A Common Law Court in a Regulatory World

SAUL ZIPKIN*

In recent decisions across an array of civil procedure and federal courts law settings, the Supreme Court has rearticulated the terms of access to the federal courts. In these cases, addressing standing, pleading standards, class actions, and bankruptcy jurisdiction, the Court has relied on an account of the judicial role centered on resolving disputes that stem from personal harms, and has shaped procedural doctrine around claims that take that form. I argue that the Court's approach reflects a common law model of the federal courts, a model whose renewed prominence at the procedural stage is striking in an era increasingly characterized by legislative and regulatory frameworks. I contend that the Court's emphasis on a common law account presents a distinct model of a common law court in a regulatory world. The Article presents this model and its invocation in the recent cases, and discusses its implications for the enforcement of substantive law. In particular, I suggest that this approach shapes a judicial orientation apart from rather than alongside the political branches, minimizing the judicial role in facilitating the enforcement of the law.

TABLE OF CONTENTS

*Visiting Assistant Professor of Law, Florida State University College of Law. I began this project while I was a Visiting Assistant Professor of Law at The Ohio State University Moritz College of Law. I benefitted from presentations at the Junior Faculty Federal Courts Workshop, the Big Ten Untenured Law Faculty Conference, as well as workshops at Ohio State and Florida State. Thanks to Susan Bandes, Eric Berger, Amy Cohen, Sam Issacharoff, Henry Monaghan, Marc Spindelman, and Dan Tokaji for helpful comments and conversations. I am grateful for a Moritz summer research grant.

I. INTRODUCTION

The federal courts have long been called upon to take part in securing enforcement of the law.[1] A number of recurring hurdles complicate efforts to realize the goals motivating legal enactments, such as executive disinterest in or insufficient resources for enforcement, the cost of bringing claims exceeding the potential recovery, and plaintiffs lacking the information needed to support claims at the time of suit. In response to these obstacles, Congress has sought to promote enforcement of statutory schemes by regularly including private enforcement provisions in regulatory statutes. These provisions give private actors authority (and often financial incentives) to act as "private attorney generals" and bring suit in federal (or state) court to enforce the law, either in addition to or instead of enforcement by government actors.[2] The Federal Rules of Civil Procedure likewise advance the goal of enforcement by easing the bringing of claims in the federal courts, for example through provisions for discovery and for aggregation.[3]

The widespread reliance on these enforcement mechanisms reflects the fact that enacting laws does not ensure they will be implemented[4] and reveals an effort to make use of the federal courts in the enforcement project. In pursuing this approach, political actors position the courts as co-participants in the work of governing. For this process to work, however, the federal courts must be willing to play this role. An array of recent decisions indicate that the current Supreme Court is not committed to doing so.

In order to understand and assess the tension between the Court's recent rulings and legislative efforts to promote private enforcement through the

---

[1] The two primary roles traditionally attributed to the federal courts are the common law function of resolving disputes between individuals and saying what the Constitution means. *See* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72–76 (6th ed. 2009) (discussing "dispute resolution" and "law declaration" models of the federal courts); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973) (setting out "private rights" and "special function" models).

[2] *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010) (discussing private enforcement provisions).

[3] *See infra* notes 54–55 and accompanying text.

[4] *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1142 (2012) (noting that "our system of regulation is only as good as the enforcement mechanisms underlying it"); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 782 (2011) ("The practical meaning of federal law depends in large part on the choices legislators make about enforcement.").

courts, this Article examines the conception of the judicial role that the Supreme Court has relied upon in a series of civil procedure and federal courts law decisions over the past few years. A close review of the Court's opinions—across contexts of standing, pleading standards, class actions, and bankruptcy jurisdiction—reveals an idea of the fundamental institutional mission[5] of the federal courts as resolving claims stemming from common law or common law-like disputes presenting personal harms, and indicates that the Court is shaping procedure and justiciability doctrine around that account. This model, which I characterize as a common law model because it is structured around the resolution of common law-type claims, constitutes the basic vision of the federal courts the Court has used to guide its analysis where it has found interpretive space, whether in applying constitutional law or statutes or the Federal Rules of Civil Procedure. In short, when considering contested questions about access to and the operations of the federal courts, this common law model is the vision of the judicial role from which the Court's reasoning has proceeded.

This common law model reflects a traditional conception of litigation involving interpersonal or individual–state disputes, such as tort, contract, and property claims, in which a party seeks a remedy for a harm they have suffered.[6] The model envisions that type of personal harm (which nowadays need not stem from an actual common law claim) as the key to federal court access.[7] But this common law orientation, notwithstanding its historical pedigree, is in some tension with the contemporary world of legislation and administrative governing, a world that presents significant departures from the common law approach. Among them: the common law reflects an accretive process of law articulated by courts based on precedent, while statutes embody the directives of a governing authority;[8] the common law typically presents ex post frameworks responding to harms, whereas regulatory models often seek to

---

[5] By "institutional mission," I mean "an identifiable purpose or shared normative goal." Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 79 (Cornell W. Clayton & Howard Gillman eds., 1999).

[6] *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) (observing that "[i]n our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights").

[7] *See* Honig v. Doe, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting) (indicating that both standing and mootness doctrines "have equivalently deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition").

[8] *See* KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT 178 (2004) (suggesting that "political development in America shows a movement from prescriptive to positive lawmaking; that is, from finding the law, based on precedent, in the stylized manner of courts, to making the law, based on present circumstances, in the stylized manner of legislatures").

prevent harm ex ante as well;[9] and the common law tends to focus on the individual rights-holder (or duty-bearer),[10] while legislation can be pitched at the aggregate or societal level. As these differences indicate, the divide between these frameworks does not simply reflect the contents of particular doctrines but addresses the organizing logic of the legal system. Because the legislative model is premised on the efforts of political actors to achieve public ends through law, it aligns well with a judicial role that allows for facilitating the enforcement of the law, as opposed to a common law model centered on the remedy of individual harms.[11]

While American law has continued to make use of common law elements even as it has adopted statutory and administrative frameworks,[12] the Court's reliance on a common law model in the recent cases not only collides with the legislative provision for judicial involvement but also presents tensions surrounding the use of the common law framework itself. The common law encompasses an array of elements, including a distinct methodology, a certain domain of application, and the content of common law doctrines. These elements, which are interdependent under the traditional common law system, have diverged under current practice,[13] raising questions about the relationship of the common law to the federal courts today. In particular, we should consider whether a common law model should continue to guide the Court's analysis of

---

[9] *See, e.g.*, Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377–80 (2007) (discussing the FDA's ex ante model of regulation, and emphasizing that "[t]he key is that *both* ex ante and ex post review are essential parts of the regulatory model—sometimes operating in tandem, sometimes as substitutes").

[10] *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 13–14 (1921) (discussing the "extreme individualism" of the common law and noting that it "tries questions of the highest social import as mere private controversies between John Doe and Richard Roe").

[11] *Cf.* Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937–38 (1975) (sketching a roughly similar divide over the judicial role, distinguishing a Conflict Resolution model of the federal courts from a "Behavior Modification Model" which "sees the courts and civil process as a way of altering behavior by imposing costs on a person"). Scott's Behavior Modification Model, which "focuses on the defendant, not on the plaintiff," *id.* at 939, is ultimately a form of governing in light of its efforts to promote certain ends, and is somewhat analogous to the facilitational role of the federal courts I describe here.

[12] *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 425–26 (1987) ("One of the greatest ironies of modern administrative law—an area whose origins lay in a substantial repudiation of the common law—is its continuing reliance on common law categories."); Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 456 (1989) (book review) (noting that "[a]lthough the legislative component in contracts, torts, and property may have increased in recent years, the degree of judicial lawmaking surrounding nominally statutory areas of law has increased more than commensurately, and as a result, common law method flourishes as it has never before" (footnote omitted)).

[13] I detail this point *infra* Part IV.

questions of judicial access even as the common law plays a diminished role for other purposes.[14]

While the Court's shaping of judicial access by reference to an account of common law-type harms is familiar from cases involving constitutional and other claims against state actors, especially in standing jurisprudence,[15] the emphasis on this model in cases involving efforts by private actors to enforce the law against other private actors presents distinct concerns. The counter-majoritarian anxieties that accompany judicial oversight of state action have motivated an array of strategies to cabin judicial engagement and inhibit the courts from acting as a "Council of Revision."[16] These concerns differ markedly from the hesitations surrounding judicial participation alongside the political branches in the enforcement of regulatory schemes. The Court's account of the judicial role calls for an assessment specific to this context.

The common law orientation invoked by the Court in the recent cases thus spotlights crucial questions about the judicial role in the twenty-first century regulatory state. A common law court operating within a common law world differs markedly from a common law court acting in a legal landscape characterized by regulatory law and aggregate harms.[17] I contend that the Court's reliance on a common law model in response to claims involving the

---

[14] For an example of this tension, compare *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (Scalia, J., for the Court) ("'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment))), with *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (contending that previous decisions "chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms ('The judicial Power'; 'Cases'; 'Controversies') that have virtually no meaning except by reference to that tradition").

[15] *See, e.g.*, Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433 (1988) (arguing that "[r]ecent and still quite tentative innovations in the law of standing have started to push legal doctrine in the direction of what we may call a private-law model of standing" under which "a nineteenth century private right is a predicate for judicial intervention" and that "as a result, courts may not redress the systemic or probabilistic harms that Congress intended regulatory schemes to prevent").

[16] Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011) ("Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them."). I discuss this passage *infra* text accompanying notes 63–67. For a prominent early articulation of these issues, see Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961) (discussing "the wide area of choice open to the Court in deciding whether, when, and how much to adjudicate," in particular "the devices for avoiding adjudication").

[17] *See* HOWARD SCHWEBER, THE CREATION OF AMERICAN COMMON LAW, 1850–1880: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP 28 (2004) (observing that "to retain old doctrines in the face of different circumstances is, itself, a choice that changes the meaning and function of a rule or decision").

private enforcement of regulatory provisions[18] or addressing mass harms serves to delineate a distinct role for the federal courts today. Much as the Supreme Court labored in the twentieth century to structure the courts' relationship with administrative agencies,[19] and just as the development of constitutional rights by the Warren Court propelled reassessments of the judicial role in overseeing state action,[20] I argue that the recent decisions present the Court working to calibrate its stance toward the evolving forms of litigation of our era. By effectively demanding common law-type harms in order to access the federal courts, the Supreme Court fashions the federal court as a common law court in a regulatory world. This model is not anachronistic or confused but rather embodies an orientation that situates the federal courts apart from—and opposite to—the political branches rather than as a co-participant in the work of governing.

As this synopsis suggests, my aim here is primarily analytical, seeking to explain both the through-line connecting the recent dramatic rulings across civil procedure and federal courts settings as well as the ways the Court deploys the rules structuring itself as an institution as a means of calibrating not only its own role but in turn the broader operation of governing the American state. I accordingly evaluate these developments not from the standpoint of the outcomes of the individual cases or their doctrinal implications for civil procedure and federal courts law, but in terms of the vision of the judicial role the Court invokes and its relationship to the practice of governing. In doing so, I argue that the recurring indications of a common law court orientation speak to a distinct vision, one likely to shape future rulings.

I seek to call attention to the practical implications of this orientation as well. As noted, legislative attempts to promote the implementation of federal law through the courts reveal a persisting inclination that judicial participation

---

[18] Because I focus here on the relationship between the Court's procedural rulings and the government's efforts to secure enforcement of the law, I limit my discussion of private enforcement provisions to those in which the private enforcers are acting on behalf of the government in its sovereign capacity rather than remedying a proprietary injury suffered by the government, and therefore do not discuss the treatment of *qui tam* provisions. See *infra* note 217 for explanation of this distinction.

[19] *See generally* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007) (exploring evolving relationship between courts and agencies in the New Deal era); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011) (detailing the development of the appellate review model of administrative law in the early twentieth century).

[20] *See* Chayes, *supra* note 6 (examining the role of courts in light of the shifting public law litigation forms of the modern era); Monaghan, *supra* note 1, at 1363–64 (developing inquiry on "the conditions under which constitutional determinations should be made: who may obtain constitutional declarations and when"); Sarah Staszak, *Institutions, Rulemaking, and the Politics of Judicial Retrenchment*, 24 STUD. AM. POL. DEV. 168 (2010) (examining institutional retrenchment of the judiciary since the 1960s through history of the Federal Rules of Civil Procedure).

is crucial for the project of enforcing the law. But legislators (and commentators) have not adequately addressed the Court's vision of the federal courts' role—and the compatibility of that account with the project of implementing substantive law. As a result, before relying on private suits as a means of enforcing legislative schemes or proposing better ways for the federal courts to achieve the goals of the law, we should consider whether promoting the attainment of the ends of the law is treated by the Supreme Court as within the role of the federal courts, and think about what to do if the answer is no.

I begin in Part II with some background, presenting the recent cases as the latest manifestation of a recurring dynamic in which the federal courts calibrate procedural and justiciability practices to shape the judicial role in the work of American governing. The historical discussion is illustrative rather than comprehensive, with the aim of highlighting that the Court does not act in isolation and that it has regularly framed procedural doctrines in response to external political and societal developments. The Court's analogous project today is not unprecedented, and recognizing the historical parallels allows us to evaluate that project on its own terms.

I engage the Court's decisions in Part III, examining recent rulings on standing, pleading standards, class actions, and bankruptcy jurisdiction in order to extract the underlying account of the Court's institutional mission that serves to shape the outcomes of these cases. The cases indicate that the Court has relied on a claim of personal harm as the basis of access to the federal courts. This Part details the recurring emphasis on this model in the context of private actors advancing claims against other private actors, shaping a law of courts oriented around a common law-style model of personal harm.

Part IV addresses the relationship of the law of courts with practices of governing, focusing on the implications of the Court's developing approach for the enforcement of federal law. This Part explores the mechanisms and judicial treatment of private enforcement provisions before assessing the practical and structural implications threatened by the recent decisions and their motivating ideas. I contend that the privileging of common law-like claims shapes a preference for public enforcement mechanisms, and threatens to constrain the federal government's capacity to govern effectively in settings that do not yield common law-style claims.

In Part V, I address the Court's common law-based model of the role of the federal courts, assessing the meaning of this model in an era moving away from the common law on the substance of the law and to some extent at the level of method as well. I argue that the Court's recent decisions shape a model of a common law court in a regulatory world, a role that orients the federal courts apart from the political branches, rather than working alongside them in the practice of governing.

II. CIVIL LITIGATION AS A FORM OF GOVERNANCE

Throughout American history, civil litigation has served not only as a means of enforcing agreements and compensating those who are harmed, but also as a form of governance.[21] In this Part, I present an overview of the dynamics of governing through courts, focusing on how the federal courts have shaped this process. I emphasize the ways the law of courts (encompassing civil procedure and federal courts law) has shifted alongside and in response to substantive developments in the law. The basic point here is that federal and state courts have calibrated the form and extent of their participation in governing based on ideas of the judicial role.[22]

A. *Governing Through Courts*

The examination and explication of the American state has come to be a significant scholarly concern. Political scientists addressing issues of American political development, along with historians and legal scholars, have shown that while the United States diverges from the model of the powerful central state familiar from Europe, a strong state—increasingly, a strong central state—can be observed throughout American history.[23] Significantly, this governing authority has taken form in large part through law and the courts rather than through administration or bureaucracy.[24]

Historians have shown that in the pre-Civil War period the common law instantiated a framework of governance. By "governance," I refer to the efforts of state authority to achieve certain ends, whether through direct regulation, the provision of incentives for certain conduct, participation in the market, or

---

[21] *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001) (discussing American reliance on "adversarial legalism," meaning "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation").

[22] *Cf.* Susan Bandes, Erie *and the History of the One True Federalism*, 110 YALE L.J. 829, 829 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000) and emphasizing Purcell's reminder that "only recently have federal courts scholars begun to consider the extent to which their subject is the product of distinctive historical developments").

[23] *See* Desmond King & Robert C. Lieberman, *Ironies of State Building: A Comparative Perspective on the American State*, 61 WORLD POL. 547, 547 (2009) (noting that "[t]he American state is, in a variety of domains and through unexpected mechanisms, more potent as an authoritative rule maker, national standardizer, and manager of the nation's affairs than earlier accounts had generally concluded"). *See generally* BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA (2009) (discussing development of strong national state).

[24] *See* JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 211–78 (2007) (discussing why "courts and private institutions [have] played central roles in the kinds of social programs that comparable western nation-states perform through public administrative bureaucracies," *id.* at 214).

otherwise.[25] As examples, William Novak elucidates the practice of regulation pursuant to common law models based on an ideal of furthering "the people's welfare,"[26] Howard Schweber details the process by which courts developed the common law in the mid-nineteenth century as a means of promoting "a vision of technology-driven progress,"[27] and Jerry Mashaw notes the place of the courts in early forms of administration, such as common law actions against federal administrative officials, as well as the "commandeering" of state courts in the enforcement of early regulatory statutes.[28] Such analyses reveal the ways in which state and federal courts,[29] working largely through the common law and enforcing the police power of the state, served to shape regulation in nineteenth-century America through a distinctly judicial form.[30] In short, "[u]ntil the emergence of our patchwork schemes of federal regulation during the progressive era, only courts seemed to have the independence, geographic reach, and institutional resources to govern effectively on a statewide or national basis."[31]

The development of the modern administrative state accelerates after the Civil War and the Reconstruction period. This era marks the moment when governing authority begins to shift from the state and local level to the federal government, following the Civil War and Reconstruction and the greater intertwining of American society aided by developments like the telegraph and

---

[25] *See* Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 3 (2008) ("Governance may be defined as organized efforts to manage the course of events in a social system. Governance is about how people exercise power to achieve the ends they desire, so disputes about ends are tied inextricably to assessments of governance means."); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004) ("Governance signifies the range of activities, functions, and exercise of control by both public and private actors in the promotion of social, political, and economic ends.").

[26] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 1–2 (1996).

[27] *See* SCHWEBER, *supra* note 17, at 2.

[28] *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1321–33 (2006).

[29] Because the federal courts did not have federal question jurisdiction until 1875 (except for a short period in 1801–02), the judicial role in governance in the pre-Civil War period primarily involved state courts. *See* Kermit L. Hall, *The Courts, 1790–1920*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA, VOLUME II: THE LONG NINETEENTH CENTURY, 1789–1920, at 108 (Michael Grossberg & Christopher L. Tomlins eds., 2008) (noting that "during the nineteenth century the great body of day-to-day justice took place in the state trial and appellate courts, not the federal courts").

[30] Additional studies on this topic are discussed in Harry N. Scheiber, *Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America*, 107 YALE L.J. 823, 829–40 (1997) (reviewing NOVAK, *supra* note 26).

[31] Daniel R. Ernst, *Law and American Political Development, 1877–1938*, 26 REV. AM. HIST. 205, 209 (1998).

the railroad.[32] The establishment of the Interstate Commerce Commission in 1887 is traditionally seen as the first emergence of the modern administrative agencies, leading to the development of administrative law.[33] While this era does not reveal a single unified trajectory of events, encompassing various and sometimes competing changes,[34] the period presents a consistently increasing governance role for the federal courts.

Developments in these years yielded a "dramatic and controversial expansion of federal judicial power,"[35] in both explicit and more subtle ways. The formal sphere of federal court authority increased due to the grant of federal question jurisdiction in 1875, the expansion of removal the same year, and the introduction of the Circuit Courts of Appeals in 1891.[36] Commentators have highlighted the way these and related developments "redirect[ed] civil litigation involving national commercial interests out of state courts and into the federal judiciary."[37] Along with these migrations of decision-making authority, the treatment of a number of areas of substantive doctrine—including oversight of state and local government and regulation of commerce—further shifted governance capacities to the federal courts.[38] In short, the federal courts

---

[32] *See* NOVAK, *supra* note 26, at 239–48 (sketching these developments); ORREN & SKOWRONEK, *supra* note 8, at 179 (noting that "the post-Civil War Congress entered into the boldest and most contentious period of its history by producing a spate of legislation to expand national power at the expense of the states").

[33] *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 13 (2012) (noting that "there is no denying the conventional view, particularly in the legal academy, that the American national administrative state, and with it federal administrative law, emerged with the late nineteenth-century passage of the Interstate Commerce Act of 1887"); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189 (1986) (indicating that with the establishment of the Interstate Commerce Commission in 1887, "[t]he modern age of administrative government had begun").

[34] *See* BALOGH, *supra* note 23, at 14 (noting that "no period in America's history was *less* representative of America's past than the brief era that stretched from the end of Reconstruction in 1877 through the panic of 1893").

[35] Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 511 (2002).

[36] *See* William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, *in* CAMBRIDGE HISTORY, *supra* note 29, at 655–56 (discussing these developments).

[37] Gillman, *supra* note 35, at 517.

[38] To provide a few illustrative examples: Edward Purcell discusses the ways in which the Court's shifting construction of the term "state" "stretched the power of the federal judiciary over the actions of state and local governments." Edward A. Purcell Jr., *Some Horwitzian Themes in the Law and History of the Federal Courts*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY II: ESSAYS IN HONOR OF MORTON J. HORWITZ, 271, 279–81 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010) [hereinafter TRANSFORMATIONS]. William Novak explains that "[o]ne of the most important developments in the regulation of economic activity in the late nineteenth and early twentieth centuries, and a perfect example of the creative force of law in the construction of the American regulatory state, was the legal invention of the idea of the public utility." William J. Novak, *Law and the Social*

amassed authority in these years from both state courts and political and bureaucratic actors, acting through both public and private litigation, and assisted in this process by a national bar.[39] William Forbath details the work of courts

> to define and redefine the rules and standards governing much of social and economic life, leaving many areas of twentieth-century social policy and social provision that other nations were assigning to public bureaucracies in the hands of common law judges, attorneys, and private bureaucratic institutions, like employers and insurance companies.[40]

The role of federal courts continued to evolve in the twentieth century. Constitutional law plays a part here, with the so-called "Shift in Time" marking a move away from aggressive enforcement of the Commerce Clause in the New Deal era. This period likewise marks the emergence of the contemporary framework of administrative law, and the elaboration of the relationship between federal courts and administrative agencies. 1938 also presents the removal of the federal courts from the general common law field in *Erie* and (on the same day) the toe-dipping in the contemporary form of protection of individual rights in *Carolene Products*.[41] These moves were elements of the emerging focus for the federal courts in protecting individual rights and overseeing government action, a role that accelerated with the *Brown* decision and the Warren Court in the 1950s and 60s, and the evolution of administrative law through the 1970s. While these developments undoubtedly reflect changes in American governing and political culture more broadly, we see that the role of the courts in shifting forms of governance evolves as well, yielding different models of substantive law and new procedural practices.

Control of American Capitalism, 60 EMORY L.J. 377, 399 (2010). Michael Collins has highlighted the Court's relocating, in the 1896 Term in particular, of general law limitations on states to the Fourteenth Amendment's Due Process Clause, meaning that they could be invoked not only by out-of-staters proceeding in diversity, but by state residents bringing claims under federal question jurisdiction as well. *See* Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71 (2001).

[39] *See* Ernst, *supra* note 31, at 212–13; William E. Forbath, *Courting the State: An Essay for Morton Horwitz*, *in* TRANSFORMATIONS, *supra* note 38, at 70, 76 (making this point).

[40] Forbath, *supra* note 36, at 695.

[41] *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); United States v. Carolene Prods. Co., 304 U.S. 144 (1938). *See also* PURCELL, *supra* note 22, at 3 (arguing that "*Erie* was an integral part of [Justice Brandeis's] long-term effort to adapt the court system of the states and the nation to the demands of a new interstate society" and that the decision was intended "not only to terminate the 'federal general common law' but also to cabin more generally the lawmaking powers of the national courts in a variety of cognate areas").

B. *The Evolving Law of Courts*

As doctrines of substantive law have evolved, reflecting changing conceptions and practices of governing, the Court has reshaped rules and practices of procedure and justiciability to calibrate the judicial role alongside. I present here a suggestive, though certainly not exhaustive, narrative of moves in this area analogous to those I argue are at play in the cases today.

In the late nineteenth century, as Edward Purcell has shown, the federal courts reshaped elements of diversity jurisdiction in ways that allowed national corporations to be heard in federal, rather than state, court,[42] while limiting federal court availability for other types of suits.[43] The Court also developed in this era its use of the injunction, famously in labor disputes, as a means of organizing judicial oversight.[44] Further, the Court introduced the *Ex Parte Young* doctrine to allow for review of the constitutionality of state action consistent with state sovereign authority.[45] In these settings, we see the Court reworking jurisdictional and procedural forms alongside developments in both substantive law and the politics and society of the time with the effect of establishing a distinct role for the federal courts.[46]

---

[42] *See* Purcell, *supra* note 38, at 272–74 (explaining that in the early 1890s, "[a]cross a range of issues, [the Court] began consistently to broaden the scope of diversity jurisdiction, allowing corporate defendants ever-greater opportunities to remove actions to the federal courts," *id.* at 273).

[43] *See* Edward A. Purcell, Jr., Ex Parte Young *and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOL. L. REV. 931, 951 (2009) ("Believing that future federal-law challenges to regulatory efforts would likely bring a 'great flood of litigation' to the national courts, and recognizing that those suits would henceforth usually be brought under federal-question jurisdiction, the Court sought to offset anticipated docket growth by systematically and selectively narrowing the scope of diversity jurisdiction." (footnote omitted)).

[44] *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 59–97 (1991) (discussing practice of "Government by Injunction" and indicating that "[c]ourts cast aside customary limits on the purpose and scope of injunctions to accommodate the injunction's new role as a mode of lawmaking and law enforcement in industrial cities and regions," *id.* at 62); Purcell, *supra* note 43, at 945–47 (discussing the "expansion of federal equity jurisdiction" and use of injunctions in this era).

[45] *Ex Parte* Young, 209 U.S. 123 (1908); PURCELL, *supra* note 22, at 43 (discussing *Young* and explaining that "[b]y avoiding the 'well-pleaded complaint' rule, the decision allowed challengers to control the choice of forum and force states to defend their actions in the national courts," *id.* at 1456).

[46] *See* Purcell, *supra* note 43, at 967–68 (arguing that "the enduring achievement of the turn-of-the-century Court was not political or economic but institutional" as "it expanded the scope and content of federal law, strengthened the ability of the federal courts to enforce that law, and established more firmly the primacy of the federal judiciary in authoritatively construing a supreme national law").

This dynamic recurs in the events of the twentieth century. As Steven Winter[47] and Cass Sunstein have argued,[48] and Daniel Ho and Erica Ross have confirmed empirically,[49] the development of the modern doctrine of standing during the 1930s by Justices traditionally associated with liberal positions served as a means of keeping the more conservative federal courts away from New Deal legislation. Standing doctrine formally structures the role of the federal courts in elaborating a constitutional rule governing when the courts can oversee state action, thereby limiting the territory of judicial oversight.[50] These standing rules developed alongside early doctrines of administrative law, reflecting a broad effort to structure the judicial relationship to the work of governing in the emerging administrative state. As with the late-nineteenth-century developments, these doctrines worked to support the efforts of the national government, limiting to some extent intervention in the work of administrative agencies.

In this same period, the procedural practice of the federal courts was remodeled by non-judicial actors as well, with the enactment of the Rules Enabling Act of 1934 and the subsequent development of the Federal Rules of Civil Procedure.[51] Commentators have elucidated the ways in which the Federal Rules have altered—or allowed for the alteration of—the role of the federal courts, sparking a move from trials to dispositive interim rulings and granting judges enhanced equity powers, as well as empowering lawyers in the litigation process.[52] Paul Frymer suggests that: perhaps the most important event in the

---

[47] Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1441–57 (1988) (discussing Justice Brandeis and Justice Frankfurter "trying to develop doctrines of jurisdictional limitation").

[48] Sunstein, *supra* note 15, at 1437 (arguing that "courts favorably disposed toward the New Deal reformation developed doctrines of standing, ripeness, and reviewability largely to insulate agency decisions from judicial intervention").

[49] Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 596 (2010) (contending that "cases from the 1930s and early 1940s provide substantial support for [Winter's and Sunstein's] thesis" and that "[t]he contrast between the sharp conservative valence of the post-1950 period and the liberal valence of the New Deal era provides striking evidence for progressive use, if not invention, of the standing doctrine during the New Deal period").

[50] For discussion of the Court's application of standing doctrine in a context where judicial oversight has been treated as desirable, see Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179 (2011).

[51] 28 U.S.C. § 2072 (2006). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (detailing the history leading to the enactment of the Rules Enabling Act).

[52] *See* Ernst, *supra* note 31, at 211 (noting that "it took the thoroughgoing reforms of the Federal Rules of Civil Procedure (1938) to make today's 'managerial judges' a possibility"); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987) (arguing that "an historical examination of the evolution of the Federal Rules reveals that rules of equity prevailed over common law procedure").

courts' eventual capacity to conduct civil rights policy successfully was not the heralded 1938 footnote in *Carolene Products*[53] but the reforms to the federal rules of civil procedure that passed through Congress in the same year.[54] The Federal Rules facilitated the bringing of claims by individual litigants, easing the process of private enforcement of regulatory programs,[55] and further promoting judicial involvement in the work of governing.

Standing doctrine evolved in the 1970s and 80s into the form familiar today, largely in response to developments in substantive law, such as broadened constitutional rights and the advance of administrative law.[56] The heightened protection of rights in the Warren Court era led to claims seeking judicial oversight of numerous state and federal practices.[57] In particular, this era witnessed the growth in judicial monitoring of state institutions based on systemic constitutional violations such as school desegregation and prison conditions, through the use of structural injunctions and other remedies, a trend which sparked a corresponding backlash against the broad equitable powers of the federal courts.[58] Further in this period, the federal courts saw the rise of class action claims, following from the 1966 amendments to Rule 23, and the ensuing push-and-pull over the judicial role in this setting, eventually leading to the Class Action Fairness Act of 2005 and the broadening of diversity jurisdiction and the federal judicial sphere.[59]

---

[53] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[54] Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483, 486 (2003).

[55] *See* Staszak, *supra* note 20, at 176 ("During the civil rights era the rules [of civil procedure] were increasingly used as a tool for opening the door to more litigants and to a wider range of cases."); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989) ("Few disagree that the Federal Rules were intended by their drafters to open wide the courthouse doors.").

[56] *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); City of L.A. v. Lyons, 461 U.S. 95 (1983); Assoc. of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); *see also* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1182–98 (2009) (suggesting that the Court's development of standing in the 1970s, and movement away from the "standing for the public" model, reflected its discomfort with "the proliferation of 'public interest' suits," *id.* at 1198); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723–47 (1975) (discussing treatment of standing in administrative law).

[57] *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 1–2 (1984) (noting that "[t]he era of the public lawsuit began with *Brown v. Board of Education*").

[58] For contemporary discussions of these developments, see Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Chayes, *supra* note 6; Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

[59] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

The common thread across these developments is not so much an expanding as a reshaping judicial role, calibrating the work and domain of the federal courts to the challenges of the twentieth-century American state, providing for certain forms of monitoring of state and administrative action, and facilitating private enforcement of substantive law. From an institutional perspective, we see the Court continuing to adjust the rules of access and operation that define its institutional identity, employing the tools available to it in combination with an evolving vision of the judicial mission to reorient the position of the federal courts in relation to a changing legal and political environment. Each of these calibrations would in turn influence the development of the legal and political environment the courts confronted and thus provides the starting point for subsequent moves.

Much as the heightened prominence of standing requirements as a hurdle for those challenging state action in the late twentieth century served to limit somewhat and shape the settings in which federal courts would oversee the regulatory or legislative process, and the shifts in diversity jurisdiction in the late nineteenth century and the exit from federal general common law in the 1930s organized the federal courts' engagement with private disputes in a changing litigation environment in those eras, I contend that the recent developments present an analogous approach today.

III. A COMMON LAW COURT

In an array of recent decisions, the Supreme Court has reframed doctrines of justiciability and civil procedure. In this Part, I examine these decisions—across areas of standing, pleading standards, class actions, and bankruptcy jurisdiction—in order to grasp the Court's vision of the judicial role. I argue that these decisions reflect a conception of a personal claim as the trigger for federal court consideration. This common law-based model of the judicial role is shaping the development of the law of courts, and, in turn, practices of governing. In approaching contested questions based on a distinct account of the institutional identity of the federal courts and, pursuant to its vision of that identity, demanding a personal relationship to a common law or common law-like claim, I contend that the Court is forging a distinct procedural framework as a response to the evolving litigation settings of our time.

Though issues of justiciability and civil procedure are of course distinct, speaking respectively to the domain of the court's authority and the procedures the court uses in considering claims that are within its domain—and they are usually treated in separate courses in the law school curriculum—they overlap in shaping the terms on which a plaintiff can assert a claim. In contexts like pleading standards and class actions, where the effective ability to bring a claim may depend on procedural mechanisms, civil procedure rules structure judicial access just as standing rulings do. I thus treat them together here in discussing the evolving governance role of the federal courts.

A. *Standing and the Publicization of Private Claims*

Cases raising standing issues in the Supreme Court historically tend to involve a challenge to government action, with a state actor on the far side of the original "v."[60] This should not be surprising given the early treatment of standing as a means of protecting progressive legislation and regulation[61] and the development of the doctrine in the 1970s and 80s in response to changes in constitutional and administrative law.[62] In short, standing has traditionally functioned as a public law doctrine. Recent decisions push against that framing.

In *Arizona Christian School Tuition Organization (ACSTO) v. Winn*, the Court addressed a prototypical standing dispute: can taxpayers bring an Establishment Clause challenge to a state tax credit scheme that subsidizes scholarships to religious schools?[63] The opinion presents a straightforward (though contested)[64] standing analysis focused on the alleged harm and the doctrine of taxpayer standing under *Flast v. Cohen*.[65] Justice Kennedy adds this at the end of his opinion for the Court:

> Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. In 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. Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change.[66]

This paragraph is striking in the scope of its concern. Why does Justice Kennedy bring class actions into this discussion? What do they have to do with concerns about the Court acting "in the role of a Council of Revision"? Claims that cast the Court in that type of oversight role will often be appropriate for class treatment, as they tend to raise common questions and seek injunctive relief.[67] And even assuming that we are in "an era of frequent litigation [and]

---

[60] I discuss the exceptions of private enforcement of regulatory provisions and *qui tam* claims in Part IV.

[61] *See supra* notes 47–50 and accompanying text.

[62] *See supra* notes 56–58 and accompanying text.

[63] ACSTO v. Winn, 131 S. Ct. 1436, 1440–41 (2011).

[64] *See id.* at 1450 (Kagan, J., dissenting) (arguing that the Court's approach "has as little basis in principle as it has in our precedent").

[65] Flast v. Cohen, 392 U.S. 83 (1968).

[66] *Winn*, 131 S. Ct. at 1449.

[67] *See* FED. R. CIV. P. 23(b)(2) (providing that a class action may be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the

class actions," why exactly would that mean that "courts must be more careful to insist on the formal rules of standing"? Is there a connection between these seemingly different concerns? The Court's invocation of class action practice in this standing dispute suggests a convergence of these doctrines and indicates an inclination to merge the concerns of public law into private law contexts.

The Court's 2008 decision in *Sprint Communications v. APCC Services* highlights these developments.[68] The case stemmed from a statutory scheme that regulates the terms on which long distance communications carriers and payphone operators allocate the money spent on "dial-around" calls.[69] Because disputes regularly arise under this framework, and because the costs of bringing suit in federal court often exceed the amount at stake, "aggregators" like APCC Services have developed a business in which they are assigned claims by the rights-holding payphone operators and are paid a fee to prosecute those claims, and then return to the payphone operator any compensation they recover.[70] The question before the *Sprint* Court was whether an aggregator like APCC can claim an "injury in fact" that can be redressed by the federal court, as standing doctrine requires.[71] In a decision by Justice Breyer, and over a dissent by Chief Justice Roberts, the Court concluded that APCC, as an assignee of the payphone operators' claim, had standing to bring suit.

On *Winn*'s account of the purpose of standing rules, this dispute is perplexing. If standing is about separation of powers and keeping the courts within their assigned role[72] and away from acting as a Council of Revision,[73] what does the *Sprint* case have to do with any of that? This is not a case of a party nosing into things that aren't its business (it literally is APCC's business), and no party asks the Court to oversee the political branches—indeed, they are seeking to enforce federal law—so why should standing doctrine bar this claim? Chief Justice Roberts emphasizes in dissent that the problem is that plaintiff lacks a "personal stake" in the suit—it has "nothing to gain."[74] But this familiar standing concern appears here in a somewhat uncommon form, as APCC is not acting on an ideological basis. Rather, it runs a business litigating these claims

---

class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

[68] Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269 (2008).

[69] *See* 47 U.S.C. § 226 (2006); 47 C.F.R. § 64.1300 (2007); *Sprint*, 554 U.S at 271 (explaining the scheme).

[70] *See Sprint*, 554 U.S. at 271–72 (explaining this system).

[71] *See id.* at 273–74.

[72] *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009) (noting that standing requirements are "founded in concern about the proper—and properly limited—role of the courts in a democratic society" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (internal quotation marks omitted)).

[73] Justice Kennedy, the author of *Winn*, joined the Court's opinion in *Sprint*.

[74] *See Sprint*, 554 U.S. at 299, 300 (Roberts, C.J., dissenting) ("personal stake"); *id.* at 298 ("nothing to gain").

on behalf of the rights-holders,[75] and in doing so allows for the otherwise unviable enforcement of federal law.

That seems to be the problem. Chief Justice Roberts makes his concerns clear: "The right to sue is now the exact opposite of a personal claim—it is a marketable commodity."[76] And, "[l]egal claims, at least those brought in federal court, are not fungible commodities."[77] But legal claims apparently are commodities, so long as the buyer purchases both the claim and the remedy.[78] This suggests that it is the splitting of right and remedy that commoditizes the claim. On this account, that commoditization depersonalizes the claim and renders it unsuitable for resolution by the federal courts.

In debating APCC's ability to facilitate the enforcement of the statutory scheme, the *Sprint* opinions engage broader questions about what types of claims can call forth judicial involvement in enforcing statutory schemes. For the dissenters, the statutory scheme at issue here grants a right and a remedy to payphone operators: it is their claim. And if the rights-holders aren't going to enforce that claim themselves or give the whole thing to someone else to do so, the Court should not take part in enforcing it either. What is at stake for standing in *Sprint*, then, does concern separation of powers, but from a different angle than in *Winn*. The case asks when the federal courts can participate in promoting the enforcement of substantive law rather than when they can monitor and oversee the other branches. And, for four Justices, just as in the more familiar latter setting, the Court should not extend its role beyond the resolution of personal claims to engaging the work of the political branches in this way. As a result, in facilitating or refusing to accommodate private enforcement of federal law through standing and procedural doctrines, the Court shapes the practices of twenty-first-century governance.[79]

---

[75] APCC Services is a subsidiary of the American Public Communications Council, Inc., the national trade association for payphone service providers. AM. PUB. COMM. COUNCIL, INC., http://www.apcc.net (last visited Jan. 14, 2013).

[76] *Sprint*, 554 U.S. at 302 (Roberts, C.J., dissenting).

[77] *Id.*

[78] *Id.* at 306 ("Much of the majority's historical analysis focuses on the generic (and undisputed) point that common law and equity courts eventually permitted assignees to sue on their assigned claims. I would treat that point as settled as much by *stare decisis*, as by the historic practice of the King's Bench and Chancery." (citations omitted)).

[79] The Court last Term dismissed as improvidently granted a case that directly raised these standing issues, addressing whether a legislative grant of a statutory right (there involving the Real Estate Settlement Procedures Act of 1974) is sufficient to support standing when plaintiff did not allege an economic or other tangible harm from the violation of the statutory provision. *See* First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536, 2537 (2012). As emerged in oral argument, a fundamental question in the case surrounded the capacity of private plaintiffs to enforce the statutory scheme. *See, e.g.*, Transcript of Oral Argument at 29, First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (2012) (No. 10-708) (Scalia, J., questioning counsel for respondent) ("[T]here can be suits by—by the Federal Government or, I think, under this statute even by State—State attorneys general. The issue isn't whether Congress can achieve that result. It's whether they can achieve it by permitting private suits.").

Though the party seeking judicial involvement wins in *Sprint*, the divide revealed by the opinions calls attention to the role of standing doctrine in the sphere of claims against private actors and to the importance accorded the presence of a personal claim by a number of the Justices. This framing is familiar in the standing case law: what is striking is the work it is doing in a private actor context like that in *Sprint*. The issues at stake in this setting are mirrored by those raised in two recent areas of controversy: pleading standards and class action rules.

B. *Pleading Standards and Personal Knowledge*

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[80] and *Ashcroft v. Iqbal*[81] have received an enormous amount of attention. These decisions reworked the law of pleading standards,[82] abandoning the old generous approach to Rule 8 stemming from the 1957 decision in *Conley v. Gibson*,[83] and adopting a new "plausibility" standard whose precise contours remain in some dispute.[84] The Court's treatment of these issues aligns with the standing cases in effectively requiring some personal relationship to the underlying claims by demanding the plaintiff initially plead non-conclusory facts that in the court's view support a claim for relief.

In raising the requirements for access to the federal courts,[85] the heightened pleading standards function much like standing requirements. Just as plaintiffs must assert an "'injury in fact' that is concrete and particularized,"[86] so too must plaintiffs now plead non-conclusory facts that can state a claim in order to access the federal courts. Standing requirements and pleading standards thus combine to limit the types of claims that federal courts will consider.

While the *Twombly* decision announced the new pleading era, *Iqbal* not only took the *Twombly* framing a step further,[87] but read the new standard back

---

[80] 550 U.S. 544 (2007).

[81] 556 U.S. 662 (2009).

[82] Pleading standards are "the set of threshold requirements a plaintiff's case-initiating written filing must satisfy to obtain access to discovery and the other case development tools and procedures characteristic of U.S. litigation." Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 109 (2009).

[83] 355 U.S. 41, 47–48 (1957).

[84] *See, e.g.*, David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 121 (2010) (arguing that "*Iqbal* did not, and inevitably could not, answer a number of questions about how a court should adjudicate a motion to dismiss").

[85] *See* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 876 (2009) (viewing *Twombly* "not so much as a pleading decision but rather as a court access decision, one that addresses a general problem of institutional design: how best to prevent undesirable lawsuits from entering the court system").

[86] Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009).

[87] *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 851 (2010) (arguing that "a fair reading of

into *Twombly*.[88] The *Iqbal* decision articulates that standard as requiring plaintiffs to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[89] In developing this standard, the Court identifies two principles: "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"; and that the complaint must state "a plausible claim for relief" as judged by the reviewing court's "judicial experience and common sense."[90] Taken together, these principles reveal the *Iqbal* Court effectively telling would-be plaintiffs: "You just tell us the facts and we'll let you know if they state a claim."

Iqbal's divide between facts and legal conclusions recalls not only the traditional judge–jury divide, but also the nineteenth-century Field Code model of procedure, which likewise emphasized fact pleading.[91] In departing from the older common law pleading model,[92] the Field Code was intended to facilitate the enforcement of common law rights.[93] By framing the initial pleading requirements as fact-based, and giving federal judges the authority to dismiss claims based on an initial assessment of whether the pleaded facts really state a claim—potentially before any discovery[94]—the *Iqbal* Court sharply limits the ability of plaintiffs to advance claims based on facts outside of their personal knowledge.

In doing so, the Court complicates private enforcement of federal law, especially where the plaintiff is not directly involved in the underlying events, requiring as a practical matter a personal connection to the claim.[95] The

---

the majority opinion shows that *Iqbal*'s version of plausibility is significantly stricter than *Twombly*'s").

[88] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678–80 (2009).

[89] *Id.* at 678.

[90] *Id.* at 678–79.

[91] *See* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 328–31 (1988) (noting that "'[F]acts constituting a cause of action' was the pleading requirement" used in the Field Code, *id.* at 328, and discussing that standard (alteration in original) (quoting 1848 Field Code at § 120(2))).

[92] *See, e.g.*, Subrin, *supra* note 52, at 914–18 (outlining traditional common law procedure).

[93] *See* Subrin, *supra* note 91, at 327 ("The major goal of the Code was to expedite the predictable enforcement of discretely articulated rights."); *see also* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 97 (1989) ("Late nineteenth century jurists believed in a fundamental dichotomy between right and remedy and in the right-remedy-procedure hierarchy that held that procedure was instrumental to granting the ideal remedy, which, in turn, was instrumental to protecting legal rights rooted in natural law beliefs.").

[94] *See* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 53 (2010).

[95] *See* Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 1998 (2010) (observing that in complex litigation settings, plaintiffs make allegations about themselves, about other

plaintiffs in *Twombly* lacked such a personal connection to the claim, (aside from being "subscribers of local telephone and/or high speed internet services" in the relevant period), and seven members of the Court were disinclined to let them enforce the antitrust laws without something beyond "circumstantial evidence" of parallel conduct and allegations of conspiracy.[96] While Iqbal obviously did have a personal stake in his claim that he was "deprived of various constitutional protections while in federal custody,"[97] Justice Kennedy's opinion treats him almost as though he had no feud with Attorney General Ashcroft and FBI Director Mueller themselves, (as opposed to the other defendants),[98] and that Iqbal was basically just guessing as to the nature or extent of their involvement. The result in both cases turns in large part on the sense that plaintiffs lacked the type of personal involvement in the events generating the dispute that would give them access to non-conclusory facts. The decisions thus reshape pleading requirements by effectively demanding personal knowledge of the case.

It is fitting that *Conley* and *Twombly* form the two poles of the notice pleading era. The *Conley* standard emerged in the context of a claim for private enforcement of a regulatory scheme, an effort to secure compliance with the Railway Labor Act.[99] Notice pleading aligns well with private enforcement mechanisms, as plaintiffs enforcing federal statutory law would not necessarily have access to all the relevant facts as easily as they would in bringing traditional common law claims. Charles Clark, a leading force behind the Federal Rules, anticipated that procedure would function in much this way, as a means of promoting the enforcement of federal law.[100]

Twombly is the natural endpoint of this approach. Aside from having lost a small amount of money, Twombly has no real personal claim, but is instead seeking, along with the class he represents, to enforce the antitrust laws. This is the point at which the Court indicates the departure from the personal common law claim has gone far enough and draws the line. *Iqbal* is not a private enforcement claim but, as a *Bivens* claim,[101] asks the court to oversee official

---

members of the class, and about defendants, and arguing that allegations plaintiffs make about themselves may deserve a stronger presumption of truth).

[96] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553–54, 564–69 (2007).

[97] *Iqbal*, 556 U.S. at 666.

[98] *See id.* at 681–82.

[99] Conley v. Gibson, 355 U.S. 41, 42 (1957).

[100] *See* Subrin, *supra* note 52, at 966 (noting that "Clark perceived litigation as designed for something more than the purpose of merely resolving a dispute between two parties").

[101] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 388 (1971) (allowing tort action against government official for violation of constitutional rights). It is worth noting that the *Bivens* doctrine has become something of a constitutional dead end (and the *Bivens* action has been codified into statutory law), raising further difficulties for Iqbal's claim. *See, e.g.*, Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 4), *available at* http://ssrn.com/abstract=2042175.

action and enforce the Constitution against government officials.[102] Here, in a claim that stems from a common law model but now takes a form particular to the administrative state, the Court confirms the new *Twombly* approach and its expectation of a personal connection. This new pleading standard looks back to the pleading standards of an earlier era, demanding that plaintiffs plead facts that the Court can determine to state a claim, thereby privileging the types of common law claims that underlie that former pleading requirement.

The pleading standards decisions are thus a companion piece to the standing debate in *Sprint*. In both settings, the Court struggles over a model of procedural law calibrated to a world of common law claims in contrast to an approach that facilitates the vindication of statutory programs. Recent class action rulings present this tension as well.

C. *Class Actions and the Nature of Courts*

The rules governing class actions have been a source of drama in recent years. Like the standing and pleading standards decisions discussed above, the treatment of class actions reveals a court orienting its procedural law around the resolution of common law claims. I examine these cases here, first discussing the Court's emphasis on the idea that there is a fundamental nature of the federal courts that guides the analysis in these procedural disputes, and then observing the Court's privileging of the personal claim. The class action setting reveals the tensions between this approach and one that emphasizes the enforcement of substantive law.

1. *Fundamental Attributes of the Adjudicative Forum*

Two recent decisions address the availability of aggregation procedures in arbitration proceedings under the Federal Arbitration Act (FAA).[103] These decisions illuminate the divide on the Court surrounding the fit of class actions with a particular vision of the judicial role. In a 5–3 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* the Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."[104] The Court explained that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[105] This idea of "the nature of arbitration" appears to be doing much of the work in this decision.

---

[102] *See* David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 314 (2009) (discussing the personal liability suit as "an increasingly popular alternative to litigation under traditional administrative law").

[103] 9 U.S.C. § 2 (2006).

[104] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010) (emphasis removed).

[105] *Id.*

The Court reiterated this framing on an almost identical divide in *AT&T Mobility v. Concepcion*,[106] ruling that the FAA preempts California contract law providing that class action waivers are unconscionable and unenforceable in certain circumstances.[107] Writing for the Court, Justice Scalia emphasized that class arbitration differs dramatically from individual arbitration, and stated that class treatment "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[108] In dissent, Justice Breyer argued that the law at issue is simply state contract law applicable to any contract, and the characteristics of class arbitration are therefore irrelevant.[109]

This divide follows from the Court's recurring approach in these cases. The Court indicates that class treatment is so inconsistent with the idea of arbitration that it is appropriate only if the parties agree to it. In emphasizing the "fundamental attributes of arbitration"[110]—like *Stolt-Nielsen*'s invocation of the "nature of arbitration"[111]—the *Concepcion* opinion treats the FAA just as the Court's standing jurisprudence treats Article III of the Constitution: the Court identifies the inherent nature of the adjudicating institution, there based on a traditional account of "cases" and "controversies,"[112] and limits the forum to disputes fitting that ideal.

After detailing the ways that class treatment differs from individual litigation,[113] the *Concepcion* Court discounts one of the primary interests that underlie class action law and perhaps the primary driver of the 1966 amendments to Rule 23: the goal of making negative-value claims viable.[114] In

---

[106] *See* AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1740 (2011). Justice Sotomayor had recused herself in *Stolt-Nielsen*, but joined the dissent in *Concepcion*, and Justice Kagan replaced Justice Stevens in dissent. Justice Thomas concurred separately, but "reluctantly join[ed]" the Court's opinion. *Id.* at 1754 (Thomas, J., concurring).

[107] *Id.* at 1746–47 (discussing Discover Bank v. Superior Court, 113 P.3d 1100 (2005)).

[108] *Id.* at 1748.

[109] *Id.* at 1760 (Breyer, J., dissenting) ("Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision.").

[110] *Id.* at 1748.

[111] *Stolt-Nielsen*, 130 S. Ct. at 1774.

[112] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) ("Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.' We have always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.").

[113] *Concepcion*, 131 S. Ct. at 1750–52.

[114] *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 684 (1941) ("The type of injury which tends to affect simultaneously the interest of many people is also apt to involve immensely complex facts and intricate law, and redress for it is likely to involve expense totally disproportionate to any of the individual claims."); *see also infra* text accompanying note 173. *But see* Brown v. Plata, 131 S. Ct. 1910, 1952 (2011) (Scalia, J., dissenting) (advancing "the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable").

basing its ruling on the character of the forum, and minimizing the interest in vindication of the underlying rights,[115] a majority of the Court privileges a particular vision of the adjudicative role, one centered on an idealized model of individual litigation, over a vision focused on achievement of substantive ends. This focus on an essential institutional nature as the basis of decision—and that nature being individual litigation—shapes the treatment of all of these cases.

The fractured decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.* poses a similar question about the nature of the forum, there in the setting of the *Erie* doctrine.[116] Beneath the doctrinal complexities, the basic question of *Shady Grove* is whether the mechanism for aggregating claims is tied to the adjudicative setting or if it instead travels with the substantive right. This is of course the *Erie* inquiry, but this framing illuminates the larger issue here: what does identifying the class action as connected variously to the right or to the institution say about the judicial role? In its treatment of this issue, the *Shady Grove* opinion aligns with the other recent cases in privileging a common law dispute resolution role over that of facilitating the enforcement of substantive law.

Quick background: New York statutory law provides that payment of insurance benefits be made within thirty days, and specifies that overdue payments incur a two percent per month interest rate.[117] Shady Grove Orthopedic Associates had a claim against Allstate Insurance for failure to pay roughly $500 in statutory interest, and sought to bring the claim as a class action based on the allegation that "Allstate routinely refuses to pay interest on overdue benefits."[118] The complication was that the New York class action law indicates that, unless specifically provided, "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."[119] Because the claim therefore could not proceed as a class action in the New York courts, Shady Grove brought a diversity action in federal court, raising the question whether the proposed class could be certified under the Federal Rules of Civil Procedure or whether the New York class action bar applied in federal court as well.[120]

Applying the familiar *Erie* substance/procedure analysis, the case produced a 4–1–4 split: a plurality joining an opinion by Justice Scalia combined with Justice Stevens to conclude that the claim could proceed as a class action in federal court, while Justice Ginsburg argued in dissent that New York law as to the remedy should apply. The three opinions reveal relevantly different orientations to the interplay of class certification and (state) substantive law,

---

[115] *Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

[116] Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

[117] N.Y. INS. LAW § 5106(a) (McKinney 2006).

[118] *Shady Grove*, 130 S. Ct. at 1436–37.

[119] *Id.* at 1436 n.1 (quoting N.Y. C.P.L.R. 901(b) (McKinney 2006)).

[120] *Id.* at 1436.

and I address them here in some detail, though with as little immersion in the weeds of *Erie* as possible.[121]

Justice Scalia's reasoning is straightforward: for purposes of the *Erie* analysis, a Federal Rule of Civil Procedure is procedural if on its face it regulates procedure, whatever its effects on substance.[122] This approach echoes his treatment of the Free Exercise Clause in *Employment Division v. Smith*,[123] and the right to vote in *Crawford v. Marion County Election Board*[124]: real-world effects are not the point—the restriction is on a certain kind of rule. As a form of joinder, the class action is a procedural mechanism,[125] and that is all the Rules Enabling Act demands.[126] As such, the Federal Rule applies.

Justice Stevens reverses this inquiry, focusing on the state law at issue and whether it addresses "substantive rights and remedies."[127] On this account, if a federal procedural rule conflicts with state substantive rights and remedies that rule would not apply. Justice Stevens sets a high bar for this conclusion,[128] emphasizing that what the federal rule conflicts with must actually be a substantive right or remedy, and not just a state policy.[129] (I will return in a moment to this enigmatic distinction.) Because it was not sufficiently clear whether the New York law reflected a substantive right or remedy or merely a policy judgment, he concludes that the class action could proceed in federal court under Rule 23.[130] In framing the analysis to center on the state law rather than the federal rule, Justice Stevens departs from the facial assessment of the federal rule that Justice Scalia advances.

In contrast to both of these approaches, Justice Ginsburg addresses the interplay of the federal rule and the state law rather than either alone, and argues that the federal rules should be applied wherever possible to avoid conflict with state policy.[131] On her account, there need not be a conflict if we treat the federal class action as a purely procedural mechanism that only addresses claim aggregation and leaves state law to specify the remedy, thus allowing federal

---

[121] For discussion of the intricacies of *Erie* in this setting, see Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131 (2011).

[122] *Shady Grove*, 130 S. Ct. at 1442.

[123] 494 U.S. 872 (1990).

[124] 553 U.S. 181, 204–09 (2008) (Scalia, J., concurring in the judgment).

[125] *Shady Grove*, 130 S. Ct. at 1443.

[126] 28 U.S.C. § 2072(b) (2006) (providing that the rules of procedure "shall not abridge, enlarge or modify any substantive right").

[127] *Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring in part and concurring in the judgment).

[128] *Id.* at 1457 ("In my view, however, the bar for finding an Enabling Act problem is a high one.").

[129] *See id.*

[130] *Id.* at 1459–60.

[131] *Id.* at 1467–68 (Ginsburg, J., dissenting).

procedure and state substantive law to coexist.[132] This approach smuggles the state policy into the application of Rule 23, shaping a framework in which the federal rule would function differently in varying substantive settings, in contrast to Justice Scalia's "one-size-fits-all" model.[133]

Though Justice Ginsburg indicates that plaintiffs raising claims under New York law can bring class actions seeking declaratory or injunctive relief or actual damages,[134] there will often be no reason to go to the trouble of trying to certify a class without the possibility of aggregating the statutory remedy. We can therefore read her opinion as a subtle means of barring this class action without explicitly saying so. Accordingly, while Justice Ginsburg presents a procedural account of class actions as a means of aggregating claims without inherent remedial implications, her treatment of the state class action law as a significant practical constraint reveals a more substantive account of the class mechanism.

The Justices' division over the application of *Erie* highlights the central divide in the case: to what extent should federal courts treat class action law as a matter of substance, rather than procedure? Justice Stevens is willing to do so, but is not convinced in this case, while Justice Ginsburg applies the New York law as a substantive limitation on statutory penalties. Both of these approaches differ from Justice Scalia's emphatically procedural account of class actions. Indeed, Justice Scalia declines to say "whether a state law that limits the remedies available in an existing class action would conflict with Rule 23,"[135] suggesting that rules pertaining to aggregation may be inherently procedural, however they are framed.

Justice Stevens usefully presents this question in drawing a line between substantive rights and remedies, on the one hand, and state policy on the other. This framing stems from the Rules Enabling Act's direction that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right."[136] Justice Stevens articulates the operative distinction as between a definition of rights or remedies or, in this case, a "'limitation' on New York's 'statutory damages,'"[137] as opposed to "a judgment about how state courts ought to operate."[138] While this explanation of the opposed categories is at heart another way of saying "substance" and "procedure," it presents the divide as between the content of the right and the institutional means of enforcement. The distinction thus addresses the extent to which the aggregation mechanism travels with the right or is instead a characteristic of the institutional setting.

---

[132] *Id.* at 1466 ("Rule 23 describes a method of enforcing a claim for relief, while [the New York law] defines the dimensions of the claim itself.").

[133] *Shady Grove*, 130 S. Ct. at 1437 (plurality opinion).

[134] *Id.* at 1467 (Ginsburg, J., dissenting).

[135] *Id.* at 1439 & n.4 (plurality opinion).

[136] 28 U.S.C. § 2072(b) (2006).

[137] *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring in part and concurring in the judgment).

[138] *Id.*

Justice Stevens reads New York law to limit the role of courts in allocating statutory damages, requiring such litigation to proceed on a retail rather than wholesale basis.[139] On this view, once the case moves from state to federal court, the characteristics of the federal judicial setting govern, allowing aggregation under Rule 23. His divide from Justice Ginsburg can be understood as her seeing the New York class action policy to implicate the content of the right: limiting statutory damages to their statutorily defined amount in any single litigation. In contrast to both, and consistent with his opinion in *Concepcion*, Justice Scalia treats the availability of class treatment to inherently follow from the institutional setting, and thus provided for here by Rule 23.

Like its predecessor *Gasperini v. Center for Humanities*,[140] *Shady Grove* reveals a consistent divide on the Court on whether provisions that take form as procedure but have significant substantive implications should be treated as tied to the right itself or to the adjudicating institution. Viewing *Concepcion* and *Shady Grove* together, the divide is whether aggregation mechanisms are features of the institutional setting or are better viewed as entwined with the underlying substantive right. And the institutional account wins in both cases.

Justice Ginsburg invokes the Class Action Fairness Act[141] (CAFA) at the end of her dissent, pointing out the "large irony" in the Court's decision.[142] Her point is that Shady Grove's state law claim was in federal court solely by virtue of CAFA's bestowal of diversity jurisdiction on this type of class action, and the basic purpose of CAFA was to limit the availability of class actions rather than to allow for federal consideration of claims that would not be viable in state court.[143] But there is no irony here: just as the New York class action provision is understood by the plurality and Justice Stevens as institutionally based and thus untethered to the underlying right, CAFA likewise is treated as shaping institutional practice distinct from the interest in any substantive result. In drawing a line between institutional practice and substantive rights, the *Shady Grove* result is in tension with the intents of political actors in a number of ways—the New York law barring class action treatment of these claims, the Rules Enabling Act, which prohibits the modification of substantive rights by the Federal Rules, and CAFA, which was intended to limit the availability of class actions—each of which arguably connects the procedural provision to the substantive right. This judicial assertion of authority follows from a conception of the aggregation mechanism as a component of an institutional role and

---

[139] *Id.* at 1459.

[140] 518 U.S. 415 (1996). *Gasperini* presented a fairly analogous *Erie* claim, and produced almost the identical division, but with a flipped result because Justice Souter joined Justice Ginsburg's opinion in *Gasperini*, and his successor Justice Sotomayor joined (most of) Justice Scalia's opinion in *Shady Grove*.

[141] 28 U.S.C. § 1332(d) (2006).

[142] *Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting).

[143] *Id.* ("By providing a federal forum, Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions. . . . In other words, Congress envisioned fewer—not more—class actions overall." (citations omitted)).

unconnected to an accommodation of any substantive interest. In these cases, the Court indicates that achieving the goals of substantive law is not the Court's concern.

2. *The Individual and the Class*

The indication that federal courts will decide these procedural issues with reference to the institutional characteristics of the adjudicative forum prompts questions about how class actions fit with those characteristics. Perhaps the most fundamental problem in this setting is the relationship of the individual to the class, an issue that emerges in recent cases in a variety of forms. Consistent with the recent emphasis on the personal relationship to the claim in standing and pleading standards doctrine, we see here as well the Court organizing its approach around the individual harm.

This question recently arose when a federal district court sought to enjoin a putative products liability class action claim in state court in a situation where the federal court had already denied class certification on a largely identical claim brought by a separate plaintiff, and the state court plaintiff was not connected to the federal court proceeding.[144] At heart, the question before the Court in *Smith v. Bayer Corp.* was this: when a plaintiff seeks to certify a class and is denied, is that a judgment against the proposed class or only against that particular plaintiff?[145] From an efficiency perspective it may be counter-productive to allow new plaintiffs to continue trying to certify the identical class; at the same time, Smith, the state court plaintiff, had not yet received his "day in court," even if the proposed class in some sense had.

The Court had considered an analogous issue a few years before in *Taylor v. Sturgell*, where, after an airplane buff lost on a Freedom of Information Act (FOIA) claim to declassify the plans for an F-45 airplane, a friend of the first plaintiff filed his own FOIA claim seeking the same plans.[146] The *Taylor* Court unanimously rejected the D.C. Circuit's "virtual representation" approach that had precluded the second claim, concluding that the virtual representation approach would create "a common-law kind of class action" without any of Rule 23's "procedural protections."[147] The point is that the second plaintiff is entitled to his day in court, just as anyone else is.[148] Unlike *Taylor*, the *Smith*

---

[144] Smith v. Bayer Corp., 131 S. Ct. 2368 (2011).

[145] As a doctrinal matter, the questions were whether the class certification issue before the state court was the same as that before the federal court and whether the state court plaintiff was, as "an unnamed member of a proposed but uncertified class," a party to the federal court litigation or otherwise precludable under class action exceptions. *Id.* at 2379.

[146] Taylor v. Sturgell, 553 U.S. 880, 885–87 (2008).

[147] *Id.* at 901.

[148] For discussion of the problems raised by this case, see Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 198–203, and Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 685–90 (2011).

plaintiffs did not know one another and were not represented by the same attorney, so the only basis for a different result would be if the failed attempt to certify the class swept all members of that class into the web of preclusion.

Sure enough, the *Smith* Court unanimously rejected the preclusion claim,[149] denying any party preclusion based on being a member of a failed class.[150] In response to the efficiency concerns, the Court indicated that "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs."[151] Thus, to whatever extent efficiency is a concern, the proper response is not to deny individuals the right to bring a claim but instead to figure out some other way to deal with the problem.

Smith presents the Court's recognition of the challenges presented by a litigation model premised on the individual day in court and the commitment to that model despite its costs. In both *Taylor* and *Smith*, the claim plaintiff sought to raise in the second case had been considered and decided by the first court, and a second (or third, or fourth) go-around was plausibly a waste of time.[152] But *Smith* holds that those systemic inefficiency issues must be handled, if at all, at the level of how the court approaches the claim, not by interfering with a plaintiff's basic ability to bring suit based on his or her personal harm. The common law (or common law-like) personal harm dictates the Court's approach, here demanding as opposed to barring judicial access. In keying preclusion to the individual rather than the class, *Smith* asserts the primacy of the individual claim.

This dynamic takes different form in the *Wal-Mart* decision, again presenting an opinion for the Court by Justice Scalia and a dissent by Justice Ginsburg.[153] This dispute famously addressed an effort to certify a class of all female Wal-Mart employees since 1998 based on allegations of discrimination on the basis of sex in violation of Title VII.[154] While the Court was unanimous in denying certification of the proposed class under Rule 23(b)(2), the Justices split 5–4 on the question of commonality under Rules 23(a)(2) and whether plaintiffs could potentially seek certification of the class under Rule

---

[149] Justice Thomas did not join the party preclusion part of the *Smith* opinion, though without explanation. *Smith*, 131 S. Ct. at 2373.

[150] *Id.* at 2379–80. The Court also indicated that the state court's consideration of the state Rule 23 presented a different legal question than a federal court ruling on certification under Federal Rule 23, especially where the state supreme court had earlier indicated that federal court decisions on Rule 23 were "not binding or controlling" on it. *Id.* at 2378 (quoting *In re* W. Va. Rezulin Lit., 585 S.E.2d 52, 61 (2003)).

[151] *Id.* at 2381.

[152] I leave aside the "different court/different question" issue raised in *Smith*. *See supra* note 150.

[153] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[154] *Id.* at 2549.

23(b)(3)[155]—ultimately, whether the plaintiffs' allegations could support class treatment on any theory.

The *Wal-Mart* opinions are not entirely clear about the extent to which the divide is about class action doctrine or about substantive antidiscrimination law. In an article cited by both the majority and the dissent, Richard Nagareda argues that disputes about aggregate proof in class certification are often disputes about the underlying law.[156] And the divide in *Wal-Mart* indeed reveals a disagreement about the nature of the claimed discrimination: whether the claim is that the discretion given by Wal-Mart headquarters *allows for* individual acts of discrimination, which would then need to be proven,[157] or whether the discretion-granting system *itself results in* discrimination, as demonstrated by statistical data.[158] Are we dealing with a bunch of individual acts of discrimination or a framework of aggregate discrimination?

While the divide may stem as much from diverging accounts of Title VII as of Rule 23, the competing visions of the underlying right shape the treatment of the class certification claim. The *Wal-Mart* Court indicates that not only can the proposed class not be certified under 23(b)(2), but that it could not be certified under 23(b)(3) either, and plaintiffs shouldn't bother coming back to try again. In going beyond what was necessary to decide the case (unanimously!) under (b)(2) alone, Justice Scalia arguably sought to enshrine guidelines for class certification more generally.[159] The majority's framing presents the question of commonality as the decisive issue, and ultimately treats the commonality inquiry in a distinctive way, what Justice Ginsburg refers to as its "dissimilarities position."[160] On this approach, plaintiffs must identify a "common contention" that is "of such a nature that it is capable of classwide resolution,"[161] and that is not subject to the type of dissimilarities that would get in the way of common answers.[162] The demand is thus for a class in which "all their claims can productively be litigated at once."[163] In contrast, Justice

---

[155] *Id.* at 2561–62 (Ginsburg, J., concurring in part and dissenting in part).

[156] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 104 (2009) ("Aggregate proof frequently offers not so much a contested account of the facts that bear on class certification but, more fundamentally, an implicit demand for a new and often controversial conception of the substantive law that governs the litigation.").

[157] *Wal-Mart*, 131 S. Ct. at 2554–55.

[158] *Id.* at 2564 (Ginsburg, J., concurring in part and dissenting in part) (noting the district court's articulation of the common question as "whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination").

[159] Indeed, the Court itself added the commonality issue to the questions presented. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010) (granting certiorari and adding to the question presented an additional question: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)").

[160] *Wal-Mart*, 131 S. Ct. at 2566 (Ginsburg, J., concurring in part and dissenting in part) (internal quotation marks omitted).

[161] *Id.* at 2551 (majority opinion).

[162] *See id.* at 2551, 2556–57 (quoting Nagareda, *supra* note 156, at 132).

[163] *Id.* at 2551.

Ginsburg would focus the commonality inquiry on whether there is a dispute "the resolution of which will advance the determination of the class members' claims."[164] And so, while Justice Scalia indicates that the reasons for the allegedly discriminatory employment decisions must be common,[165] Justice Ginsburg identifies the question common to the class as whether the discretionary policies—rather than the individual employment decisions—were discriminatory.[166]

These competing approaches tie the *Wal-Mart* decision to the broader argument here. Much of what makes the plaintiffs' claim complex is its framing as a pattern or practice claim under Title VII, a claim that is by definition an aggregate claim, requiring evidence extending beyond any individual plaintiff.[167] Aggregate claims of this type are predictably intractable on a basic personal harm account. In tension with the plaintiffs' framing of the claim, Justice Scalia's opinion effectively articulates commonality as a function of identical individual claims rather than of a uniform aggregate claim. In other words, consistent with his insistence in *Shady Grove* on class actions as a joinder device—and motivated by an emphasis on judicial efficiency rather than enforcement of substantive law[168]—Justice Scalia's *Wal-Mart* opinion depicts the putative (b)(3) class to follow from a mass of shared individual claims and thus to demand similarity at a high level.[169] This approach is in contrast to Justice Ginsburg's framing, which starts the commonality inquiry from the

---

[164] *Id.* at 2562 (Ginsburg, J., concurring in part and dissenting in part).

[165] *Id.* at 2552 (majority opinion).

[166] *Wal-Mart*, 131 S. Ct. at 2565 (Ginsburg, J., concurring in part and dissenting in part).

[167] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360–61 n.46 (1977) ("[A]t the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking. While a pattern might be demonstrated by examining the discrete decisions of which it is composed, the Government's suits have more commonly involved proof of the expected result of a regularly followed discriminatory policy."). Some courts have indicated that private plaintiffs filing pattern or practice suits should bring them as class actions rather than as individual suits. *See* Celestine v. Petroleos de Venez. SA, 266 F.3d 343, 355–56 (5th Cir. 2001) (making this point and citing cases from other courts).

[168] This is a historically contested view. *See* Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 472 (discussing Professor Moore's dispute with Kalven and Rosenfield about the nature of the class action and quoting his explanation: "'The basic controversy remains whether the proper goal for the class action should be limited to the minimum one of providing a shortcut to otherwise multitudinous litigation, or on the other hand, should be extended to the maximum one of opening court access to otherwise nonlitigable claims.'" (quoting 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.03[1] (2d ed. 1982)).

[169] *See Wal-Mart*, 131 S. Ct. at 2552 ("Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*").

challenged policy itself, allowing for more variation among the individuals subject to that policy as a means of facilitating enforcement of Title VII.

Justice Scalia's treatment of the commonality inquiry suggests a renewal of an old approach to class actions. As one commentator has noted, "[i]t is impossible to avoid the conclusion that the Court was hostile to common question class actions" in the pre-Federal Rules era.[170] Later, the original version of Rule 23 provided for so-called "spurious" class actions, involving rights which were "several, and there is a common question of law or fact affecting the several rights and a common relief is sought."[171] This version of the Rule, described by its original drafter as a "permissive joinder device,"[172] was amended in 1966, based in significant part on the interest in promoting the vindication of substantive rights.[173] The Court's invocation in *Wal-Mart* of the judicial efficiency justification for class actions at the expense of the facilitation of private enforcement thus echoes an earlier procedural model centered on the resolution of individual claims. In short, consistent with *Concepcion* and *Shady Grove*'s framing of the class action as a question of institutional authority, *Wal-Mart* articulates a model of procedure premised on a vision of the federal courts as responding to individual claims.

The unanimous decision addressing class certification of securities fraud claims in *Erica P. John Fund v. Halliburton* challenges this account.[174] To simplify, securities fraud claims present a five-part story: (1) Defendant misrepresents, (2) causing the price of the stock to rise (or to not fall), (3) at which point plaintiff purchases the stock, (4) following which the truth emerges, (5) causing the price to drop and plaintiff to suffer a loss. In order to state such a claim under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, plaintiffs must demonstrate reliance, among other elements, as a means of connecting steps (1) and (2) to step (3).[175] The hurdle emerged that reliance, an element of the common law fraud cause of action, is largely incompatible with class action treatment, because each class member would need to individually demonstrate that he or she had relied on the fraudulent statement and had acted in reliance on the misrepresentation, meaning that individual questions would predominate and the class could not be certified under Rule 23(b)(3).[176] In 1988, however, the Court adopted the "fraud-on-the-market"

---

[170] Wood Hutchinson, *supra* note 168, at 467.

[171] *Id.* at 469 n.37 (quoting FED. R. CIV. P. 23(a)(3) (1938)).

[172] *Id.* at 470 (quoting MOORE, *supra* note 168, ¶ 23.10[1]).

[173] *See* Resnik, *supra* note 148, at 650 ("The core ideas of the 1966 version of Rule 23 are access and equality.").

[174] Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011).

[175] *See id.* at 2184 (listing "elements of a private securities fraud claim based on violations of § 10(b) and Rule 10b–5").

[176] *Id.* at 2185 (noting that "'[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would' prevent such plaintiffs 'from proceeding with a class action, since individual issues' would 'over-whelm[] the common ones'" (alterations in original) (quoting Basic Inc. v. Levinson, 485 U.S. 224, 242 (1988))).

presumption, according to which "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations."[177] This presumption allowed securities fraud classes to be certified without the need for individual demonstrations of reliance,[178] thus providing an aggregate means of connecting step (3) with steps (1) and (2).

In *Halliburton,* the Court rejected the Fifth Circuit's demand that plaintiffs show loss causation—that the alleged misrepresentation caused their loss[179]—in order to obtain class certification.[180] The upshot of this holding is that anything after step (3) is a separate question from anything beforehand,[181] a question common to the class of purchasers at step (3) and allowing for class treatment. What is not clear is why the Court approached the issue this way. The incompatibility of the Fifth Circuit's approach with the Supreme Court's treatment of the fraud-on-the-market presumption was apparent, and from an error correction perspective the decision is unsurprising, but it is worth considering why the Court reaffirmed, and arguably strengthened, the presumption at all. The fraud-on-the-market theory has been criticized by numerous commentators, for a variety of reasons,[182] and the Court—or even one Justice—could easily have taken *Halliburton* as an opportunity to limit or clarify the doctrine. Why would the same Court that reached the other decisions discussed here unanimously facilitate class actions?

Commentators have indicated that the fraud-on-the-market model reflects a fraud-on-the-market itself, as the name implies, rather than on individual plaintiffs.[183] On this account, individual reliance is largely irrelevant, and persists in the elements of securities fraud doctrine as a vestigial reminder of the

---

[177] *Basic*, 485 U.S. at 246.

[178] *See* Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 CORNELL L. REV. 907, 908 (1989) ("The fraud on the market theory avoids these problems by interpreting the reliance requirement to mean reliance on the integrity of the market price rather than reliance on the challenged disclosure.").

[179] *See* Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 336 (5th Cir. 2010) (following Oscar Private Equity Inv. v. Allegiance Telecom, Inc., 487 F.3d 261 (5th Cir. 2007)). None of the other courts of appeals to consider this issue followed the Fifth Circuit approach. *See Halliburton*, 131 S. Ct. at 2184 (listing cases).

[180] *Halliburton*, 131 S. Ct. at 2186 (noting that "[l]oss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock").

[181] *See* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 180 (describing this relationship and noting that loss causation "is conceptually distinct").

[182] *See, e.g.*, William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 72 (2011) ("The fraud-on-the-market (FOTM) cause of action just doesn't work."); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1303 (2008) (describing failure of compensatory rationale for private enforcement of Rule 10b-5 and questioning deterrence justification).

[183] *See* Langevoort, *supra* note 181, at 163–65.

doctrine's origins in the common law of misrepresentation.[184] To the extent the fraud is viewed as on the market (rather than on any individual), the question is common and class treatment is appropriate. As a result, *Halliburton* presents the opposite claim as that the Court understood the *Wal-Mart* plaintiffs to be raising, involving not a mass of individual actions, but a single unitary claim that yields a common answer.[185] If the fraud is on the market, all that is particular to the individual class members is the nature of their individual harms stemming from the timing and extent of their participation in the defrauded market, much as if Wal-Mart had enacted an explicitly discriminatory policy (i.e., "only men can be managers"), and the individual harms followed from a claim that was indisputably on grounds common to the class. And so, just as with individual discriminatory hiring decisions stemming from a common policy, the *Halliburton* plaintiffs suffer individual injuries from a common market-wide fraud. In both cases, a common act inflicts multiple injuries, which are then aggregated in the class. But the basis of the claim remains the personal injury suffered by individual plaintiffs. The fraud is treated as a mass tort, with the accompanying class treatment.[186]

Taken together, the recent class action decisions reveal tensions over the extent to which a vision of an inherent judicial role shapes the treatment of

---

[184] *See* Bratton & Wachter, *supra* note 182, at 82 (noting that "[f]raud on the market under Rule 10b-5 takes the common law tort of misrepresentation from face-to-face dealings to faceless markets").

[185] *See* Nagareda, *supra* note 156, at 132 ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.").

[186] In its most recent consideration of the fraud-on-the-market presumption, the Court ruled that proof of materiality "is not a prerequisite to class certification," because under Rule 23(b)(3), "the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class." Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (2013). Significantly, the basis of disagreement between the *Amgen* majority, written by Justice Ginsburg, and the dissents by Justice Scalia and Justice Thomas, was not whether materiality is a common question, but rather whether all the elements of the fraud-on-the-market presumption—even elements, such as materiality, that are common to the class—must be demonstrated for class certification. *See id.* at 1205 (Scalia, J., dissenting) ("In my view, however, the *Basic* rule of fraud-on-the-market . . . governs not only the question of substantive liability, but also the question whether certification is proper. All of the elements of that rule, including materiality, must be established if and when it is relied upon to justify certification."); *id.* at 1206 (Thomas, J., dissenting) ("Without demonstrating materiality at certification, plaintiffs cannot establish *Basic*'s fraud-on-the-market presumption. Without proof of fraud on the market, plaintiffs cannot show that otherwise individualized questions of reliance will predominate, as required by Rule 23(b)(3)."). The divide presents a sort of order of operations problem, differing over whether a common question that is within the elements of the presumption (as well as the underlying cause of action) is to be established before or after certification. *See id.* at 1193–94 (opinion of the Court); *id.* at 1207 (Thomas, J., dissenting). While the dissenters' presumption against the presumption aligns with the logic of the common law personal injury model, the Court's decision is consistent with *Halliburton* in treating any fraud in this setting as on the market itself and thus amenable to class treatment.

procedural questions and the extent to which class action claims are ultimately individual claims. Along with the standing and pleading standards decisions, the emphasis on the personal claim as a fundamental model of judicial involvement underlies these cases, and shapes the Court's structuring of procedural law.

D. *Bankruptcy Jurisdiction and the Prototypical Claim*

The account presented here is confirmed by another recent decision that illuminates the competing visions of the role of the federal courts. In *Stern v. Marshall*, the Court returned to one of the messiest areas of constitutional law,[187] considering whether a United States Bankruptcy Court could constitutionally enter final judgment on a debtor's common law counterclaim.[188] In a series of cases, the Court has vacillated on the circumstances in which bankruptcy and administrative judges, who do not enjoy the protections of Article III, including life tenure and salary protections,[189] can exercise judicial power.[190] In an opinion by Chief Justice Roberts, and over a dissent for four Justices by Justice Breyer, the *Stern* Court ruled that the bankruptcy court's jurisdiction over the common law claim was unconstitutional under Article III.

To reach this conclusion, the Court relied on a longstanding distinction between "private rights" and "public rights," following an 1856 decision which indicated that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[191] As Chief Justice Roberts articulated this idea in the *Stern* opinion: "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts."[192] Such private rights are contrasted with public rights—rights "integrally related to particular federal

---

[187] *See* N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 93 (1982) (White, J., dissenting) (referring to characterization of this area as "one of the most confusing and controversial areas of constitutional law"); *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 563 n.12 (2007) (collecting sources making similar claims).

[188] Stern v. Marshall, 131 S. Ct. 2594 (2011).

[189] U.S. CONST. art. III; *see also* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747 (2010) (discussing this point and arguing that bankruptcy judges demonstrate values consistent with Article III).

[190] *See N. Pipeline*, 458 U.S. at 87 (striking down broad grant of jurisdiction to bankruptcy courts in the Bankruptcy Act of 1978); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (finding no constitutional violation in agency jurisdiction over common law counter-claims).

[191] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) (quoted in *Stern*, 131 S. Ct. at 2609).

[192] *Stern*, 131 S. Ct. at 2609 (citation omitted) (quoting *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment)).

government action"[193]—which may be decided outside the framework of Article III. This distinction emphasizes the difference between common law-type rights—rights "of the liability of one individual to another under the law as defined"[194]—and public rights defined by statute and relating to a "federal regulatory scheme" or involving claims against the government.[195] On this model, a personal harm, meaning a common law harm or a statutory or constitutional harm that takes the form of a common law harm, necessitates access to an Article III Court, while public harms defined by positive law but not taking a private form do not compel access to the federal courts but might potentially be remedied in other ways, either through administrative or legislative courts, or by administrative enforcement.

With this distinction, the *Stern* majority confirms the reading of the recent cases advanced here, going on to describe "the most prototypical exercise of judicial power: the entry of a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime."[196] Dismissing the efficiency benefits Justice Breyer emphasizes in dissent, the *Stern* Court refuses to let the common law claim proceed through the bankruptcy court. *Stern* reiterates the sense that common law claims, or claims that look like common law claims, are what the federal courts do, a vision that shapes procedure and federal courts law in numerous ways.

The divide in *Stern* reprises the question in all of these cases: Is the availability of the federal courts to be determined by a basic judicial nature of responding to personal harms, or can an interest in effectuating the enforcement of substantive law be taken into account? The competing views on this issue will shape the availability of the federal courts for participation in the work of governance going forward, as I turn to in the next Part.

IV. PERSONAL CLAIMS AND REGULATORY SCHEMES

The model the Court has presented in these cases structures the work of the federal courts. In this Part, I situate this approach in relation to the question of how the law is enforced. I argue that the Court's approach limits the role of private enforcement of regulatory programs, thereby privileging public enforcement and threatening to constrain the capacity of the federal government to govern effectively in a number of settings.

---

[193] *Id.* at 2613.

[194] *Id.* at 2612 (quoting Crowell v. Benson, 285 U.S. 22, 50–51 (1932)).

[195] *Id.* at 2613; *see also* Nelson, *supra* note 187, at 566–67 (discussing distinction between private and public rights).

[196] *Stern*, 131 S. Ct. at 2615 (emphasis omitted).

A. *Private Enforcement and the Court*

When a legislature enacts a statute, it must decide how the statutory scheme will be enforced.[197] Among numerous calibrations, the legislature must determine the balance between public enforcement and private enforcement of the program. Public enforcement encompasses a broad array of options for action by government actors, most prominently undertaken by federal administrative officials,[198] and encompassing action by state officials as well,[199] while private enforcement provisions give specified private actors the right to bring suit for violations of the statute. The distribution of enforcement powers does much to shape the actual operation of the statutory program.

The Supreme Court has long debated when to imply private rights of action when statutes do not explicitly provide for private enforcement,[200] and commentators have canvassed the effects and implications of doing so in different settings.[201] A number of scholars have recently examined the considerations that shape the initial allocation of enforcement power by the legislature. In a comprehensive treatment of this issue, Sean Farhang argues that "conflict between Congress and the president over control of the bureaucracy, a perennial feature of the American state, creates incentives for Congress to bypass the bureaucracy and provide for enforcement via private litigation."[202] David Freeman Engstrom emphasizes, in examining the development of fair employment law, how the allocation of enforcement power may be influenced by the desire of various parties for either centralized public enforcement or more unpredictable private mechanisms.[203] Professor Farhang notes the

---

[197] Justice Frankfurter explains:

> How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice.

Tigner v. Texas, 310 U.S. 141, 148 (1940).

[198] *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 700 (2011) (noting that "[v]irtually all federal civil statutes vest enforcement authority in a federal agency").

[199] *See id.* (examining state enforcement of federal law).

[200] Significant cases in this line include *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), *Cort v. Ash*, 422 U.S. 66 (1975), *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), and *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

[201] *See, e.g.*, Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 106–20 (2005) (discussing advantages and disadvantages of private enforcement).

[202] *See* FARHANG, *supra* note 2, at 5.

[203] *See* David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1076–77 (2011) (noting that "an important precondition of court-centered, private

example of the legislative debate over the Interstate Commerce Act and the Sherman Act, in which "legislators said explicitly that they were departing from the default common law rules on attorney's fees and damages for the purpose of mobilizing private litigants in the regulatory struggle to bring powerful economic interests under control."[204] In short, decisions about the structure of enforcement mechanisms reflect legislative determinations of how best to achieve the underlying substantive goals of the regulatory scheme. I step back here from distinctions between enforcement regimes to consider the effect of the emerging procedural orientation of the federal courts on private enforcement more broadly.

These private enforcement provisions are designed to encourage private actors to bring suit to enforce the law—in fact, Congress regularly offers various incentives to those willing to act as the private attorney general, including enhanced damages and the availability of attorney's fees[205]—but in doing so they enlist the courts as partners in the work of governing. In these settings, courts are the primary if not exclusive providers of state oversight of the process of legal enforcement,[206] and the legislature can be understood to be seeking judicial support for achieving the goals of the statutory scheme by hearing claims that would otherwise not come before the court.

Private enforcement schemes align with the facilitating mechanisms of the Federal Rules of Civil Procedure as well: provisions for notice pleading, for discovery, and for class actions indicate that the federal courts serve not merely to decide cases, but also to allow for plaintiffs to develop their claims such that those claims may be decided on the basis of more complete information.[207] Such provisions, which apply across regulatory and common law settings, reveal an effort to govern by making use of the courts to promote the achievement of the goals of substantive law, an orientation dramatically different from one in which courts are open to hear disputes properly brought before them but disclaim any role in a larger project of governing.[208] To be clear, my point is that the logic of these orientations are opposed, such that the

---

enforcement is that the chief regulatory beneficiaries must be willing to relinquish control to a combination of ideologically diverse judges, unpredictable juries, and litigants and counsel seeking private advantage").

[204] *See* FARHANG, *supra* note 2, at 64.

[205] *See id.* at 60–68 (providing empirical study of Congress's use of these mechanisms); *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247–63 (1975) (discussing history of legislative use of attorney's fees provisions).

[206] In frameworks like Title VII, the agency also plays a role in the process of private enforcement. *See* 42 U.S.C. § 2000e-5 (2006) (providing that aggrieved persons must file a charge with the EEOC (or state agency) and receive a right-to-sue letter before bringing suit).

[207] *See supra* notes 54–55 and accompanying text.

[208] *See* Paul D. Carrington, *The American Tradition of Private Law Enforcement*, 5 GERMAN L.J. 1413, 1413 (2004) ("American judicial institutions . . . were not designed merely to resolve civil disputes, but were fashioned for the additional purpose of facilitating private enforcement of what in other nations would generally be denoted as public law.").

Supreme Court has filled open interpretive space following an account at odds with that underlying these provisions, and not that the Court has refused to apply such provisions when they are straightforwardly applicable. Nonetheless, the Court's emerging account has shaped, and has the potential to dramatically affect, the project of governance directed by the political branches.

We can get a sense of the Court's orientation toward private enforcement by examining the treatment of such provisions in standing doctrine, the setting in which these questions have emerged most directly, often in the context of claims against government officials.[209] The 1992 decision in *Lujan v. Defenders of Wildlife* announces the current approach.[210] There, the Court denied standing to an environmental group's effort to challenge the Secretary of the Interior's interpretation of a provision of the Endangered Species Act that required consultation with other agencies in certain circumstances, even though Congress had authorized such an action in the statute.[211] The Court explained its treatment of the "citizen suit" provision by insisting that

> [t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[212]

While the *Lujan* ruling constrains Congress's ability to deputize private actors to ask the federal courts to make the executive branch enforce the law,[213] the precise boundaries it sets are not entirely clear. Justice Kennedy concurred in a separate opinion, joined by Justice Souter, (the "fifth" and "sixth" votes for the outcome), to emphasize that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," but that "[i]n exercising this power, . . . Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[214] This view, later incorporated into the Court's ruling in *Massachusetts v. EPA*,[215] allows Congress to grant rights of action so long as it specifies the injury and the set of permissible plaintiffs.

---

[209] *See* Magill, *supra* note 56 (discussing development of treatment of standing in public law claims).

[210] 504 U.S. 555 (1992).

[211] The provision indicated that "'any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.'" *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g) (1988)).

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

[213] *See* Cass R. Sunstein, *What's Standing After* Lujan*?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 217–18 (1992).

[214] *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

[215] 549 U.S. 497, 516–17 (2007).

Decisions since *Lujan* indicate a strict though still somewhat hazy limit on Congress's ability to leverage private enforcement as a means of ensuring that the executive follows the law.[216]

The Court has less often considered when private actors have standing to bring suit against other private actors as a means of enforcing substantive law.[217] In the 2000 decision in *Friends of the Earth v. Laidlaw Environmental Services*[218] involving a claim under the Clean Water Act, the Court found that the harm at issue was redressable (and that plaintiffs therefore had standing) because where plaintiffs face ongoing illegal conduct, "a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress."[219] And, the Court indicated, "[c]ivil penalties can fit that description."[220] Justice Scalia raised the stakes in dissent, rejecting the majority's analysis and contending that the Court's standing ruling "has grave implications for democratic governance."[221] As he explained, "[b]y permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law."[222] As a result, "[e]lected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision

---

[216] *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) (denying an environmental group standing to challenge Forest Service notice, comment, and appeal procedures based on an allegation of probabilistic injury); FEC v. Akins, 524 U.S. 11, 20–21 (1998) (finding standing based on a congressionally granted right to information in a challenge to an FEC determination).

[217] Private enforcement can be seen to implicate action on behalf of the government in either the government's sovereign capacity or its proprietary capacity. *See* Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 341–45 (2001) (discussing this distinction). In a 2000 decision, the Court distinguished "the injury to [the Government's] sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud." Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000). As Myriam Gilles explains, "when the government suffers a proprietary injury, it is acting more as a private actor than as a governmental entity," Gilles, *supra*, at 342 n.152; in other words, the proprietary harm is an injury to the government "as the keeper of the public fisc and the owner of public property" *id.* at 344. The Court has ruled that *qui tam* provisions (which give the private enforcer a percentage of any proceeds collected) allow for individual standing to bring suit on behalf of the government's proprietary injuries. *See Stevens*, 529 U.S. at 769–70 (detailing recoveries available to relators under the False Claims Act); *id.* at 777–78. As noted above, because my emphasis here is on questions of governing, I focus the discussion on plaintiffs acting on behalf of the government's sovereign interests in enforcement of the law and do not address *qui tam* suits.

[218] 528 U.S. 167 (2000); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 86 (1998) (raising an analogous private enforcement claim).

[219] *Laidlaw*, 528 U.S. at 185–86.

[220] *Id.* at 186.

[221] *Id.* at 202 (Scalia, J., dissenting).

[222] *Id.* at 209.

should be postponed."[223] On this account, the private enforcement provision is inherently incompatible with the proper roles of the executive and the courts.

There is a clear tension between the legislative reliance on private enforcement and Justice Scalia's accounts in his *Laidlaw* dissent and the *Lujan* opinion—as Professor Farhang emphasizes, a basic reason for private enforcement is precisely to deprive the executive of discretion to decide that certain violations should not be prosecuted.[224] But for Justice Scalia (and Justice Thomas and maybe Justice Kennedy), private enforcement presents a grave threat to democratic governance,[225] and violates not only Article III, but potentially Article II as well,[226] serving "to place the immense power of suing to enforce the public laws in private hands."[227] While the Court has not further developed this point in the context of standing doctrine, the recent decisions cohere with this account across a variety of civil procedure and federal courts settings. Before evaluating the Court's approach, I sketch some implications of the personal harm model in order to clarify the stakes of the assessment to follow.

B. *Implications of the Common Law Model for Private Enforcement*

The Court's decisions privilege a certain kind of claim, one that looks like a traditional common law claim raising a personal harm. The question is of resemblance rather than identity: in practice, some common law claims will not look like traditional common law claims (e.g., mass torts or consumer class action claims), and some statutory claims may take a form akin to a common law claim (e.g., some Title VII employment discrimination claims).[228] As I discuss below, the reliance on an idea of the basic mission of the federal courts as responding to personal harms tracks a common law ideal of responding to interpersonal duties and wrongs, the making and failure of interpersonal

---

[223] *Id.* at 210.

[224] *See supra* note 202 and accompanying text.

[225] Notably, Justice Scalia has indicated that he sees no relevant difference between the standing rules allowing private enforcement against state actors as opposed to against private entities. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 n.5 (1998) ("[R]edressability—like the other prongs of the standing inquiry—does not depend on the defendant's status as a governmental entity. There is no conceivable reason why it should.").

[226] *See Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting); *id.* at 197 (Kennedy, J., concurring) (reserving the question of whether "exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II"); *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 784 (2009) (developing the argument that by limiting private enforcement of the law, standing doctrine protects individual liberty).

[227] *Laidlaw*, 528 U.S. at 215 (Scalia, J., dissenting).

[228] *Cf.* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) (referring to employment discrimination provision as a "federal tort").

agreements, and the like.[229] The account advanced in the recent cases invokes an underlying vision of what it is that courts do, and shapes doctrine that would limit the federal courts to doing just that.

Consistent with the logic of Justice Scalia's *Laidlaw* dissent, the upshot of this framing is to privilege enforcement power by public authorities, which in practice will usually be the executive. For Justice Scalia and those who side with him, this is the point, as they contend that Article II vests the enforcement power in the executive, and private enforcement of regulatory schemes is therefore presumptively problematic, for both constitutional reasons and concerns about the proper operation of democracy.[230] The question is thus when and how Congress can allow private attorney generals to trigger judicial involvement in the enforcement of federal law. What is at stake is the terms on which the federal courts will allow themselves to be enlisted in regulatory schemes, particularly the extent to which courts will facilitate the vindication of claims or allow plaintiffs to remedy gaps in the statutory framework.

The allocation of public and private enforcement is not solely a decision about *who* will enforce the statute but equally about *how* the law will be enforced. Administrative agencies do not have to demonstrate standing when Congress gives them enforcement authority,[231] often do not need to aggregate plaintiffs or confront class action concerns,[232] and have subpoena power allowing them to avoid pleading standards difficulties.[233] Further, under various administrative law regimes, the agency is given interpretive deference,[234] but a private actor will not qualify for such deference. Public and private enforcement thus differ in ways that may result in varying levels of effectuation of the statutory program, not just because the agency may not bring some claims that private actors would pursue (though that as well), but also because the claims that are brought will be subject to a different framework of procedural scrutiny than private claims.[235] Highlighting the workings of this dynamic, Margaret

---

[229] *See infra* Part V.A.

[230] *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (arguing that standing doctrine is essential to separation of powers).

[231] *See* Grove, *supra* note 226, at 792–94 (discussing cases in which "the Supreme Court made it clear that the Executive Branch had standing to assert injuries that would not suffice for a private plaintiff," *id.* at 792, at least when Congress confers standing).

[232] *See, e.g.*, Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 323 (1980) (concluding that "Rule 23 is not applicable to an enforcement action brought by the EEOC in its own name and pursuant to its authority under § 706 to prevent unlawful employment practices").

[233] As an example, the Federal Trade Commission is given broad investigatory powers. *See* 15 U.S.C. § 49 (2006) (providing that "the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation").

[234] *See* Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984).

[235] Public enforcement presents its own difficulties. *See* Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 518–56 (2011) (discussing challenges arising when regulatory agencies attempt to organize compensation for mass harms, particularly

Lemos has elucidated the ways in which the mix of private and public enforcement has shaped the treatment of Title VII claims.[236] Ultimately, then, the Court's common law model directs enforcement of the law pursuant to the logic of executive enforcement as well as the idiosyncrasies of executive discretion. In this way, these procedure and justiciability rulings play a part in shaping the operation of regulation and governing more broadly.

The recent cases thus raise questions about the proper role of the federal courts in the context of regulatory programs: do the courts stand outside the program and adjudicate disputes between private parties stemming from legislatively defined harms, as well as state-directed enforcement, or can the courts allow themselves to be enlisted alongside the legislature in the achievement of the regulatory program, facilitating plaintiffs' efforts to bring statutory claims? The procedural and justiciability decisions are ultimately stand-ins for this fundamental question of governance.

In limiting the enforcement options and methodologies available to the legislature, the approach signaled in these decisions threatens to constrain the governance capacity of the federal government more broadly. Inasmuch as the explicit provision for private enforcement speaks to a legislative belief that allowing private actors to bring suit against regulated parties is a useful or necessary means of achieving the objectives of the legislative program, the cabining of this enforcement mechanism presumptively limits the effectiveness of the program more broadly. As a result, these decisions may have marked impact on the federal government's ability to effectively develop some regulatory schemes, particularly those that do not yield claims that take a personal harm form, such as aggregate or systemic claims, and that may benefit from the availability of private enforcement, because of their political nature or implications, or because of the desirability of distributed rather than uniform enforcement. In short, to the extent provisions for private enforcement reflect a legislative judgment as to the preferred means of accomplishing statutory goals, decisions limiting the practical ability of private parties to bring such suits strikes at the government's ability to achieve such goals.

If this common law role were actually what the Constitution required, the fact that these innovations are useful or that these decisions limit the legislature's governance capacity may be unfortunate, but may play little role in the Court's analysis. But if this approach is invoked as a basic idea of "what courts do," it is more problematic. We should therefore consider whether the Court's approach reflects a persuasive and compelling account of the proper role of the federal courts. I turn to this inquiry now.

---

because "agencies lack most of the procedural safeguards that exist in private litigation," *id.* at 518).

[236] Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 380–92 (2010).

V. A COMMON LAW COURT IN A REGULATORY WORLD

The Court's reliance on a personal harm account presents a traditional common law ideal of the federal courts. The insistence on this framing at the procedural stage diverges from the shift away from common law practice on the merits and the increasing emphasis on statutory law. I characterize the Court's approach as shaping a distinct role as a common law court in a regulatory world. This Part explains and assesses this framing.

A. *Leaving the Common Law*

The source of the Court's self-identity as a forum for remedy of personal harm is not mysterious. The American courts' origins in the English common law (and equity) courts are familiar,[237] and the establishment of the federal courts at the Founding connects to that tradition.[238] The important question is the role of that common law model in structuring judicial access today. When Chief Justice Roberts identifies "the most prototypical exercise of judicial power" as the resolution of a common law claim,[239] that may be true as a historical matter, but it is not clear what this idea of prototypicality is supposed to accomplish. In short, to what extent should this common law judicial role act as a limitation on judicial power in the legal setting of our day?

The types of claims the common law traditionally encompasses, such as doctrines of contract and tort and property, confirm its primary focus on responding to personal harms.[240] These familiar common law matters present a model of interpersonal disputes seeking judicial resolution. While there have always been some public law-like elements of the common law, such as public

---

[237] *See* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784 (2004) ("Most of the states that ratified the Constitution adopted in some measure the common law of England."). Of course, what exactly was included in the common law the courts adopted is not entirely clear. *See, e.g.*, Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 797–816 (1951) (discussing varying approaches to adoption of common law).

[238] *See Ex Parte* Grossman, 267 U.S. 87, 109 (1925) ("The statesmen and lawyers of the Convention who submitted [the Constitution] to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary.").

[239] Stern v. Marshall, 131 S. Ct. 2594, 2615 (2011).

[240] *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516–17 (2003) (explaining that to "late eighteenth- and early nineteenth-century jurists . . . tort was the part of the civil side of common law that identified, and provided redress for, injurious wrongs committed by a citizen—or, in certain instances, a state actor—against another"); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004) (noting that "[r]ights at the core of [the private rights] category include an individual's common law rights in property and bodily integrity, as well as in enforcing contracts").

nuisance law,[241] such aggregate claims must be either premised on personal harms or be brought by the state in its sovereign capacity,[242] consistent with the basic common law model. In short, the approach the Court has invoked in the procedural setting tracks the basic contours of the traditional common law account in its focus on a private individual harm as a trigger for judicial involvement. When Justice Frankfurter insists that for the Framers of Article III, "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies,'"[243] he is referencing a judicial power tied to a law largely concerned with disputes between individuals. It is that model of the prototypical claim that shapes the recent decisions.

Invocations of the common law implicate an array of distinct ideas and practices, including the content of common law doctrines, the common law method, and the ideas on which the common law is based, as well as the domain of the common law in terms of the types of claims courts may consider.[244] The recent cases raise questions about the extent to which this last element can be separated from the others. Can the substance of common law claims be disconnected from common law methodology and common law procedure? Does the continuing move away from the common law on the merits and on the organizing logic of the legal system have implications for the continued reliance on the common law model to shape judicial access?

These questions reflect that we no longer live in the common law world. It is not news that the content of substantive law is increasingly diverging from the common law. Numerous commentators have described the development of the administrative or legislative state and have noted the diminishing space of the common law.[245] On one account, "[p]olicy formation has displaced the

---

[241] *See* NOVAK, *supra* note 26, at 60–62 (discussing distinction between private and public nuisance law and explaining that "[t]he common law of nuisance was one of the most important public legal doctrines of nineteenth-century regulatory governance").

[242] *See* Woolhandler & Nelson, *supra* note 240, at 701–04 (discussing standing to bring public nuisance claims); *cf.* RESTATEMENT (SECOND) OF TORTS § 564A (1977) (allowing liability for group defamation only based on reference to a particular individual).

[243] Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring in the judgment); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) (arguing that Article III's limitations on the judicial power mean that the federal court "will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed").

[244] *Cf.* Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 771 (2004) (noting that "the idea of the common law has numerous substantive as well as methodological components").

[245] *Id.* at 765 ("Yet for all of our common law origins and for all of our persistent celebration of the common law, there are important features of the common law that appear to be in rapid retreat." (footnote omitted)).

diffused and incremental operation of the common law as our primary means of social regulation, and agencies have displaced common-law courts as the primary means by which that regulation is effectuated."[246] This shift stems from a number of factors, among them trends in the concept of democracy, the growing complexity of society, and changes in governing ideology.[247] The growth and greater prominence of the national government plays an important part in the reduced emphasis on common law, inasmuch as there is for the most part no federal general common law (at least since *Erie*),[248] and the rise of federal question jurisdiction since 1875 focuses the federal courts' attention on statutory (and constitutional) law.[249]

Significantly, the diminishing role of the common law takes form not only in new settings of administrative governance, but within traditional common law settings as well. Tort law presents a useful example here. During the twentieth century, models of tort law premised on ideals of deterrence or efficiency came to prominence, in contrast to the previous (often implicit) idea of compensation for harm as the theoretical basis of tort liability.[250] These emerging ideals present a regulatory approach, where the doctrine is premised not simply on the relationship between the parties, but on the broader allocation

---

[246] Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369 (1989); *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) (observing that in the last fifty to eighty years "we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law").

[247] *See* Novak, *supra* note 38, at 377 (indicating that "the rise of a distinctly modern administrative regulatory state in the United States . . . was rooted in three interlinked developments: the centralization of public power; the individualization of private right; and the constitutionalization of the rule of law").

[248] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law."); *cf.* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 594–614 (2006) (describing the "enclaves" of federal common law).

[249] *See* PURCELL, *supra* note 22, at 41 ("By the early twentieth century, actions based on congressional enactments accounted for a substantial and growing part of the federal caseload.").

[250] *See* Goldberg, *supra* note 240, at 517–18 (explaining that pursuant to the "traditional account" of tort law, meaning the model existing until the twentieth century, "[t]ort was . . . conceived as a law of personal redress rather than as a law of public regulation or punishment" and that tort suits "were understood as occasions to resolve disputes over whether an actor (or actors) could be held responsible under the law for injuries suffered by the plaintiff(s)"); *id.* at 519–21 (contending that "much of twentieth-century tort theory is predicated on the notion that the traditional account could not survive" the challenges presented by "changing material, political and intellectual conditions" and that "[t]he traditional account—under which tort law was understood as a set of rules and concepts, grounded in ordinary morality, for resolving disputes over alleged wrongs committed by *A* against *B*—was no longer obviously in tune with modern realities or political and intellectual sensibilities").

of costs and incentives.[251] This move tracks the evolution of the torts themselves, as the rise of industrial society and a national and international consumer market gave rise to new forms of accidents and mass harms that shaped developments in the doctrine and administrative practice.[252] Torts scholars have in recent years advanced a theoretical paradigm centered, whether as corrective justice or civil recourse theory, on the interpersonal duties underlying the structure of tort law, returning, especially in the civil recourse model, to a common law-style account.[253] The common law model thus now appears as one competing orientation to the field. Catherine Sharkey has demonstrated how in the administrative preemption setting the Supreme Court "has oscillated between competing conceptions of tort as either primarily regulatory or compensatory."[254] This doctrinal and philosophical debate highlights the departure from the classical common law model in shaping the understanding and operation of tort law.

We can likewise see how the evolving regulatory state has unsettled the common law treatment of torts at the level of its practical operation, both engulfing it directly through regulation and undermining it through facilitation mechanisms. The rise of regulatory preemption exemplifies this dynamic, prominently in cases questioning whether regulatory approval or a manufacturer's compliance with agency safety specifications preempts state tort law claims. In this messy area of law, where statutes often prove unhelpful,[255] one move that can be discerned, and has been highlighted by Professor Sharkey,[256] is the recurring judicial emphasis on the agency's structuring of the regulatory scheme, essentially asking whether the agency's approach leaves room for the common law remedy. The divergent results in *Geier v. American Honda Motor Co.*[257] in 2000 and *Williamson v. Mazda, Inc.*[258] in 2011 provide

---

[251] *See, e.g.*, Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 73 (1975) (describing four goals of the law of torts: "two 'compensation goals'—spreading and distributional equity—and two 'deterrence goals'—specific or collective deterrence and general or market deterrence").

[252] *See generally* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004) (detailing the development of American tort law from the problem of industrial accidents).

[253] *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010) ("To study torts is to learn what sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer.").

[254] *See* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 459–71 (2008).

[255] *See id.* at 450 (noting that "Congress repeatedly punts, leaving unresolved the key question of the extent to which federal standards and regulations preempt state common-law remedies").

[256] *See* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2128 (2009) (noting that "federal agencies have become the real decisionmakers in preemption controversies" and that "Congress has taken a back seat to federal agencies on critical questions of preemption").

[257] Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

a notable example of this inquiry, concluding, in two cases addressing the same regulatory scheme, that the regulation at issue in the former preempted common law tort claims, but that in the latter did not. We see an analogous dynamic in the opposed results of *Wyeth v. Levine*[259] and *PLIVA, Inc. v. Mensing*,[260] decided two years apart and turning on the particular provisions of the federal statutory and regulatory drug labeling programs. The point is not that common law remedies have disappeared but instead, perhaps more strikingly, that they have come to be evaluated as components of a broader regulatory program.

The rise in mass torts and the evolution of Rule 23 of the Federal Rules of Civil Procedure have yielded an increasing number of class action or other aggregated tort claims. Such claims do not fit well with a traditional common law account of tort law, looking more like a type of public law. Indeed, scholars have advanced accounts presenting mass tort class actions as taking legislative or administrative form or as themselves regulatory mechanisms.[261] Likewise, commentators have argued that by involving public officials in the processes of settlement, the Class Action Fairness Act treats class actions as a type of public law litigation.[262] These arguments have been vigorously criticized, often based

---

[258] Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1139 (2011) (noting that in *Geier*, "the regulation's history, the agency's contemporaneous explanation, and its consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives," but that "[h]ere, these same considerations indicate the contrary").

[259] Wyeth v. Levine, 555 U.S. 555 (2009).

[260] PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2581–82 (2011) (indicating that despite obvious similarities, the case differed from *Wyeth* because of the particulars of the federal regulatory scheme at issue).

[261] *See* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1060 (2002) (noting that "there is increasing skepticism over the view that a class action is simply an unaltered aggregation of individual claims" and contending that "[c]lasses do take on the form of an 'entity,' . . . with rather immediate consequences for the prospect of successful prosecution of a claim" (footnote omitted)); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 152–53 (2003) (arguing that "the class action—with its tendency toward settlement at the behest of self-appointed agents for the class—has emerged not simply as a procedural supplement to preexisting law but, rather, as an institutional rival to the ordinary process of lawmaking itself"); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 859 (1984) (arguing that by "enlarging the judicial inquiry from the particular case and its parties to the aggregate of similar cases and similarly situated parties, a public law approach would enable courts to overcome the problems posed by systematic causal indeterminacy"); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917–18 (1998) (arguing "that the notion of the class as entity should prevail over more individually oriented notions of aggregate litigation").

[262] *See* Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 1001 (2011) (contending that "CAFA also signals that Congress understands the class action to be a form of public law litigation" as the settlement notice provision "demonstrates mistrust of private lawyers as well as the importance of class actions for the enforcement of socially beneficial laws"); Catherine M. Sharkey, *CAFA Settlement Notice Provision:*

on a commitment to the individual day in court ideal stemming from due process guarantees.[263] Here too, we see robust academic debate and some judicial and political movement away from the basic common law ideal in tort settings.

Alongside these developments surrounding the content of common law doctrine, the common law model has been challenged at the level of method as well. Traditionally, common law courts seek to identify what custom and legal practice dictate through application of precedent to particular cases.[264] This approach, which places the courts in a "law-saying" role without grounding in an authoritative text,[265] depends on the specificity of the claim before the court to uncover the law.[266] Under the common law system, then, the nature of the cases judges will hear is closely connected to the way the courts will approach those claims on the merits.

This idea of judge-made (or judge-discovered) law has fallen out of favor in our era, and we see now a broad preference for law traceable to democratic processes, with accompanying limitations on courts.[267] The shift to a statutory focus on the merits has been accompanied by departures from common law methodology, such as the reliance on textualist doctrines.[268] To be sure, these

---

Optimal Regulatory Policy?, 156 U. PA. L. REV. 1971, 1975, 1980 (2008) (indicating, in discussing "CAFA as regulatory policy," that "[t]he settlement notice provision creates a mechanism for public oversight of private litigation and thus an opportunity for cooperative regulation spurred by public and private parties").

[263] *See, e.g.*, Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1588–1603 (2007) (arguing for incompatibility of "entity" view of class actions with due process guarantees); *see also* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 312–18 (2011) (arguing for the importance of individual consent as against the American Law Institute's advance consent aggregate settlement proposal).

[264] *See* Brian Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 8, 20 (William Twining ed., 1986) (describing the common law system to consist "of a body of practices observed and ideas received over time by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts").

[265] *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 9 (1986) (explaining that under classical common law theory, "[t]he office of the judge is not to make, but publicly to expound and declare, the law: *jus dicere* not *jus dare*").

[266] *See id.* at 36 (observing that under common law theory "the principles [of law] are uncovered through reflection *on the particular cases*—through experience and the reflection of many on that experience—and not through a priori reasoning").

[267] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 9 (Amy Gutmann ed., 1997) (indicating that the development of the common law "would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy").

[268] In a series of articles, Peter Strauss has examined the Court's departure from common law methods in its treatment of statutes. *See generally* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225 (1999); Peter L. Strauss, *Courts or*

methodological moves have been much criticized and are not as consolidated as the move away from the common law on the merits. Still, the regular disparaging of common law method—even by those most insistent on the common law framing at the procedural stage[269]—challenges the reliance on the common law procedural model. To the extent the fundamental nature of the courts that the Court has invoked is a model intimately tied to the substance and methodology of the common law, the divergence of these models calls for careful assessment of the Court's approach.

B. *Examining the Common Law Judicial Role*

As this discussion shows, while the demand for a common law-like claim evokes an account of the role of the federal courts stemming from the era of the Framing, both the content and methodology of the law today differ dramatically from that before the courts of that time.[270] We can understand the Court's procedural moves to shape a judicial role as a common law court in a statutory and regulatory environment. My claim is not that the Court is making a basic error of fit by adopting a procedural model unsuited to the substantive law setting in which it acts—though it may be, as the procedural framework of the common law was closely connected to the content and method of that law—but that a role as a common law court in a regulatory world is a distinct judicial orientation which can and should be assessed on its own terms.

Justice Kennedy's "Council of Revision" argument from *ACSTO v. Winn* reflects an approach motivated largely by concerns about legitimacy, especially the legitimacy of judicial oversight of state action.[271] The idea is that the power of law-saying can be exercised only in response to disputes arising from harms inflicted directly on individuals, perhaps because only such a harm justifies the departure from the democratic process into the courts, as Justice Scalia has argued.[272] On this account, the Court employs the common law framing as a legitimating resource: to the extent justification for judicial involvement is necessary, the Court indicates that the presence of common law-style harms—and only the presence of such harms—suffices to provide that legitimacy. This point highlights a striking discrepancy between a disappearing world in which

---

Tribunals? Federal Courts and the Common Law, 53 ALA. L. REV. 891 (2002); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429 (1995).

[269] *See supra* note 14 (noting contending positions on this point by Justice Scalia).

[270] *Cf.* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 742 (2010) (arguing that "important aspects of the intellectual world of the Founders have wholly vanished, rendering greatly problematic any originalist understanding of the Supremacy Clause").

[271] *See supra* text accompanying notes 66–67.

[272] *See* Scalia, *supra* note 230, at 895 (arguing that only concrete injury "can separate the plaintiff from all the rest of us who also claim benefit of the social contract, and can thus entitle him to some special protection from the democratic manner in which we ordinarily run our social-contractual affairs").

judicial development of the common law was uniquely legitimating, to an extent even greater than statutes,[273] and our present day vision in which democratic processes are widely preferred, but common law frameworks of judicial access retain their pull.

To illustrate, pursuant to the Court's approach, plaintiffs in the *Winn* case would have had standing if they had suffered a direct financial harm, and the Court would have then considered the constitutionality of the state program. The same dynamic is present in *Sprint*, where the Justices appear to agree that APCC would have had standing if they stood to win even one dollar.[274] As the presence of such harms would have little effect on the underlying claims in these cases, the formality of the lines drawn on a model of private individual harm serves to entrench the judicial role in the familiar common law terms, even in contexts diverging dramatically from traditional common law settings.

Though I present the Court's actions in terms of a somewhat formalist account of the judicial role, the reliance on formalist methods is not itself the point, but rather what the Court is being formalistic about. The cases suggest a vision of legitimacy that attaches at the initial invocation of the federal courts: the court can be activated only by plaintiffs raising certain kinds of claims, but once the court is properly activated by a personally harmed plaintiff, it is free to decide. Here, the job of the federal courts is to resolve certain kinds of claims, and any broader interest in promoting effective or efficient enforcement of the law is not their concern. Once a court is considering a claim of the proper sort, those may be relevant interests to further, but the recent cases indicate these goals are secondary to the basic ideal of policing the parameters of the judicial role and resolving disputes that fall within that role. As this is true even where the nature of the plaintiff's interest would have no practical effect on the court's consideration of the claim,[275] we can see that the issue is not one of judicial

---

[273] *See* Kunal M. Parker, *Law "In" and "As" History: The Common Law in the American Polity, 1790–1900*, 1 U.C. IRVINE L. REV. 587, 594–607 (2011) (developing argument that "the law-politics problem as we imagine it today . . . was not a problem for many nineteenth-century Americans," *id.* at 596, and detailing nineteenth-century treatment of common law).

[274] *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 289 (2008) ("Were we to agree with petitioners that the aggregators lack standing, our holding could easily be overcome. For example, the Agreement could be rewritten to give the aggregator a tiny portion of the assigned claim itself, perhaps only a dollar or two."); *id.* at 305 (Roberts, C.J., dissenting) ("Perhaps it is true that a 'dollar or two' . . . would give respondents a sufficient stake in the litigation. Article III is worth a dollar.").

[275] *See* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 809–14 (2004) (making this point with reference to the challenge to the Line Item Veto Act in *Clinton v. City of New York*, 524 U.S. 417 (1998)); Daniel A. Farber, *Standing on Hot Air:* American Electric Power *and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121, 123 (2011), http://yalelawjournal.org/2011/09/13/farber.html (noting, as "another key problem with standing doctrine" and with reference to *American Electric Power Co. v. Connecticut*, 131

competence or epistemic authority, but is instead a commitment to a particular account of the legitimacy of judicial action. The upshot is that drawing the judicial access line based on the nature of the courts as resolving common law-type disputes distances the courts from the political branches' governing efforts.

In limiting the possibilities for private enforcement through the courts as a means of effectuating regulatory programs, the approach embodied in the recent cases disavows a judicial role as a co-participant in promoting achievement of the substantive goals of the law, yielding a stance apart from rather than alongside the political branches. While the federal courts are not Congress's agents to be drafted into assistance in legislative projects, this disposition reflects a Court going the other way in shaping a particular judicial role in an evolving governing environment. By privileging executive participation in the enforcement of substantive law, the Court places a brake on the processes of governance precisely in the contexts of aggregate harm in which some form of state intervention are most needed, based on a model of law it has left behind in other settings.

What is lost in the Court's common law model is the type of governing–facilitating role inherent in the private enforcement approach, a model implicit to some extent in the twentieth-century development of the law of courts. This role leverages the distinct adjudicative capacities of the federal courts to play a part in the enforcement of substantive law and decouples appropriate judicial involvement from a close focus on the personally harmed individual to, instead, the nature of the underlying regulatory program and the terms of judicial participation in that project. Where Congress has affirmatively sought judicial involvement, and where claims are presented in a manner suited for judicial engagement (with adverse parties, addressing the interpretation of a statute, and seeking legislatively specified remedies, for example), the question of legitimacy takes a new and distinct form which the common law model cannot resolve.

As the discussion in Part II demonstrates, the role of the federal courts and their accompanying doctrinal practices, both procedural and substantive, have evolved throughout American history in response to and alongside the developments of the time. Accordingly, concerns about the Court's retrenchment in these cases stem not solely from the identification of the fundamental nature of the federal courts as resolving common law-like disputes, but from the accompanying idea of there being an inherent nature of the federal courts at all. As the law the courts confront continues to evolve, the terms of judicial involvement might continue to change as well.

S. Ct. 2527 (2011), that "the 'injury' that forms the basis for Article III standing does not need to have any logical connection with the legal claim").

VI. CONCLUSION

While my aim in this Article has not been to present a concrete alternative proposal for how the judicial role should be envisioned and implemented today, I offer a first step towards such an account in concluding. When considering the terms of access to the federal courts, a primary focus should be on the institutional dynamics of the relevant legal framework, reflecting the democratic distribution of enforcement capacity, the particulars of judicial competence and legitimacy, and the means of promoting effective governing. Such an approach would move away from a "fundamental attributes of the federal courts" model towards an engagement with the other branches in the work of governance, taking concerns about judicial overreach and democratic control seriously but accommodating a role for the federal courts in the work of governing. In doing so, it would not function as a unitary rule for structuring judicial involvement but would allow variation across settings. Much as the Court has indicated that efficiency concerns are best dealt with in the treatment of the claim rather than by denying the plaintiff a day in court,[276] so too evaluations of the judicial role might take closer account of the content of the substantive legal framework at issue when identifying what it is the federal courts do.

[276] *See supra* text accompanying notes 144–51.