not previously adopted the reasoning of the majority opinion in Celotex, which is not binding on us as a matter of law, and declines to do so today.”); see also Jones & Trevor Mkts., Inc. v. Lowry, 284 P.3d 630, 639 n.9 (Utah 2012) (“While we have not adopted Celotex in its entirety, there are significant portions of our jurisprudence that are entirely consistent with Celotex.”).


California, \(^{163}\) Louisiana, \(^{164}\) and Tennessee\(^{165}\)—rejected Celotex at one time but have since adopted Celotex by statute or by judicial decision. \(^{166}\) Alaska, \(^{167}\) Idaho, \(^{168}\) New Jersey, \(^{169}\) and Wyoming \(^{170}\) apply Celotex, but they rejected its summary judgment cousin Anderson v. Liberty Lobby. \(^{171}\) Thus, state courts have demonstrated a willingness to reject the Supreme Court’s modern summary judgment decisions, though not (or not yet) Scott v. Harris.

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\(^{166}\) See supra notes 162–165.


\(^{171}\) 477 U.S. 242 (1986). Celotex and Liberty Lobby address different aspects of the summary judgment standard, so it would not be incoherent to adopt one and not the other.
Table B—State Decisions on Celotex

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<th>Rejecting Celotex</th>
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*Previously rejected Celotex

3. Class Actions

Turning to class actions, Wal-Mart v. Dukes seemed to increase the evidentiary burden of establishing commonality among class members. Prior to this Article, there has been little scholarly attention on how states have reacted to Dukes.

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172. Case citations are available in Appendix 2.
174. As the foregoing demonstrates, there has been comparatively less attention to Dukes in the states. In part it may be because the Class Action Fairness Act (CAFA) sweeps into federal court many of the cases for which Dukes has the most bite. See infra note 279 and accompanying text.
On the one hand, the highest state courts in Arkansas, Georgia, Louisiana, Montana, Ohio, and Oklahoma, as well as lower courts in Delaware, Kansas, Kentucky, Missouri, Texas, and Washington, have endorsed the Dukes position on commonality.

On the other hand, a few state courts have rejected Dukes. In Soper v. Tire Kingdom, the Florida Supreme Court summarily reversed a lower court decision applying Dukes over a dissent trumpeting Dukes. Based on differences between the federal and state rules, New York’s highest court explained in Jiannaras v. Alfant that “Wal-Mart has no bearing on the

189. Soper v. Tire Kingdom, Inc., 124 So. 3d 804 (Fla. 2013) (per curiam).
191. Soper, 124 So. 3d at 804–07 (Canady, J., dissenting). The majority reaffirmed the state class action precedent laid out in Sosa v. Safeway Premium Finance Co., 73 So. 3d 91 (Fla. 2011).
certification of a class in New York courts. In *Migis v. Autozone, Inc.*, the Oregon Court of Appeals held that it “fail[ed] to see . . . how Wal-Mart controls in this case, which resolves state claims and applies state class-certification procedures.” A Connecticut Superior Court judge issued a long opinion critical of *Dukes*, rejecting its view of commonality under Connecticut law. California’s intermediate appellate courts are split, with a recent decision stating flatly: “the applicable standard in California is not . . . stated in *Wal-Mart*.” Finally, although it did not address the commonality standard in particular, the Iowa Supreme Court devoted most of its thirty-two-page majority opinion in *Pippen v. State* to criticizing *Dukes*.

State resistance to *Dukes* is particularly significant given another recent Roberts Court decision. In *Smith v. Bayer*, the Supreme Court explained that a state court may go forward with a class action under state procedural law after a denial of class certification in federal court. Therefore, state court deviation from *Dukes* is significant not only for cases first filed in state court, but also for state class actions filed after certification is denied in federal court.

**B. Standing in State Courts**

The previous Section explored how state courts have declined to follow the Supreme Court’s interpretation of the Federal Rules. State courts may also sidestep the Court’s procedural decisions rooted in Article III of the Constitution.

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192. 52 N.E.3d 1166, 1169 (N.Y. 2016); see also *Cardona*, 2014 WL 2558176, at *13 (rejecting *Dukes* and citing other New York cases).  
195. See supra note 181.  
197. See 854 N.W.2d 1 (Iowa 2014). The Iowa Supreme Court was most critical of *Dukes*’s interpretation of Title VII and its view of workplace discrimination, but it also mentioned the potential persuasive effect of the *Dukes* dissenters for issues such as commonality: “[W]ith respect to *Wal-Mart*, we have had no occasion to consider whether the majority or minority opinion in this 5–4 decision has the most persuasive power.” *Id.* at 18.  
199. In *Smith*, the state class action was filed in West Virginia court. *Id.* at 303. Although West Virginia has not endorsed or departed from *Dukes*, its class action law deviates from the federal approach in other ways. *See id.* at 310 (citing *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (2003)).  
200. See *id.* at 304–05. The Anti-Injunction Act barred the federal court from enjoining the state suit, and the federal decision was not preclusive. *Id.* at 307–12.  
201. As explained below, a separate suit would be necessary because denial of certification is not a basis for remand if removal had been based on CAFA. See infra note 279.
Although the US Constitution applies in state courts, Article III regulates only the power of the federal courts—state courts are thus free to depart from constitutional constraints on federal justiciability. This Section will focus on standing, though other Article III doctrines may be subject to similar analysis.

The mechanism for state court deviation from federal standing law is straightforward: state courts simply decline to incorporate the federal court understanding of Article III into state constitutional or common law. In fact, state courts frequently depart from the federal approach to justiciability.

To give an example paralleling earlier analysis, a number of state court decisions have expressly rejected Lujan’s approach to standing as a requirement for state justiciability.

More generally, Helen Hershkoff exhaustively described state court deviations from various federal justiciability doctrines. For example, she noted that virtually every state provides for taxpayer standing.

Hershkoff did not focus on the type of statutorily defined injury at issue in Spokeo and other cases, but it turns out that many states also deviate from this federal approach by recognizing statutorily created standing.

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202. See U.S. CONST. art VI, cl. 2 (Supremacy Clause).

203. Id. This Section focuses on states applying standing doctrine that is broader than Article III. State courts may be restricted in their ability to limit standing for federal claims proceeding in state court. Cf. Testa v. Katt, 330 U.S. 386, 392–94 (1947) (requiring state court to exercise jurisdiction over federal claim).


205. For an example that got the attention of the Supreme Court, see Nike, Inc. v. Kasky, 539 U.S. 654, 661 (2003) (per curiam) (Stevens, J., concurring) (noting that California’s unfair competition law allowed a private attorney general to sue Nike in state court for misrepresentations regarding foreign working conditions even though plaintiff would have been unable to establish Article III standing).


208. See id. at 1854.

209. See supra notes 66–68 and accompanying text (discussing Spokeo).

Furthermore, state courts have the authority to apply their local standing requirements to federal claims. In *ASARCO v. Kadish*, the Supreme Court explained that state courts may adjudicate federal claims that would not satisfy Article III’s case-or-controversy requirement if brought in federal court. Though not exceedingly common, state courts have adjudicated federal claims for which federal justiciability was in doubt. For example, in *Keyhea v. Rushen*, California taxpayers brought suit in state court under Section 1983, alleging third-party harms to prisoners from the use of psychotropic drugs against their will, even though they would have lacked standing in federal court. In *New Jersey Citizen Action v. Riviera Motel*, a nonprofit association pursued a claim under the federal Americans with Disabilities Act, even though it appeared to lack federal standing. In *Marriage of Gilbert*, a Washington court found standing under state law to enforce requirements of the Federal Child Support and Establishment of Paternity Act where federal standing seemed doubtful. And in *Smith v. Wisconsin Department of Agriculture, Trade & Consumer Protection*, the Seventh Circuit ordered remand of a nonjusticiable federal constitutional claim to the state court. The court explained:

While some consider it odd that a state court might have the authority to hear a federal constitutional claim in a setting where a federal court would not, it is clear that Article III’s “case or controversy” limitations apply only to the federal courts. . . . Wisconsin’s doctrines of standing and ripeness are the business of the Wisconsin courts, and it is not for us to venture how the case would there be resolved.

211. Federal statutes are regularly enforced in state courts unless Congress says otherwise. Indeed, prior to Reconstruction, there was no grant of general federal question jurisdiction, so many federal law claims were presumptively adjudicated in state courts. See 18 Stat. 470 (1875) (conferring federal question jurisdiction on the federal circuit courts for suits with an amount in controversy exceeding five hundred dollars).

212. See 490 U.S. 605, 617 (1989) ("[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute."). *ASARCO* also explained that the Supreme Court could review such a decision “if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review . . . .” Id. at 623–24.


214. See 5 Cal. Rptr. 2d 762, 763 (Cal. Ct. App. 1992) (depublished). Ultimately, plaintiffs did not prevail on their federal law claim, but they obtained attorney fees under Section 1988 based on a successful state law claim. *Id.*


217. See 23 F.3d 1134, 1142 (7th Cir. 1994).

218. *Id.* (citations omitted); see also *Me. Ass’n of Interdependent Neighborhoods v. Me. Dep’t of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989) (holding that the district court should remand, rather than dismiss, a case raising a substantial federal issue in which plaintiff lacked Article III
State court decisions deviating from Article III highlight a tension in the Supreme Court’s justiciability jurisprudence. On the one hand, many cases holding that Congress may not confer constitutional standing frame the doctrine as manifesting a separation-of-powers constraint on federal courts. This is the view articulated in Spokeo and the three earlier cases it cited for that proposition, which is consistent with the more general view of the case-or-controversy requirement as a constraint on the judicial branch. In this light, decisions on the federal allocation of authority are simply unrelated to the separation of powers in the states, particularly given the background assumption of limited federal and general state courts.

On the other hand, the Lujan decision suggested that, in the context of private enforcement, standing doctrine stops Congress from encroaching on the executive’s duty to take care that the laws are enforced. Admittedly, the Court (and Lujan-author Justice Scalia) seemed to step back from this view of standing in Steel Co. v. Citizens for a Better Environment, but it is a defensible view of the doctrine and one that persuaded some justices over time. This view of...
standing law cuts against state courts hearing “no-standing” federal claims. It would be odd to protect executive authority by denying Congress the ability to create private actions in federal court but allow Congress to create private actions in state courts instead. And yet, broader state justiciability rules invite exactly this sort of lawmaking. Indeed, Congress seemingly could create insulated causes of action for which state court jurisdiction is exclusive or removal is prohibited.

In any event, under current law, state courts may entertain state and federal suits even if plaintiffs would lack Article III standing in federal court.

C. International Law in State Courts

International law cases represent another area in which the Supreme Court’s procedural decisions have attracted criticism, and they represent another area where state courts may provide remedies in spite of procedural retrenchment in the federal courts.

First, after a short period in which Alien Tort Statute (ATS) litigation was in vogue, the Supreme Court’s recent ATS decisions have put a damper on international human rights litigation in federal court. But the ATS is a statute governing federal subject-matter jurisdiction. Much like Article III, federal subject-matter jurisdiction statutes do not bind state courts, and indeed, federal jurisdictional law is premised on the backstop of state courts of general

requirement operates as a limitation on the power normally exercised by a legislative body.

225. See supra notes 213–216.


228. See supra notes 94–95 and accompanying text.


230. 28 U.S.C. § 1350 (2012); see also Sosa, 542 U.S. at 729 (“All Members of the Court agree that § 1350 is only jurisdictional.”).

231. Professor Coleman made a similar observation about other Roberts Court subject-matter jurisdiction decisions. See Brooke D. Coleman, Civil-izing Federalism, 89 Tul. L. Rev. 307, 360–65 (2014).
jurisdiction. Lawyers have brought international human rights cases in state courts for decades. If one of these cases were removed to federal court, a finding of no jurisdiction under the ATS should result in remand to state court—and it has. (Note also that many ATS cases are founded on state law causes of action, so they are not always candidates for federal question jurisdiction.) Indeed, some plaintiffs have filed putative ATS suits and state court cases on the same claims. Admittedly there are other hurdles to successful international cases in state courts. But because many of these limits are judicially created doctrines, state courts could change those too.

A related set of responses is also available to the Supreme Court’s decisions holding that habeas petitions based on the Vienna Convention on Consular Relations are subject to state procedural-default rules. While commentators have lamented this as an example of the United States flouting international law, the situation was more complex than it seemed. For present purposes, the

232. For example, the amount-in-controversy requirement for diversity jurisdiction essentially allocates cases between federal and state courts based on potential recovery. See 28 U.S.C. § 1332 (2012).


238. See Ayemou v. Amvac Chem. Corp., 312 F. App’x 24 (9th Cir. 2008) (describing federal and state actions against Dow Chemical and Shell Oil for chemical exposure in the Ivory Coast); Hereros ex rel. Riuako v. Deutsche Afrika-Linien GmbH & Co., 232 F. App’x 90, 93 & n.1 (3d Cir. 2007) (describing overlapping federal and D.C. suits); Bano v. Union Carbide Corp., 273 F.3d 120, 122–25 (2d Cir. 2001) (adjudicating the Bhopal disaster ATS case and noting overlapping suits filed in state courts).


240. Personal jurisdiction presents an obstacle to these suits that state courts cannot change. See infra Part II.D. At a minimum, though, these state options could help with cases against US-based defendants or defendants engaged in relevant conduct within the United States (thus supporting specific jurisdiction). See id.


242. See supra note 95 (collecting sources).
most interesting aspect of *Medellin v. Texas* was a seemingly tossed off reference to the State of Oklahoma in Justice Stevens’s opinion concurring in the judgment. In a paragraph explaining the low cost of an evidentiary hearing, Justice Stevens noted that this “is a cost that the State of Oklahoma unhesitatingly assumed.” In a footnote, Justice Stevens explained that, in another habeas case, an Oklahoma state court honored the United States’ obligations under the Vienna Convention and granted an evidentiary hearing to determine whether the violation of the Vienna Convention prejudiced the defendant. Justice Stevens’s opinion was not only a plaudit to Oklahoma, but also was a signal to other states that this option was available to them as well. The Supreme Court of Nevada took Justice Stevens up on his suggestion and ordered an evidentiary hearing in a Vienna Convention case—a hearing that ultimately led the lower court to vacate the petitioner’s death sentence on Vienna Convention grounds. Currently, the Supreme Court of Ohio is considering this issue, and other states could follow suit.

State courts are not the only bodies that can give effect to the Vienna Convention. State legislatures could adjust state habeas procedures by statute. State executives can act too, and indeed the Governor of Oklahoma commuted the death sentence of the habeas petitioner in the example above. More generally, there are substantial opportunities in the American system for states to play a role in international affairs, including in treaty implementation. States have been active in implementing private law treaties such as the

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243. *See Medellin*, 552 U.S. at 536–37 & n.4 (Stevens, J., concurring in the judgment).
244. *Id.* at 537.
246. This is a different type of Supreme Court signal than those addressed by Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921, 966–71 (2016), but no less clear.
249. For background on this case, see generally Loza v. Mitchell, 766 F.3d 466 (6th Cir. 2014).
250. *See Medellin*, 552 U.S. at 537 n.4 (Stevens, J., concurring in the judgment).
International Wills Convention, but arguments in favor of state participation are not limited to private law. There may be reasons to be cautious about states implementing international law, but this Section demonstrates that such opportunities exist.

D. Personal Jurisdiction in State Courts

Although state courts are not bound by Article III standing law, the Supreme Court’s constitutional decisions on personal jurisdiction apply directly in state courts. In other words, state courts cannot deviate from personal jurisdiction law as they have done from other procedural doctrines described herein. However, state courts may be able to skirt the intention of the Supreme Court’s personal jurisdiction decisions while remaining true to those decisions as written.

The Roberts Court’s personal jurisdiction decisions have not addressed the traditional jurisdictional basis of consent. States interested in increasing personal jurisdiction over corporate defendants could treat state corporate-registration statutes as constituting jurisdictional consent. Tanya Monestier has been at the forefront of analyzing this option: courts in at least ten states

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255. See, e.g., Ku, supra note 251, at 468–70 (collecting sources); Spiro, supra note 251, 686–97 (collecting sources).
256. See supra notes 77–86 and accompanying text; see also U.S. CONST. amends. V, XIV. In theory, personal jurisdiction in federal court could be broader than in state court—the Fifth Amendment may allow more than the Fourteenth. See, e.g., Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017) (leaving this question open); Omni Capital Int’l, Ltd. V. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) (same). But state courts would lack jurisdiction in any case that failed the federal court test as well.
259. See id. at 1377–1401.
have found general jurisdiction based on corporate-registration consent, and courts in another six states have found specific jurisdiction on this basis.

The Supreme Court’s recent decisions on personal jurisdiction have seemingly nudged state actors both towards and away from finding consent-based personal jurisdiction. On the one hand, the Supreme Court of Delaware relied on Daimler and Goodyear to hold that its state corporate-registration statute did not confer personal jurisdiction. On the other hand, as a conscious response to Daimler, New York legislators have proposed at least four bills to amend state registration law to make jurisdictional consent express. None of this is to say that such statutes would pass constitutional muster—in addition to direct challenges under the Due Process Clause, these statutes also must survive objections as unconstitutional conditions and restraints on interstate commerce. But consent-based jurisdiction remains a potential channel for states to reject the Supreme Court’s procedural retrenchment.

## E. State Court Assessment

This Section shows that state courts have at times exercised their prerogative to deviate from the Supreme Court’s decisions on the Federal Rules

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265. See D. Craig Lewis, Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated, 15 DEL. J. CORP. L. 1 (1990).

of Civil Procedure, Article III, and international law.\textsuperscript{267} State court deviations from \textit{Twombly} and \textit{Iqbal}, for example, are not just a dream of law professors and the plaintiffs’ bar. These state court decisions are constitutionally valid, and they represent real opportunities for advocates of private enforcement and access to justice who believe they have been shut down in the Supreme Court. But, to the extent that we expect state courts to be vehicles for justice and enforcement, those courts must be proficient and available—and that takes effort and attention. The over-emphasis on federal courts may be obscuring something important.

That said, not all state court options are created equal. State court deviations on standing are the most insulated from erosion by federal decisions.\textsuperscript{268} State courts are free to confer standing more broadly than federal courts and apply broader state law standing doctrine to federal law claims.\textsuperscript{269} If defendants attempt to remove such claims to federal court, these cases will be remanded when federal standing does not exist, leaving state courts free to adjudicate the underlying issues.\textsuperscript{270} Thus, the Supreme Court’s standing decisions in \textit{Spokeo}, \textit{Lujan}, and others—and perhaps its decisions on other aspects of justiciability\textsuperscript{271}—are the broadest invitations to state courts.\textsuperscript{272}

Decisions on the Federal Rules also do not apply in state courts, but state decisions on pleading, summary judgment, and class actions are only effective if cases remain in those state courts.\textsuperscript{273} And while plaintiffs select the initial forum, if defendants can remove cases to federal courts, then federal procedure will reign.\textsuperscript{274} Significantly, this is the alignment in many cases that attempt to enforce federal statutory rights,\textsuperscript{275} which would create federal question jurisdiction.\textsuperscript{276} A state legislature might obviate the need to plead a federal question by creating a state law cause of action, though an aggressive Supreme Court could find that federal law preempts the state law (thus leaving a federal question in place).\textsuperscript{277}

\textsuperscript{267} See supra Parts III.A–D.

\textsuperscript{268} See infra Part II.B.

\textsuperscript{269} See infra Part II.B. Although state courts may confer standing more broadly than the federal courts, they may not be able to restrict standing for federal law claims. See, e.g., Testa v. Katt, 330 U.S. 386 (1947).

\textsuperscript{270} See supra Part III.C.

\textsuperscript{271} See supra note 204.

\textsuperscript{272} See Clopton, supra note 65 (exploring these invitations in more detail).

\textsuperscript{273} See supra Part II.A.


\textsuperscript{275} Many, but not all—the Federal Employers’ Liability Act, for example, limits removal of some claims originally filed in state court. See 28 U.S.C. § 1445 (2012).

\textsuperscript{276} See 28 U.S.C. § 1331 (2012) (federal questions). Indeed, federal statutory claims are the focus of Burbank and Farhang’s work cited supra notes 19, 74.

\textsuperscript{277} See U.S. CONST. art. VI, cl. 2 (Supremacy Clause); see also Coleman, supra note 231, at 320–24 (collecting cases from the Roberts Court). Similarly, when Congress recently federalized the law of trade secret misappropriation, it impliedly gave defendants the option to elect federal court
Congress also can undercut state procedural reform by making more cases removable to federal courts. For example, the Class Action Fairness Act (CAFA) sweeps more putative class actions into federal court. It seems, was motivated in large part by state courts deviating from federal class action law—eerily familiar to the deviations described above. CAFA is particularly effective in this regard because it applies to putative class actions even if federal courts ultimately deny certification.

State courts’ attempts to deviate from arbitration law are the least effective. Arbitration was noticeably absent from this Section, and the reason is that the Court’s arbitration jurisprudence derives from the Federal Arbitration Act (FAA), a federal statute with preemptive power over inconsistent state laws. Despite the persistent efforts of Justice Thomas, the Supreme Court has consistently held that the FAA applies in state courts. So while state courts could exhibit hostility to arbitration sotto voce—as Justice Scalia seemingly accused the California courts—they cannot use state law to escape the FAA.

In sum, state courts have deviated from a range of federal procedural decisions, but those deviations vary in their ability to withstand removal and preemption. To put it another way, many of the Supreme Court’s most devastating decisions for court access and private enforcement are linked to the work of Congress—e.g., federal statutes preemping state law, establishing procedural law, when previously many of these cases remained in state court. See 18 U.S.C. § 1836 (2012) (as amended by the Defend Trade Secrets Act of 2016).

278. See, e.g., supra note 41 (discussing Shady Grove). The same effect would result from statutes providing exclusive federal jurisdiction.


281. See, e.g., Wright Transp., Inc. v. Pilot Corp., 841 F.3d 1266 (11th Cir. 2016) (retaining jurisdiction); Metz v. Unizan Bank, 649 F.3d 492, 500–01 (6th Cir. 2011) (same); Buetow v. A.L.S. Enters., Inc., 650 F.3d 1178, 1182 n.2 (8th Cir. 2011) (same); Cunningham Charter Corp. v. Learjet, Inc., 592 F.3d 805, 806–07 (7th Cir. 2010) (same); United Steel Int’l Union v. Shell Oil Co., 602 F.3d 1087, 1089 (9th Cir. 2010) (same); Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1268 n.12 (11th Cir. 2009) (same); see also Kevin M. Clermont, Jurisdictional Fact, 91 CORNELL L. REV. 973, 1015–17 (2006) (presaging this result).

282. 9 U.S.C. §§ 1–16 (2012); see also supra notes 52–59 and accompanying text.


284. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011) (“Although these statistics are not definitive, it is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.”).

285. For a potential counterexample, see infra Part III (public enforcement).
federal jurisdiction, or permitting removal.\textsuperscript{286} Though it is little solace to defeated plaintiffs to hear that they should divide their anger between at least two branches, this insight is important conceptually for understanding (and reforming) civil justice.\textsuperscript{287}

III. CIVIL PROCEDURE AND STATE ENFORCEMENT

The previous Section outlined how state courts could deviate from federal approaches that seem to restrict private enforcement and access to justice. But courts are not the only actors.\textsuperscript{288} This Section looks to state public enforcement as a response to the Roberts Court’s curtailment of private litigation, especially private aggregate litigation.\textsuperscript{289} The theme here is that, in many areas, public suits may be substitutes for private suits that are cutoff by federal procedure. By “substitutes,” I do not mean perfect substitutes—as explored throughout, public enforcement may not exactly match displaced private enforcement with respect to remedies, compensation, or process. But public enforcement at least represents an imperfect substitute, lessening the blow from federal procedural retrenchment.\textsuperscript{290} And, in theory, the right state legislative and executive action could push public enforcement closer to substitutability.\textsuperscript{291}

Before beginning this analysis, two caveats are in order. First, public enforcement is not limited to the states—federal agencies routinely enforce federal law, and many of the Roberts Court’s procedural decisions leave open federal public enforcement as well. While I mention a few illustrative examples of federal enforcement in the forthcoming survey, the target of this Section remains \textit{state} public enforcement. Second, as explained throughout, the “data” in this Section are more impressionistic than the state-by-state reviews above. But like that earlier analysis, this Section both explains the alternative pathways and offers examples of these alternatives in action.\textsuperscript{292}

\begin{itemize}
  \item \textsuperscript{286} Another way to understand these conclusions is that retrenching judges or litigants might look for doctrines based in federal preemption or subject-matter jurisdiction to ensure against state deviations.
  \item \textsuperscript{287} There also may be reasons to think differently about choices made by the Supreme Court and those made by Congress. \textit{See infra} Conclusion.
  \item \textsuperscript{288} A simple legislative solution would be for Congress to overrule by statute every offending, non-constitutional federal procedural decision. \textit{Cf.} William N. Eskridge, Jr., \textit{Overriding Supreme Court Statutory Interpretation Decisions}, 101 \textit{Yale L.J.} 331 (1991) (cataloging cases overridden by Congress). There is not much to add to this possible but highly unlikely idea.
  \item \textsuperscript{289} There is not much to say about political branch responses to decisions on pleading and summary judgment, other than to repeat that legislation could address these topics.
  \item \textsuperscript{290} Public enforcement may be closer to a perfect substitute with respect to deterrence than compensation or due process. \textit{See infra} notes 453–457 and accompanying text.
  \item \textsuperscript{291} As explored throughout, public enforcement faces significant resource constraints, though there are legislative and enforcement tools available to leverage those resources to great effect.
  \item \textsuperscript{292} Unlike state court rejection, using public enforcement to respond to federal procedural decisions requires a more thoroughgoing policy design, so this Section explores that design in some detail.
\end{itemize}
A. Class Action Substitutes

As described above, the Roberts Court has seemingly made it more difficult to certify federal class actions. CAFA compounds this effect by making it easier to get putative class actions into federal court, and thus easier to evade state alternatives.

Enter public enforcement. State executive enforcers may be able to fill the shoes of class action litigants while avoiding the requirements of Rule 23. State legislatures also may authorize “private attorneys general” to pursue public enforcement. This Section reviews these options at length, in part because this analytic work applies to many issues taken up in future Sections as well.

1. Attorney General Suits

The first potential intervention is direct government litigation. Government suits could take the form of traditional public enforcement, or they could look more like representational actions on behalf of state residents. For centuries, public actors have brought representational suits on behalf of their citizens (or subjects), often labeled “parens patriae” actions. Today, state attorneys general have parens patriae authority under numerous federal statutes and often under state law, and this authority frequently applies in common class action areas such as securities, antitrust, employment, and consumer law. Importantly, public suits are not subject to certification under Federal Rule 23, even if they are seeking remedies that private class actions could

293. See supra notes 41–45 and accompanying text.
294. See supra note 279 and accompanying text.
295. One might object to referring to private attorneys general as “public” enforcement. See infra Part III.A.2. This label is useful for structuring the argument, but it is not analytically necessary. Either way, federal procedural decisions may not constrain such suits.
298. Snapp, 458 U.S. at 600-05; Lemos, supra note 297, at 492–98. Although its technical meaning is narrower, the term parens patriae has been used to describe governmental actions that seek to vindicate private rights.
299. See Lemos, supra note 297, at 495–98 (collecting statutes).
305. Of course, states may require certification or other procedures for parens patriae suits.
theoretically pursue.\textsuperscript{306} Indeed, some public-enforcement authorities were expressly adopted with class actions in mind. For example, the Second Circuit explained that “Congress empowered state attorneys general to investigate and prosecute antitrust abuses on behalf of consumers stymied by Rule 23’s certification and notification hurdles.”\textsuperscript{307} Moreover, the Supreme Court recently confirmed that \textit{parens patriae} actions are not class actions, and therefore they fall outside the reach of CAFA.\textsuperscript{308} This means that more of these suits can remain in state court, insulated from federal procedure.\textsuperscript{309}

In practice, there are many examples of \textit{parens patriae} actions filed in parallel with class actions. Perhaps the most famous example involved state suits against tobacco companies,\textsuperscript{310} which proceeded despite various courts denying certification to private class actions.\textsuperscript{311} The tobacco cases are not alone.\textsuperscript{312} Indeed, in its opinion denying certification of a class action against H & R Block, the Southern District of Georgia observed in dictum that “denial of certification does not, however, operate to preclude any state agency from initiating a state law \textit{parens patriae} action.”\textsuperscript{313} California later sued H & R Block over the same program.\textsuperscript{314}

\begin{flushright}
The H & R Block experience is suggestive of a strategy by which state agencies could look to decisions denying class certification as a potential trigger for public enforcement. Certification denials might signal good cases, as class counsel presumably would not have invested resources in a putative class action—especially one with suspect chances at certification—unless there was something to the merits of the complaint. Moreover, public actors stepping into cases midstream may benefit from the efforts undertaken by private parties before certification was denied. In short, this version of “tagalong” public enforcement could make up for federal courts undermining private enforcement.

The aforementioned California suit against H & R Block resembles this suggested strategy—a public suit following the denial of class certification. An illustrative federal example is the recent employment litigation against Cintas Corporation. In that case, the Equal Employment Opportunity Commission (EEOC) intervened in an ongoing class action but essentially sat out of the litigation. That is, until the federal court denied class certification, at which point the EEOC took the reins. The EEOC ultimately settled this case on behalf of the putative class.

Agencies also could look to class settlements for potential cases. Much has been written about the potential for class settlements to undercompensate and under-represent, and the tightening of certification rules should reduce the

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316. Indeed, the investment of resources may be a clearer signal than filing a complaint with an agency or seeking a whistleblower award. See generally Anthony J. Casey & Anthony Niblett, Noise Reduction: The Screening Value of Qui Tam, 91 WASH. U. L. REV. 1169 (2014).
317. Rule 23(c)(1)(A) directs courts to decide certification “at an early practicable time,” but at a minimum these decisions occur after plaintiffs’ preparation and filing of a complaint.
318. See supra note 315, at 318–24.
319. See supra note 314 and accompanying text.
321. Id. at *1–2.
322. Id.
325. See generally Alexandra D. Lahav, Symmetry and Class Action Litigation, 60 UCLA L. REV. 1494 (2013). Cy pres settlements have received particularly harsh treatment in the literature.
expected value of class litigation. If state attorneys general believe that Rule 23 is reducing the value of class settlements, then they might look to those settlements as triggers for public litigation. Under CAFA, state attorneys general are notified of class settlements involving their residents. States may respond to these notices by formally objecting to the settlement, but states also could respond with public suits of their own.

This is exactly what happened with respect to claims of false advertising and unfair competition against IntelliGender, the maker of a fetal gender prediction test. Pursuant to a class settlement, IntelliGender agreed to pay $10 to each class member who received an inaccurate gender prediction and to make a cy pres donation of $40,000 worth of product. Dissatisfied with the outcome, the California Attorney General brought suit on the same claims, and the Ninth Circuit held that the state could pursue civil penalties and injunctive relief on behalf of residents regardless of the class settlement. Similarly, despite a multibillion-dollar class settlement, New York and Massachusetts recently filed suit in New York state court seeking penalties from Volkswagen and its leaders for its emissions deception.

The foregoing suggestions relied on certification denials or settlements to signal public enforcement, but public enforcers also could respond with more generalized policies to identify suitable cases for public enforcement. State
enforcers might decide that the difficulty of bringing a private class action should be a factor in favor of exercising their enforcement discretion. For example, imagine that the federal courts made it more difficult to bring a particular type of class action—perhaps class actions alleging that “local managers’ discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact.” 336  State agencies might decide to target resources to claims of this type. Although agencies are often reluctant to publicize enforcement priorities, there is reason to suspect that public agencies consider the efficacy of private relief when making enforcement choices. 337 Indeed, it would not be at all surprising for a government enforcer to allocate public resources in light of private capabilities. 338

2. Private Attorney General Suits

The previous Section suggested that state enforcers could fill gaps created by restrictive interpretations of the Federal Rules. This analysis assumed that public resources were available or could be shifted among priorities. But public resources are scarce, and indeed, resource constraints were an animating purpose of the private-enforcement revolution. 339 Professors Gilles and Friedman suggested that states hire private firms on contingency to pursue similar goals without public resources. 340 Another option looks to private attorneys general. “Private attorney general” is a capacious and contested term. 341 I use it here to refer to a limited set of actions, exemplified by California’s Private Attorney General Act (PAGA), which comprises another potential response to federal procedural limits. 342

In 2003, the California legislature adopted PAGA to permit private enforcement of various provisions of the State’s labor law. 343 The private

337. For example, Urska Velikonja showed that the U.S. Securities and Exchange Commission (SEC) is particularly interested in types of enforcement cases that are difficult for private parties to win. See Urska Velikonja, Public Compensation for Private Harm: Evidence from the SEC’s Fair Fund Distributions, 67 STAN. L. REV. 331 (2015) (discussing an SEC role in cases against investment advisors, broker-dealers, and investment banks).
338. For a collection of sources (and a model of institutional design), see generally Clopton, Redundant Enforcement, supra note 315, at 314–17.
339. See, e.g., Clopton, Redundant Enforcement, supra note 315, at 315. For example, providing attorney fees or other incentives could encourage private enforcement even for negative-value claims. See, e.g., FARHANG, supra note 14, at 21–31; Margaret H. Lemos, Special Incentives to Sue, 95 MINN. L. REV. 782 (2011) (surveying mechanisms to encourage private enforcement).
341. See, e.g., Clopton, Redundant Enforcement, supra note 315, at 288 (collecting sources).
343. See 2003 Cal. Legis. Serv. 906 (S.B.796, § 2); CAL. LAB. CODE §§ 2698–2699.5.
attorney general basically stands in the shoes of the state enforcement agency. According to a State Senate Committee analysis: “Arguably, in a perfect world, there would be no need for the right to act as [private attorney general], yet the fact remains that due to continuing budgetary and staffing constraints, full, appropriate and adequate Labor Code enforcement is unrealizable if done solely by the Agency.” Under PAGA, employees supplement public enforcement by suing on behalf of current and former employees, and civil penalties may be distributed to aggrieved employees. Hundreds of reported cases have invoked PAGA seeking millions of dollars in recoveries.

Although a PAGA suit on behalf of employees sounds a lot like a class action, courts have consistently held that it is not treated as one. State and federal courts regularly permit PAGA actions on behalf of aggrieved employees without class certification. Moreover, the Ninth Circuit held that PAGA suits (like parens patriae actions) may not be removed under CAFA, thus insulating them from federal procedure more generally.

Responding to federal class action decisions, plaintiffs could file PAGA actions when class certification is denied or unlikely. Indeed, because a putative class representative could also be a PAGA plaintiff, plaintiffs could plead class and PAGA allegations in the alternative. For example, in 2011 Aladdin Zackaria filed a wage-and-hour suit on behalf of himself and current and former employees of none other than Wal-Mart. Zackaria pleaded his claims as both a class action and a PAGA suit. Wal-Mart opposed the motion for class certification, relying in large part on Wal-Mart v. Dukes. The district court agreed that class certification would be improper but permitted Zackaria to proceed with his PAGA suit.

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344. See CAL. LAB. CODE § 2699.
346. Section 2699(i) provides: “75 percent to the Labor and Workforce Development Agency for enforcement of labor laws . . . and . . . education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.” CAL. LAB. CODE § 2699(i) (West 2017).
347. Janet Alexander observed that PAGA recoveries underperform class actions where available. See Alexander, supra note 342, at 1237.
349. See Gallardo, 937 F. Supp. 2d at 1137 (collecting cases); Zackaria, 142 F. Supp. 3d at 954–55 (collecting cases).
350. See supra notes 298–311 and accompanying text.
351. See Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117 (9th Cir. 2014). Removability also might be unavailable due to lack of federal standing. See infra Part III.C.
352. See Zackaria, 142 F. Supp. 3d at 951.
353. Id. at 951–52.
maintain his PAGA claim.\textsuperscript{355} The case ultimately settled, and it is hard to imagine that Zackaria would have achieved the same recovery had he been left only with his individual claim following the denial of class certification.\textsuperscript{356}

PAGA is perhaps the clearest example of a private attorney general statute, but it is not the only one. \textit{Qui tam} provisions, common in false claims acts,\textsuperscript{357} are essentially PAGAs.\textsuperscript{358} The District of Columbia permits,\textsuperscript{359} and California used to permit,\textsuperscript{360} private attorney general enforcement for some consumer laws.\textsuperscript{361} These examples highlight the potential flexibility of private attorney general acts. Statutes can be targeted to issue areas, like California’s focus on labor and consumer law.\textsuperscript{362} They can operate as part of a more complex web of enforcement mechanisms: the federal False Claims Act and California’s PAGA permit the government to take over enforcement,\textsuperscript{363} and some of these statutes provide notice and intervention rights to private parties as well.\textsuperscript{364} When such statutes include provisions for statutory damages\textsuperscript{365} or civil penalties\textsuperscript{366} (as they


\textsuperscript{356} See supra note 326 (discussing settlement values).


\textsuperscript{358} See Alexander, supra note 342, at 1221–26.


\textsuperscript{361} So-called “citizen suit” provisions also exist and are common in environmental statutes. See Clopton, Redundant Enforcement, supra note 315, at 294 (collecting sources). But these provisions typically do not authorize compensatory damages, and they require certification when used in class actions.

\textsuperscript{362} See supra notes 342–347 and accompanying text.


\textsuperscript{364} See Clopton, Redundant Enforcement, supra note 315, at 304–05 (discussing notice and intervention in various statutory schemes that allow overlapping public and private enforcement). A legislature also could prioritize among enforcement types: the private attorney general statute could provide that such an action would only be permissible if superior alternatives were unavailable. \textit{Cf.} FED. R. CIV. P. 23(b)(3); see also supra note 312 (collecting cases in which courts found public enforcement superior to a class action).


often do\textsuperscript{367}), then they seemingly should face weaker remedial scrutiny than analogous suits seeking punitive damages.\textsuperscript{368}

Despite recent federal court decisions cutting back on class actions, there has not been a boom in PAGAs across the country. Indeed, California has eliminated private attorney general enforcement of its consumer laws,\textsuperscript{369} and it added new limits on PAGA labor actions.\textsuperscript{370} Perhaps the infrequency of PAGAs shows a lack of imagination from policymakers, but more likely it reflects some combination of a lack of appetite for increased enforcement and some unease with this unusual procedural form.\textsuperscript{371}

To review, the Supreme Court’s class action jurisprudence has made it more difficult for private parties to maintain class actions and thus has undercut private enforcement as a regulatory tool. State courts need not follow their federal counterparts, but CAFA’s inclusion of even putative class actions make this at best an incomplete response.\textsuperscript{372} If state executives are worried about the effect that class action rules have on enforcement, they might consider allocating resources to cases that are denied certification or case types that are difficult to certify.\textsuperscript{373} States also could achieve similar effects through private attorney general acts.\textsuperscript{374} These acts will require legislative action, which to date has been in short supply, but they remain available for interested legislatures.

\textbf{B. Arbitration Substitutes}

A second line of procedural jurisprudence relates to arbitration.\textsuperscript{375} Obvious responses to these decisions would take the form of congressional action or authorized federal rulemaking. Indeed, Congress has considered bills to amend the FAA,\textsuperscript{376} and the Consumer Financial Protection Bureau adopted a since-overturned rule regulating certain arbitration clauses in consumer contracts.\textsuperscript{377}

\footnotesize{\begin{itemize}
\item \textsuperscript{367} See, e.g., 31 U.S.C. § 3729 (2012) (False Claims Act); CAL. LAB. CODE § 2699(f) (West 2017) (PAGA).
\item \textsuperscript{368} See Phillip Morris USA v. Williams, 549 U.S. 346, 355 (2007) (holding that punitive damages award based on a desire to punish for harming nonparties violates due process); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568, 572 (1996) (same). For decisions declining to apply the punitive damages standards to statutory penalties, see, for example, Sony BMG Music Entm’t v. Tenenbaum, 719 F.3d 67 (1st Cir. 2013); Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899 (8th Cir. 2012); Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574 (6th Cir. 2007). There is much more to say about this idea, but this is not the place to say it.
\item \textsuperscript{369} See Morrison, supra note 360.
\item \textsuperscript{370} See supra note 346.
\item \textsuperscript{371} See infra Part IV.B (discussing the politics of enforcement).
\item \textsuperscript{372} See supra note 279.
\item \textsuperscript{373} See supra Part III.A.1.
\item \textsuperscript{374} See supra Part III.A.2.
\item \textsuperscript{375} See supra notes 52–58 and accompanying text.
\item \textsuperscript{376} See Alexander, supra note 342, at 1209–13 (citing proposed Arbitration Fairness Act, Fair Arbitration Act, and Consumer Mobile Fairness Act).
\item \textsuperscript{377} Arbitration Agreements, 81 Fed. Reg. 32,830 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040) [hereinafter “Final Rule”]. But see Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of the Rule Submitted by Bureau of Consumer Financial Protection
Of more interest here, public enforcement and private attorney general suits could counteract the Supreme Court’s arbitration decisions as well. 378

First, when government agencies and private attorneys general are not parties to arbitration agreements, 379 those agreements presumably do not constrain their actions. 380 Numerous state and federal courts (including the US Supreme Court 381 ) have permitted public enforcement in the face of private arbitration agreements, 382 and at least one federal court of appeals justified a pro-arbitration decision because the state attorney general could step in if private arbitration proved ineffective. 383 It seems unlikely that arbitration clauses would bar third parties from suing to enforce public laws that happen to touch on contractual relationships involving arbitration clauses. To take an admittedly absurd example, it would be strange if a court held that a defendant insulated itself from a Clean Air Act suit brought by the state attorney general or by an environmental nonprofit because the polluter included an arbitration clause in its contract with the smoke-stack manufacturer. 384 Similarly, when the National Consumer League (or the D.C. Attorney General) files a public-interest suit under local unfair-competition law, 385 the presence of arbitration language in the consumer contract seems beside the point. 386


378. Professors Gilles and Friedman also looked to public enforcement after Concepcion. See supra note 340.

379. See, e.g., Am. Express Co. v. Italian Colors, 133 S. Ct. 2304, 2309 (2013) (“[The FAA] reflects the overarching principle that arbitration is a matter of contract.”).

380. As explained below, for various reasons it seems that standing should not represent an insurmountable obstacle to these suits either. See infra Part III.C.

381. See EEOC v. Waffle House, 534 U.S. 279, 293–96 (2002) (holding that the EEOC was not required to arbitrate disability-discrimination claim despite arbitration clause, even when the EEOC sought victim-specific relief).

382. See, e.g., Rent-A-Center, Inc. v. Iowa Civil Rights Comm’n, 843 N.W.2d 727 (Iowa 2014) (holding that the state was not required to arbitrate employment claim despite private arbitration clause); Jadé, Inc. v. Simmons, 459 Mass. 88, 944 N.E.2d 143, 149 (Mass. 2011) (same); State ex rel. Hatch v. Cross Country Bank, Inc., 703 N.W.2d 562 (Minn. Ct. App. 2005) (same for invasion-of-privacy claims); People ex rel. Cuomo v. Coventry First LLC, 915 N.E.2d 616 (N.Y. 2009) (same for claims of fraud and anticompetitive conduct). The occasionally cited counterexample, Olde Disc. Corp. v. Tupman, found Delaware’s special administrative proceeding for securities claims to be an obstacle to the FAA, though this case involved an agency pursuing a remedy for a single claimant at the claimant’s behest. 1 F.3d 202 (3d Cir. 1993).


386. One potential limit on this strategy would be courts prudentially staying (or dismissing) public enforcement actions pending private arbitration. In a recent case, the Eastern District of Louisiana refused to preempt an EEOC lawsuit alleging transgender discrimination because of an underlying
The foregoing analysis focused on contract nonparties, but of course contractual employees are potential PAGA plaintiffs too. Recognizing this fact, some employers have expressly included PAGA among those claims to which arbitration agreements apply. However, California courts have found that PAGA waivers in arbitration clauses are unconscionable, and, contrary to current law on class waivers, the California Supreme Court and the Ninth Circuit have held that the FAA does not preempt these PAGA-unconscionability decisions. The Ninth Circuit reached this conclusion because PAGA actions are, essentially, public enforcement in private hands: “a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees . . . .” That said, the Supreme Court has not always cottoned to Ninth Circuit arbitration decisions, and other federal courts have begun to compel arbitration of qui tam suits. PAGA non-preemption thus may not last—though the aforementioned suits by contract nonparties are on stronger footing.

Assuming that state actors or private attorneys general were able to sue, their efforts could target cases involving arbitration clauses through various mechanisms. Public or private parties could scrutinize cases in which courts compel arbitration, particularly arbitration without access to class procedures. More aggressively, agencies could direct enforcement resources toward entities that include arbitration agreements in their contracts. Imagine that the Attorney General of Vermont were to conclude that arbitration unduly interfered with the State’s consumer laws. The AG could announce that, as a matter of prosecutorial discretion, the department will focus its investigative resources on entities that

arbitration clause, but (unusually) it stayed the public litigation pending the outcome of the private arbitration. See Broussard v. First Tower Loan, LLC, No. 15-CV-1161, 2016 WL 879995 (E.D. La. Mar. 8, 2016) (denying motion to reconsider order staying the EEOC’s claims); Broussard v. First Tower Loan, LLC, 135 F. Supp. 3d 540 (E.D. La. 2015); Broussard v. First Tower Loan, LLC, 150 F. Supp. 3d 709 (E.D. La. 2015) (granting motion to stay EEOC claims pending arbitration).

387. See, e.g., Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425 (9th Cir. 2015) (holding that the FAA did not preempt California rule barring waivers of representative PAGA claims); Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489, 503 (2011) (same); see also Alexander, supra note 342, at 1230 (making a similar observation).


389. See supra notes 57–58 (citing cases).

390. See Sakkab, 803 F.3d at 436; Brown, 197 Cal. App. 4th at 503.

391. Sakkab, 803 F.3d at 436; see also Alexander, supra note 342, at 1232–33 (making a similar observation).


394. See supra notes 379–386 and accompanying text (discussing these suits).

395. See supra notes 57–58 and accompanying text.
include arbitration clauses in consumer contracts because arbitration undermines deterrence as compared with private litigation.\textsuperscript{396}

Although the Supreme Court has been quick to find FAA preemption,\textsuperscript{397} there are reasons to think that the FAA may not preempt this policy. For one thing, the Supreme Court has said that the “principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.”\textsuperscript{398} Nothing about this policy would have any effect on the enforceability of arbitration agreements according to their terms.\textsuperscript{399} In other places, the Supreme Court has explained the FAA’s purpose was “to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.”\textsuperscript{400} Permitting public enforcement has no bearing on judicial hostility, nor would public enforcement affect arbitration’s equal legal footing.\textsuperscript{401} In addition, prosecutorial discretion is an area of strong deference to executive actors, so the burden on the preemption argument would be quite high.\textsuperscript{402} And, it is not as if a hypothetical state attorney general would announce a policy of disfavoring arbitration for arbitration’s sake—the proposed policy aims at ineffective private enforcement.\textsuperscript{403} Indeed, if the true culprit were the waiver of aggregate procedures,\textsuperscript{404} then this policy could apply to class action waivers without accompanying arbitration clauses as well.\textsuperscript{405}


\textsuperscript{397} See supra notes 55, 57 (citing cases).

\textsuperscript{398} AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (internal quotation marks omitted).

\textsuperscript{399} Again, a state would not be a contract party. See supra notes 379–386 and accompanying text.


\textsuperscript{401} The Supreme Court also has been wary of state contract doctrines that disfavor arbitration as applied. See \textit{Concepcion}, 563 U.S. at 341 (“[T]he inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.”). But notably its examples were doctrines applied to proceedings between parties to the arbitration clause—there was no discussion of proceedings involving a contract nonparty. See \textit{id.} (discussing this case and \textit{Perry v. Thomas}, 482 U.S. 483 (1987)).

\textsuperscript{402} See, e.g., Bond v. United States, 134 S. Ct. 2077, 2092–93 (2014) (“[W]e have traditionally viewed the exercise of state officials’ prosecutorial discretion as a valuable feature of our constitutional system . . . . Prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State.”).


\textsuperscript{404} See supra notes 57–58 and accompanying text.

\textsuperscript{405} Interestingly, the Sixth Circuit held that Fair Labor Standards Act collective-action waivers are unenforceable unless they come with an arbitration agreement. \textit{Killion v. KeHE Distrib., LLC}, 761
There is little evidence of any agency formally adopting such a policy targeting arbitration, though agencies often remain opaque with respect to enforcement discretion. \(^{406}\) That said, state and federal enforcement agencies have not been quiet with respect to arbitration. The EEOC issued the following instructions regarding potential enforcement suits:

Charges should be taken and processed in conformity with priority charge processing procedures regardless of whether the charging party has agreed to arbitrate employment disputes. Field offices are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The [EEOC] will process a charge and bring suit, in appropriate cases, notwithstanding the charging party’s agreement to arbitrate. \(^{407}\)

Consistent with these instructions, \(^{408}\) the EEOC routinely litigates against the backdrop of arbitration clauses. \(^{409}\) At the same time, the Consumer Financial Protection Bureau (CFPB) has repeatedly expressed concern about arbitration in consumer disputes; \(^{410}\) the Minnesota Attorney General sued the National Arbitration Foundation over its consumer arbitrations; \(^{411}\) and public enforcement actions frequently seek judicial relief where an analogous private action would

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\(^{406}\) It is possible that an agency would announce such a policy in order to deter the use of arbitration agreements, though I have not found it. Perhaps a better strategy would be a policy that led regulated parties to strongly suspect an emphasis on arbitration—thus achieving deterrence, but not so explicit as to prompt a successful preemption challenge.

\(^{407}\) EEOC, NOTICE NO. 915.002, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (1997).

\(^{408}\) See id.

\(^{409}\) See, e.g., EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (holding that the EEOC has authority to seek victim-specific relief in enforcement action despite an arbitration agreement between employee and employer); supra note 386 (discussing Broussard litigation). Indeed, the EEOC also has attempted to convince courts that making arbitration agreements a condition of employment is contrary to Title VII, independent of any separate discriminatory act. See Borg-Warner Protective Servs. Corp. v. EEOC, 245 F.3d 831 (D.C. Cir. 2001) (rejecting APA challenge to this EEOC policy). Courts have rejected this argument, see Oblix, Inc. v. Winieccki, 374 F.3d 488, 491 (7th Cir. 2004); EEOC v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994, 1002–04 (9th Cir. 2002) (collecting cases), but the EEOC has continued to press this view. See EEOC v. Doherty Enters., Inc., 126 F. Supp. 3d 1305 (S.D. Fla. 2015).

\(^{410}\) See Final Rule, supra note 377; CFPB STUDY, supra note 396.

be sent to arbitration. In none of these examples did a state or federal agency announce a policy of dedicating enforcement resources toward entities pushing arbitration. But these examples suggest that they might be inclined to do so—and it would raise concerns about the sincerity of their anti-arbitration rhetoric if they did not.

C. Standing Substitutes

Standing doctrine also seems to close courthouse doors, but substitute actions may work here as well. First, and again, state executive actions may be available. Standing seems to be no limit for traditional public enforcement, and federal courts seem more willing to find standing for public representational suits than for private ones. As noted above, many federal statutes authorize public enforcement, and many states have parens patriae authority. Consider again Spokeo v. Robins. In that case, Robins had difficulty establishing standing to sue under the Fair Credit Reporting Act (FCRA). But states may enforce the FCRA too, so if Robins lacks standing to sue Spokeo, government enforcers may step in.

Second, PAGAs are possible standing substitutes. Some federal courts have found “law enforcement standing” for PAGA claims, tracking the Supreme Court’s view of standing for qui tam suits. Even if federal courts found no standing, recall that many states deviate from federal standing law.

412. See supra notes 382, 409.
413. See supra notes 403 and accompanying text.
414. See supra notes 63–68 and accompanying text.
415. In addition to suggestions made here, no-standing claims are also possible in administrative tribunals and other non-Article III courts to the extent that such tribunals are available. See, e.g., Gardner v. FCC, 530 F.2d 1086, 1090 (D.C. Cir. 1976) (“[A]gencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court.”). These proceedings should not transgress the judicial-power limit either, see, e.g., Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856), because these cases are not justiciable cases or controversies. See generally Clifton, supra note 65.
417. See, e.g., Massachusetts v. EPA, 549 U.S. 497 (2007); Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982); see also Lemos, supra note 297, at 497, 502 (making a similar observation); Fallon, supra note 63, at 1081–82 (same).
418. See supra notes 297–304; see also, e.g., Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 120 (2d Cir. 2002) (“When determining whether a state has parens patriae standing under a federal statute, we ask if Congress intended to allow for such standing.”).
419. 136 S. Ct. 1540 (2017); see supra notes 66–68 and accompanying text.
420. Id.
423. See, e.g., Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000). In these cases, a PAGA plaintiff may proceed even if she lacked a personal injury-in-fact.
424. See supra Part II.B.
PAGA actions thus can be maintained in state court even if a federal court found no standing.\textsuperscript{425}

D. International Law Substitutes

Substitute actions also could pursue international law claims.\textsuperscript{426} Many putative ATS claims could be the subjects of public actions.

Following \textit{Kiobel}, scholars focused on the prospect of private plaintiffs bringing state law suits in failed ATS cases.\textsuperscript{427} Public plaintiffs could take the same advice,\textsuperscript{428} and presumably state legislatures could create PAGAs for these claims as well.\textsuperscript{429}

A similar suggestion applies to international claims based on US statutes. Not only could state courts interpret state statutes more broadly than parallel federal statutes,\textsuperscript{430} but the Supreme Court also has suggested that extraterritorial public suits under federal statutes might be permissible even when extraterritorial private suits would not be.\textsuperscript{431} Indeed, last term, the Supreme Court limited the extraterritorial effect of RICO for private but not public claims,\textsuperscript{432} despite the fact that the exact same substantive provision of RICO creates the private and public causes of action.\textsuperscript{433}


\textsuperscript{426} See supra notes 87–93 and accompanying text.


\textsuperscript{428} Criminal actions also might be available in these circumstances even if civil plaintiffs could not obtain personal jurisdiction. See \textit{infra} Part III.E.

\textsuperscript{429} See supra notes 342–346 and accompanying text.

\textsuperscript{430} The presumption against extraterritoriality is a tool of \textit{federal} statutory interpretation, see supra note 87, and states deviate significantly from the federal approach to these questions. See Caleb Nelson, \textit{State and Federal Models of the Interaction Between Statutes and Unwritten Law}, 80 U. Chi. L. REV. 657, 720–23 (2013).

\textsuperscript{431} In \textit{Empagran}, the Supreme Court suggested more solicitude to extraterritorial \textit{public} antitrust enforcement as compared with its private analog. F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 170–71 (2004); \textit{see also} Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247, 284 n.12 (2010) (Stevens, J., concurring in the judgment) (suggesting that the extraterritorial reach of securities law could depend on whether the SEC or a private party sued).

\textsuperscript{432} RJR Nabisco, Inc., v. European Cmty. 136 S. Ct. 2090 (2016) (applying the presumption against extraterritoriality to the treble-damages provision of RICO). This was the position of the United States as well. See Brief for the United States as Amicus Curiae Supporting Vacatur, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (No. 15-138), 2015 WL 9268185.

E. Personal Jurisdiction Substitutes

Turning finally to personal jurisdiction, note first that constitutional personal jurisdiction law applies with equal force to public actions and to state courts. Indeed, the seminal personal jurisdiction decision *International Shoe v. Washington* involved a challenge to a government suit in a state court. For this reason, the above-proposed substitute suits may not be viable responses to personal jurisdiction law.

Interestingly (and perhaps troublingly), the Supreme Court’s personal jurisdiction cases might not constrain an important category of enforcement actions: criminal prosecutions. Many federal and state decisions have held that the Supreme Court’s minimum-contacts analysis is not applicable to criminal cases, and the United States Department of Justice (“DOJ”) has advanced this position in some criminal prosecutions. According to the DOJ in a recent case, “[T]here is no case that applies a minimum-contacts analysis in determining whether a criminal prosecution is arbitrary and fundamentally unfair under the Due Process Clause.” The relevant decisions do not appear to distinguish between Fifth (federal) and Fourteenth (state) Amendment due process rights, so state prosecutors could offer the same arguments to overcome due process barriers in state criminal prosecutions.

For better or worse, therefore, prosecutors could bring criminal actions where civil actions are unavailable—assuming, of course, that the standards for criminal liability are met. This suggestion might be particularly compelling in areas of corporate malfeasance, where criminal and civil penalties converge and law authorizes private restitution. Criminal prosecutions also might be relevant in international law cases for which personal jurisdiction has been

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434. *See supra* notes 77–81, 240 and accompanying text.
437. See, e.g., Opposition to Defendant Roger Darin’s Motion to Dismiss the Criminal Complaint, United States v. William Hayes, 118 F. Supp. 3d 620 (S.D.N.Y. 2015) (No. 12 MJ 3229) (motion denied).
438. *Id.* at 17.
439. The mechanism is slightly more complicated. Criminal trials in absentia are not available, so the government instead would pursue an indictment and then seek extradition—or, perhaps cynically, accept the shadow of the indictment as the sanction. See Zachary D. Clopton, *Territoriality, Technology, and National Security*, 83 U. Chi. L. Rev. 45, 58–60 (2016) (discussing this effect in *Hijazi* and other cases).
440. *See generally* Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. Pa. L. Rev. 1385 (2011). For example, DOJ has obtained billions of dollars in criminal restitution from corporate defendants, much of which has been returned to victims. *Id.* at 1396.
difficult to obtain.\footnote{441} I am unaware of evidence that prosecutors are selecting cases \textit{because} civil personal jurisdiction would be unavailable, but this strategy is possible.\footnote{442} Tracking the two categories just mentioned (corporate malfeasance and international law), the DOJ has recently pressed the argument about weaker nexus requirements for criminal prosecutions in cases involving the London Interbank Offered Rate (LIBOR) scandal\footnote{443} and Somali piracy.\footnote{444}

\textbf{F. State-Enforcement Assessment}

This Section has outlined the ways in which public enforcement can respond to the Supreme Court’s decisions on class actions, arbitration, standing, international law, and personal jurisdiction. Public enforcement substitutes are free from many of the constraints on state courts acting alone.\footnote{445} Public or private attorney general suits can eschew doctrines that push courts to deny class certification or compel arbitration.\footnote{446} Many of these suits also avoid the pull of federal court jurisdiction.\footnote{447} In this way, public enforcement may be particularly meaningful when private claims are subject to removal or compelled arbitration.

Federal action may limit state public enforcement, but the requisite federal action is not easy to come by. First, federal law could \textit{preempt} state-enforcement efforts. However, this would require Congress to overcome the presumption against preemption of state law\footnote{448} and disempower state actors from enforcing the preemptive federal law.\footnote{449} Federal-enforcement actions also could \textit{preclude} state enforcement by resolving claims or issues.\footnote{450} Here, the federal statute would have to permit such federal actions, the federal enforcer would have to

\footnotesize{\begin{itemize}
  \item[441.] Moreover, although the standards are purportedly the same, it appears that courts are more willing to overcome the presumption against extraterritoriality for criminal cases than civil ones. \textit{See} Zachary D. Clopton, Bowman \textit{Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australia Bank}, 67 N.Y.U. ANN. SURV. AM. L. 137, 166–72 (2011).
  \item[443.] \textit{See supra} note 438 and accompanying text (discussing Hayes).
  \item[444.] \textit{See} United States v. Ali, 718 F.3d 929 (D.C. Cir. 2013).
  \item[445.] \textit{See supra} Part III.
  \item[446.] \textit{See supra} Parts III.A–B.
  \item[447.] \textit{See}, e.g., \textit{supra} notes 307–309 and accompanying text (discussing \textit{parens patriae} suits and CAFA); \textit{supra} note 351 and accompanying text (discussing PAGA and CAFA); \textit{supra} notes 422–425 and accompanying text (discussing PAGA and standing); \textit{supra} note 438 and accompanying text (discussing state criminal prosecutions).
  \item[448.] \textit{See}, e.g., Wyeth v. Levine, 129 S. Ct. 1187, 1194–95 (2009); N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 155–58 (1917) (Brandeis, J., dissenting). This is especially significant in the context of state police powers. \textit{See}, e.g., Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (internal quotation marks omitted) ("In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress.").
  \item[449.] This means excluding states as authorized enforcers, \textit{see}, e.g., Lemos, \textit{supra} note 296, at 708–11 (collecting examples), and as \textit{parens patriae} representatives, \textit{see}, e.g., Lemos, \textit{supra} note 297, at 495–97. The \textit{Arizona} decision may be the exception that proves the rule, given the unusual nature of the federal immigration power. \textit{See} 132 S. Ct. 2492.
  \item[450.] \textit{See} \textit{RESTATEMENT (SECOND) OF JUDGMENTS} §§ 13–29 (AM. LAW INST. 1982).
\end{itemize}
initiate and resolve the claim, and a court would have to stamp the judgment. In other words, multiple branches of the federal government would need to make concerted efforts for either preemption or preclusion to attach.

But even if public suits survive this federal gauntlet, public enforcement may not substitute perfectly for lost private suits. For one thing, public actions are imperfect substitutes when viewed through the lens of court access. Public actions might aspire to substitute for private-enforcement deterrence, but if court access matters regardless of the outcome, then public enforcement must be judged on the process it provides to represented parties. For some claims, it may be that government representation is never a meaningful substitute for an individual day in court. Compensation is subject to similar concern—even if public enforcers compensate victims, the compensation may not be sufficient.

There are also formal and functional constraints on state enforcement. Formally, statutes authorizing public enforcement do not always offer the same remedies that are available in private suits. Geography also may formally constrain state enforcement in a way that would not apply to a nationwide class action.

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451. See Clopton, Redundant Enforcement, supra note 315, at 302, 305 (collecting examples of statutes allowing and disallowing intervention or preclusion).
452. See supra notes 448–451 and accompanying text. And, if these conditions were to obtain, that would be consistent with the constitutional structure. See U.S. CONST. art. VI, cl. 2.
453. This Article has suggested that enforcement and court access run together, but that will not always be the case. See generally David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 VA. L. REV. 1871 (2002).
455. See, e.g., Lemos, supra note 297, at 531–42.
456. Whether class actions—or even individual litigation as currently practiced—constitute a meaningful day in court is a topic for another day. Cf. Resnik, supra note 16. But it is far from obvious that a class action disposed of at summary judgment meets that standard.
457. See, e.g., Adam S. Zimmerman, Distributing Justice, 86 N.Y.U. L. REV. 500 (2011) (discussing public compensation from various federal agencies); Velikonja, supra note 337, at 333 (noting that the SEC has distributed billions of dollars to investors following public-enforcement actions under the Fair Funds program). Importantly, though, we should measure compensation against the baseline of private suits.
458. See, e.g., Clopton, Redundant Enforcement, supra note 315, at 303–04 (collecting examples). For example, as noted above, the California Attorney General could not pursue compensatory relief against IntelliGender. See supra note 334.
459. Parens patriae suits, for example, are predicated on the relationship between the state and its citizens—it would make less sense for Vermont to sue on behalf of Californians than for a Vermont plaintiff to propose a nationwide class definition. Coordinated multistate litigation has been used in public enforcement, see, e.g., Clopton, Redundant Enforcement, supra note 315, at 288 (collecting sources and critics), but presumably that arrangement adds complexity and cost.
Functionally, one substantial limit on state enforcement comes from public resources, or lack thereof. Traditional public enforcement is expensive. It is unrealistic to assume that government agencies have the capacity to bring every enforcement case. Indeed, lawmakers often authorized private enforcement in response to the insufficiency of public enforcement, so it is unsurprising that public enforcement is not a perfect substitute.

Another functional limit on state enforcement is political will. Majoritarian pressures may make public enforcement less effective at protecting minority interests than private alternatives. We might also worry that public agencies will be soft on political allies. Public enforcement may be particularly problematic when state actors are defendants: substituting state enforcement might systematically undermine attempts to hold state actors accountable. Indeed, following the weakening of private remedies for police misconduct, Congress concluded that the federal government needed the ability to enjoin unconstitutional police practices in the states, and it provided the DOJ with that power in 42 U.S.C. § 14141. Section 14141, however, may be a cautionary tale for public enforcement: a lack of resources and political will has hampered the DOJ’s effective use of that statute.

Notably, these formal and functional limits are, in a sense, self-imposed. If a state wanted to use public enforcement to respond to the Supreme Court’s procedural retrenchment, it could authorize, fund, and monitor a robust public-enforcement program. This study thus provides a roadmap for public enforcers, as well as a rubric against which they can be evaluated. PAGAs also may represent an antidote to problems of resources and executive priorities. PAGAs are uncommon today and, where they exist, they are remedially limited. But this too could be corrected in the states.

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460. See, e.g., Burbank et al., supra note 4; Clopton, Redundant Enforcement, supra note 315.
461. See, e.g., Farihang, supra note 14.
463. See, e.g., Clopton, Redundant Enforcement, supra note 315, at 323.
467. For example, the EEOC and CFPB have been critical of the Supreme Court’s arbitration jurisprudence, and they have responded in ways explained above. See supra notes 406–412 and accompanying text. One could imagine in-the-weeds investigations of public enforcement operations as well as big data studies of enforcement decisions in response to the background legal landscape.
468. See supra notes 342–363.
In sum, state enforcement in practice may represent far less than a perfect substitute for private enforcement. But just as with state courts, it is important to acknowledge that its limits are not the product of the Supreme Court alone.\textsuperscript{469}

IV.
THE POLITICS OF PROCEDURE

Many of the criticisms of the Roberts Court’s procedural decisions boil down to a concern that the Court is laundering substantive policymaking through procedure.\textsuperscript{470} True enough, but we have long since recognized that the Supreme Court is a political actor,\textsuperscript{471} and procedure is part of the iterative process of politics.\textsuperscript{472} While this Article cannot tell us whether the Supreme Court’s procedural decisions were right or wrong, we might be able to get normative traction by considering the politics of procedure and the responses to it.

A. Reasons for Optimism

Straightforwardly, critics of \textit{Twombly} and \textit{Iqbal}, or \textit{Wal-Mart v. Dukes}, might revel in state court rejection or state-enforcement substitution.\textsuperscript{473} And they might use this Article to agitate for more state intervention. Moreover, by documenting state court and state-enforcement alternatives, this Article offers some reasons for optimism about procedural federalism generally.

Part II of this Article reviewed the ways that state courts have exercised judicial federalism. Federalism is valuable (in part) because it can generate experimentation and diversification—states as “laboratories of democracy.”\textsuperscript{474} But there is some concern in the literature that states do not in fact experiment with policy.\textsuperscript{475} Civil procedure has long been an area of significant state

\textsuperscript{469}. See supra Part II.E.
\textsuperscript{470}. See supra Part I.
\textsuperscript{471}. See, e.g., Richard A. Posner, \textit{Foreword: A Political Court}, 119 HARV. L. REV. 31 (2005) (characterizing the Supreme Court as a “political organ”). Then-Judge Posner focused on the Court’s constitutional docket, but much of his analysis applies equally outside of it.
\textsuperscript{472}. After all, “procedure is power.” Stephen B. Burbank, \textit{The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study}, 75 NOTRE DAME L. REV. 1291, 1292 (2000). Saying that these decisions are part of a political process is not pejorative. Politics is but one way to resolve policy questions.
\textsuperscript{473}. After all, this is politics all the way down.
\textsuperscript{474}. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). See generally Heather K. Gerken, \textit{Foreword: Federalism All the Way Down}, 124 HARV. L. REV. 4 (2010) (offering a “nationalist” account of federalism); Larry Kramer, \textit{Understanding Federalism}, 47 VAND. L. REV. 1485 (1994) (offering a theory of “process federalism”).
autonomy, and this Article provides evidence that state courts, in practice, have used their authority to experiment with procedure.476

There is also some anecdotal evidence that procedural experimentation diffuses among courts. In Twombly, Justice Stevens relied on state court experiences with pleading standards to argue against “plausibility pleading.”477 Many of the decisions in which state courts reject federal procedure cite to other states doing the same.478 States that voluntarily follow federal procedure are themselves examples of policy diffusion.479

Although this state experimentation is not systematic—there is not a central planner matching similar states and applying procedural treatments480—the hodgepodge of state procedural choices documented in Part II may generate interesting data. Consider, for one example, the intersection among state standards for pleading and summary judgment.481

476. See supra Part II. This has not always been true. For example, some framers of the Federal Rules hoped their document would be a focal point for state procedure, see Charles Alan Wright, Procedural Reform in the States, 24 F.R.D. 85 (1959), while the Conformity Act before that told federal courts to track state procedure. See 4 WRIGHT & MILLER, supra note 168, § 1002.


478. See supra Part II.A (collecting cases).

479. See supra Part II.A (collecting cases).

480. See, e.g., Koleman S. Strumpf, Does Government Decentralization Increase Policy Innovation?, 4 J. PUB. ECON. THEORY 207 (2002) (using game theory to model different modes of experimentation under which the central government cannot require particular policy experiments in particular sub-units).

481. For citations, see infra Appendix 1–2. Again, “rejecting Celotex” means rejecting it in whole or in part. See supra note 147 and accompanying text.
Table C—Celotex & Pleading Standards

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These interactions do not imply any particular normative conclusion, but they suggest that state policy choices on pleading and summary judgment are sufficiently diverse to allow for fruitful investigation. Or, note that among the fourteen states in which courts cited approvingly to Scott v. Harris on summary judgment, the proportion of Celotex to non-Celotex states is roughly the same as the proportion among all states. 483 The empirics of Twombly and Iqbal may be uncertain, 484 but that does not mean that procedural data are never meaningful. 485 If such data are meaningful, only a political process can translate that meaning into policy.

482. I have put Texas in parentheses to indicate the split among Texas courts—so one could study a jurisdiction rejecting Celotex and applying plausibility by looking at a subset of Texas courts. See supra note 127 (discussing split in Texas authority).


484. See supra note 26.

485. See, e.g., Jonah B. Gelbach, Can We Learn Anything About Pleading Changes from Existing Data?, 44 INT’L REV. L. ECON. 72, 72 (2015) (“[Civil procedure] researchers should not let the perfect be the enemy of the good: even data protocols that are less than perfectly designed may be broadly useful.”).
Turning to state enforcement, Part III demonstrated that state executives participate in policymaking through the exercise of their enforcement discretion. Indeed, this Article demonstrates that public enforcement has the capacity to respond precisely to the Supreme Court’s procedural decisions that have generated the most political outcry.\footnote{486} In this way, this Article also provides a doctrinal template for public scrutiny of state-enforcement choices.\footnote{487}

Theoretically, there are reasons that public-enforcement substitutes might be an auspicious development. Public enforcement can be coordinated across cases or issues.\footnote{488} It can select cases based on the interests of the polity rather than the highest possible damage award or attorney fee.\footnote{489} It might be easier to name and shame the attorney general for underenforcement than to vote out a legislator for sub-optimally incentivizing private suits.\footnote{490} And I have noted throughout this Article examples of courts concluding that public enforcement is not just a substitute but an improvement.\footnote{491} They could be right.

\section*{B. Reasons for Concern}

Even for those troubled by the Supreme Court’s recent procedural retrenchment (and encouraged by the responses documented above), this paper should not be read as an entirely happy story. The state-level developments described in this paper are necessarily limited, and they raise new issues that are not altogether encouraging.

First, as noted above, many factors constrain state procedure and public enforcement. Federal jurisdiction, removal, and preemption blunt the effects of state court decisions.\footnote{492} This is especially significant for the private enforcement of federal statutory rights.\footnote{493} Public suits can dodge some of these limits, but resources, political will, and remedial options may hold back robust public enforcement.\footnote{494} These limitations suggest that large swaths of cases are immune

\footnotesize
\begin{enumerate}
\item \footnote{486}{See supra Part III.}
\item \footnote{487}{Id.}
\item \footnote{488}{See, e.g., Clopton, supra note 462, (discussing this argument and collecting sources).}
\item \footnote{489}{See id.}
\item \footnote{490}{Zachary Price offered a similar structural account of the politics of enforcement discretion: “In an era of partisan polarization and legislative gridlock, Presidents often cannot count on Congress to develop legislative solutions to perceived problems, or even to negotiate over such solutions in good faith. Nevertheless, the public increasingly holds the President accountable for all failures of national policy.” Zachary S. Price, Enforcement Discretion and Executive Duty, 67 Vand. L. Rev. 671, 687 (2014).}
\item \footnote{491}{Recall that the Southern District of Georgia invited public enforcement against H & R Block when private enforcement was not available, see supra note 313 and accompanying text, and the Fifth Circuit suggested that a class waiver in an arbitration clause was less problematic because public enforcement was available. See supra note 383 and accompanying text. Many courts have held that public enforcement actions are “superior” to private class actions, and the legislature of Maryland codified this preference for public suits over class actions. See supra note 312.}
\item \footnote{492}{See supra Part II.E.}
\item \footnote{493}{See id.}
\item \footnote{494}{See supra Part III.F.}
\end{enumerate}
from some or all of the responses described in this Article. To put it affirmatively, critics of the Supreme Court’s procedural decision will need to demand significant legislative and executive action to make state responses fully effective.

Rethinking these findings through the frame of politics also raises questions of political economy. Turning first to state courts, we might expect that the procedural nature of these issues insulates them from pure politics. To engage with procedure, one needs to acquire technical expertise and professional experience. But these features of procedure also make procedural politics less transparent. If civil procedure scholars are not closely following the developments of state procedural law, then it is doubtful that state procedure is subject to anything close to intense public scrutiny. The technical nature of procedure further hinders transparency, and simultaneously gives it an aura of neutrality even if not warranted. Fragmenting procedure into fifty-plus jurisdictions further challenges effective monitoring.

In addition, the price of political influence in state courts is not high. Many states hold judicial elections, and although spending in these elections has increased, it is still relatively low compared to other races. As a result, a few interested parties could effectively influence state judicial politics. For example, in one high profile case, an Atlanta billionaire allegedly attempted to sway a judicial election in Montana—with an eye toward his pending business in the state supreme court—for the (relatively) low price of $100,000.

Judicial politics may not have a consistent ideological valence. It may be that, in some areas, trial lawyers or other traditionally liberal groups could be major players. But regardless of the policy outputs, there are democratic reasons to temper optimism for the politics of state procedure. There also are empirical reasons to think that campaign contributions can affect partisan judicial elections. For example, Joanna Shepherd showed empirically the intuitive result that “contributions from interest groups are associated with increases in the...
probability that judges will vote for the litigants favored by those interest groups. Professors Kang and Shepherd also showed that “every dollar of contributions from business groups is associated with increases in the probability that elected judges will decide for business litigants.”

Meanwhile, an understanding of public enforcement as law enforcement may shield public enforcement from scrutiny. And yet, public enforcement responses have the capacity to be even more political than court procedure. Indeed, it would be quite surprising if some partisan executive officials were not more political than federal judges with life tenure. Returning to an earlier observation, even if public enforcement had sufficient resources (a big if), we might worry that substituting public suits would systematically harm individuals with claims against government actors or defendants with political sway. And, again, the price is likely low. For example, according to the Utah State Legislature, the State’s attorney general appeared to have coordinated with payday lenders to exchange leniency in public enforcement for about $450,000 in undisclosed campaign contributions. In short, therefore, when the Supreme Court limits private enforcement, it undercuts a potential tool to check public enforcement, not to mention a tool to increase enforcement and deterrence overall.

CONCLUSION

In sum, although the Supreme Court has been the fulcrum of this Article’s analysis, it is Congress that often sets the terms of procedural politics. When Congress employs litigation as a tool of federal law enforcement, it necessarily delegates some authority to courts to set enforcement standards. When Congress provides concurrent jurisdiction over federal claims, it impliedly authorizes state judges to affect enforcement levels through procedure.

505. See supra Part III.F.
506. Id.
507. See supra notes 498–501 and accompanying text.
509. This is a tool that could be used by legislators or the public.
510. See supra note 454 and accompanying text.
511. See, e.g., FARHANG, supra note 14, at 49–54.
Congress taps state attorneys general, it invites state executives into the policymaking process.\textsuperscript{513}

This Article shows that state courts and enforcement agencies are important sites for political contestation. Thus, when Congress involves state judges or executives, it takes those judges and executives as it finds them—as political animals, or at least as political actors.

\textsuperscript{513} See supra notes 299–304 and accompanying text.
## Appendix 1

### Pleading Cases

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<td>Schmidt v. Indiana Ins. Co., 45 N.E.3d 781, 786 (Ind. 2015).</td>
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<td>Ridgerunner, LLC v. Meisinger, 297 P.3d 110, 114 (Wyo. 2013).</td>
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## Appendix 2
### Summary Judgment Cases

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<td>Cuze v. Univ. &amp; Cnty. Coll. Sys. of Nev., 172 P.3d 131 (Nev. 2007);</td>
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<td>Texas</td>
<td>Casso v. Brand, 776 S.W.2d 551 (Tex. 1989) (partially superseded by TEX. R. CIV. P. 166a(i)); see also Huckabee v. Time Warner Entm’t Co., L.P., 19 S.W.3d 413 (Tex. 2000) (criticizing <em>Liberty Lobby</em>).</td>
<td>Casso’s objections to <em>Celotex</em> were partially overruled by TEX. R. CIV. P. 166a(i), as amended in 1997.</td>
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