

DEMOCRATIC ENFORCEMENT? ACCOUNTABILITY AND INDEPENDENCE FOR THE LITIGATION STATE

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A vast literature in law and political theory focuses on questions of accountability and independence in democratic government. Commentators tend to celebrate accountability in the legislative and regulatory arenas, and independence in the context of adjudication. Yet they largely ignore the government function that lies at the intersection of law-making and law-application: enforcement. The gap in theory is reflected in our current laws and institutional structures. When an agency proposes a new regulation, we have rules in place to promote political accountability, public participation, and neutral expertise in the regulatory process. When the same agency adopts a new approach to enforcing the relevant statutes and regulations, however, we lack equivalent mechanisms for legitimating government action.

This Article seeks to fill that gap. Focusing on the civil side of the civil/criminal divide, I develop a theory of enforcement that makes sense of its place in our system of government. Enforcement, I explain, connects law-making and adjudication both in terms of how it operates—bringing cases to adjudicators so that generally applicable laws may be interpreted and applied to particular individuals and firms—and in terms of the features it shares with those more familiar modes of governance. Enforcement is a form of discretionary policymaking, necessitating the same sorts of policy judgments that characterize law-making, and triggering similar demands for accountability, transparency, and public engagement. But enforcers also must make individualized, retroactive, legal determinations of the sort we associate with judging, making the strongest forms of popular control seem inapt.

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Drawing from democratic theory, I argue that the seeming tension between accountability and independence can be resolved by understanding enforcement as a form of political representation. Casting enforcement in this light helps reveal the importance of accountability in the enforcement context, while also making clear that enforcers can “represent” the public without slavishly following the public will. To say that public enforcement should be accountable is not to deny the need for autonomous professional judgment, but to insist that it is the responsibility of government to inform its citizens of what it is doing in their name, and to listen to their views in return. A call for accountability is also a call for mechanisms by which citizens can attempt to influence enforcement prospectively, or “hold it accountable” retrospectively. And accountability to the public entails some measure of insulation from narrow, private interests.

Our current treatment of enforcement falls far short of this vision. As this Article shows, we have few tools to secure meaningful political accountability for enforcement—but neither do we have the means to shield enforcement from improper influence. Under existing law, it turns out, enforcement is both too independent and not independent enough.

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INTRODUCTION

United States law and legal scholarship are fixated on questions of democratic legitimacy. When government acts in a legislative capacity, legitimacy is grounded in public accountability.¹ Elections seem critical in this context, and indeed legislators are elected at every level of our government.² When government acts in an adjudicative capacity, by contrast—interpreting and applying the law rather than enacting it—accountability typically is traded off against other values, including independence.³ Elections are far more controversial here, as the idea of making adjudicators responsive to popular pressures sits uneasily with our vision of judging as something distinct from ordinary politics.⁴

Far less attention has been devoted to the government function that connects law-making and law-application: *enforcement*. U.S. governments (both state and federal) rely heavily on ex post enforcement to give effect to legal commands, to translate the “law in books” into the “law in action.”⁵ In part for that reason, in many areas we empower private citizens to participate in enforcement by bringing legal actions to vindicate their rights.⁶ But enforcement is also a central occupation of government. Every day, executive officials (again, both state and federal) investigate possible violations and seek sanctions in judicial or administrative proceedings. Commentators call

¹ See *infra* Part I.

² As one commentator put it, “[e]lections can occur without democracy, but democracy cannot endure without elections.” DENNIS F. THOMPSON, *JUST ELECTIONS* 1 (2002).

³ For an overview, see generally JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002).

⁴ See Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 910 (2007) (criticizing efforts “to create the impression not only that courts are part of the political system, but also that they and the judges who sit upon them are part of ordinary politics”).

⁵ See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910), reprinted in AMERICAN LEGAL REALISM 39, 39–40 (William W. Fischer III, Morton J. Horwitz & Thomas A. Reed eds., 1993).

⁶ See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 7–8 (2010). Farhang uses the term “litigation state” to refer to “private enforcement litigation,” which, he persuasively argues, should be “regarded as a component of *state* capacity.” *Id.* This Article focuses on a more literal version of the litigation state, in which the actual *state* uses litigation to regulate its citizens.

this “public enforcement”⁷—a term that simultaneously distinguishes enforcement by private actors and conveys, in shorthand, the familiar notion that government enforcement represents the public interest.⁸

Despite its manifest importance, we lack a theoretical framework for assessing the legitimacy of public enforcement, or situating it in our broader scheme of democratic governance. As a consequence, enforcement operates free of the protections we have developed in other contexts to promote and manage accountability in government. Consider the following:

- Unlike proposed administrative regulations, which are subject to requirements of public notice and comment, enforcement policies are rarely disclosed—much less justified—publicly. For example, empirical work reveals shifts in federal civil rights enforcement, from a focus on racial discrimination to an emphasis on religious discrimination and back again.⁹ But, whereas new statutes or regulations would be accompanied by lengthy explanation and public debate, changes in enforcement policy often are detectable only after the fact.¹⁰
- Unlike many regulatory actions, no formal process of centralized executive-branch review exists for general decisions about enforcement policy and priorities. Writing in 1977, then-Attorney General Griffin Bell complained that, “[a]lthough I am the chief legal officer of the executive branch, I have learned that I have virtually no control or direction over the lawyers outside the Department of Justice, except indirectly in connection with pending litigation.”¹¹ And, while there can be little doubt that federal

⁷ A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45, 45 (2000).

⁸ See, e.g., John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1443 (2005) (“A government enforcer is charged with promoting the public good”); William B. Rubenstein, *On What a “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2139 (2004) (“[I]t is a widely-utilized trope that private attorneys represent individual clients with private interests while public attorneys represent the citizenry at large pursuing their public interest.”).

⁹ See *infra* note 27 and accompanying text.

¹⁰ See *infra* section III.A.1.

¹¹ Griffin Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1050 (1978); see also Carolyn B. Kuhl & John Roberts, *Memo to the Attorney General on Areas in Which Various Conservative Groups Have Suggested that the Department Take Action* (Mar. 15, 1982) (noting that “[c]onservatives complain that litigating decisions are not sufficiently monitored from Washington, with the result that overzealous or misinformed U.S. Attorneys bring lawsuits that do not comport with the Administration program” and suggesting that “a centralized system for monitoring major litigation” might be established, or that federal litigation authority

enforcement changes with presidential administrations, the President's role in enforcement policy-setting is ad hoc and largely hidden from view.¹²

- Unlike elected judges, many of whom are prohibited by state law from personally soliciting campaign contributions and must recuse themselves from cases involving campaign contributors, elected state attorneys general (AGs) can and do solicit contributions from enforcement targets and participate in investigations and enforcement actions involving contributors.¹³ In one recent case, the target of a multistate investigation complained of receiving multiple requests for contributions from the offices of the AGs involved in the action.¹⁴
- Unlike efforts to influence legislation and regulation, lobbying contacts with federal and state enforcers are largely unregulated. Meanwhile, reports show that enforcers—perhaps especially elected state AGs—are subject to a barrage of pressure from lobbyists seeking to influence their enforcement decisions.¹⁵

The differential treatment of enforcement in areas of disclosure, oversight, elections, and lobbying reflects more than mere inattention. It is also symptomatic of a more fundamental difficulty. Enforcement, I will argue, shares features with both legislation and adjudication, making familiar notions of political accountability and responsiveness to the public will seem simultaneously indispensable and alarming.

On the one hand, enforcement entails the sorts of policy judgments that characterize legislation and regulation. No

might be centralized fully within the Department of Justice). Thanks to Steve Burbank for bringing the Kuhl and Roberts memo to my attention.

¹² See *infra* notes 153, 210–211 and accompanying text. Scholars have recently begun to consider questions related to presidential control of enforcement. Although their work sometimes touches on accountability, that is not their focus. These scholars consider only one potential source of accountability (the President), and they are interested in questions of presidential authority not directly linked to accountability. See generally Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013); Catherine Y. Kim, *Presidential Control Across Agency Policymaking Forms*, 43 FLA. ST. L. REV. 21 (2015); Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014) [hereinafter Price, *Enforcement Discretion*]; Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. L. REV. 1119 (2015) [hereinafter Price, *Politics of Nonenforcement*].

¹³ See *infra* notes 325–332 and accompanying text (describing rules limiting judicial participation in cases involving campaign contributors).

¹⁴ See *infra* notes 137–140 and accompanying text (discussing the 5-Hour Energy case).

¹⁵ See *infra* subpart IV.C.

public enforcers—at least not in the U.S.—have the resources to pursue every possible violation of the law. They have to pick and choose, to set priorities and goals. These are policy questions through and through, and it seems not only inevitable but appropriate that their resolution be “political” in some sense. Accountability, then, surely is part of the enforcement story.

On the other hand, certain aspects of enforcement seem more akin to adjudication than to legislation, making the strongest versions of popular control appear inapt. Enforcement decisions are not just made at wholesale; in actual day-to-day practice, law enforcement is a retail endeavor. Having determined to go after fraudsters, for example, enforcers must then decide to pursue *this* offender or *that* one, to seek *these* remedies or *those*. And, given that the overwhelming majority of government enforcement actions are resolved through settlement rather than judicial decree, enforcers frequently decide on outcomes as well as objectives.¹⁶ The individualized and retroactive nature of enforcement distinguishes it from prospective, generally applicable legislation, and complicates the answer to the accountability question. There is something decidedly uncomfortable in the notion that government’s choice of enforcement targets—and of penalties in each case—should be subject to public, or political, whim.

This Article develops a theory of accountability for civil law enforcement that seeks to make sense of these competing perspectives. Enforcement, I explain, is a form of discretionary policymaking with significant and often wide-ranging consequences for both regulated entities and regulatory beneficiaries. Unlike enforcement by private actors, public enforcement is designed—and expected—to serve the public interest.¹⁷ Mechanisms of political accountability can help ensure that public enforcement performs its intended purpose, and that it satisfies the basic democratic imperative that “those potentially affected by a collective decision should have opportunities and capacities to influence that decision.”¹⁸

¹⁶ See, e.g., Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 547–48 (2016) [hereinafter Lemos, *Privatizing*] (discussing the importance of enforcer choices in a litigation landscape dominated by settlement).

¹⁷ See *infra* subpart II.A. To be sure, private enforcement may also serve the public interest, either as an incidental effect of litigation that is inspired by purely private interests, or because private litigants’ interests are themselves public-serving or altruistic in nature. See *infra* note 91 and accompanying text; Lemos, *Privatizing*, *supra* note 16, at 529–30.

¹⁸ Laura Montanaro, *The Democratic Legitimacy of Self-Appointed Representatives*, 74 J. POL. 1094, 1094 (2012).

It does not follow, however, that enforcers should be slaves to public whim. Drawing from theories of political representation more generally, I argue that public enforcement can “represent” the public without parroting public opinion in every case. Indeed, some measure of autonomy is essential if public enforcement is to serve the public interest.

Thinking about enforcement as a form of political representation helps resolve the theoretical tension identified above, demonstrating that accountability and independence can coexist in the enforcement context. But it also highlights the challenge of designing enforcement institutions in a way that promotes accountability while preserving a role for independent, professional judgment. That is a gargantuan task, and we are far from completing it.

As this Article demonstrates, existing rules and practices render enforcement far less accountable than is commonly assumed. The various mechanisms we employ to give the public a voice in law-making are at best weakened, and at worst wholly inoperative, when government agencies enforce the law. Making matters worse, we have done far too little to insulate enforcement from the influence of narrow, private interests. Though it has been largely ignored in the literature on capture, I show that several features of enforcement make it particularly susceptible to private influence. Here too, our conventional solutions are largely unavailable. As noted above, few states extend lobbying regulations to the enforcement context; such rules apply to efforts to influence law-making, not implementation. Likewise, enforcement is often exempted from “sunshine” requirements and other rules designed to promote transparency in government. And, although some civil enforcers (the majority of state AGs) are elected, only glancing attention has been paid to the question of how to regulate those elections—how to balance the quest for accountability with the need to avoid bias and undue influence.

The Article proceeds in four parts. Part I provides some necessary conceptual background, sketching the role that accountability plays in democratic governance and describing how that role changes as we move from one government function to the next. Part II makes the normative case for accountability in the enforcement context. Parts III and IV turn from theory to practice, revealing that public enforcement as currently constituted is neither adequately accountable to the public, nor adequately sheltered from narrow private pressures.

Before proceeding, a few words on scope are in order. This Article focuses on the civil side of law enforcement. I do not address the work of criminal prosecutors or police. The reason for that limitation tracks the intuition that animates the Article as a whole: healthy accountability may mean something different from one context to the next, depending on the governmental function in question.¹⁹ Some criminal law scholars have considered the accountability question for prosecutors, and I draw from their work where appropriate.²⁰ But, given the important differences between civil and criminal law enforcement, theories that work on the criminal side do not necessarily translate to the civil sphere.²¹ And even if our normative ideals were the same for criminal and civil law enforcement, the means we choose to secure those ends might be different.

Although this Article brackets criminal law, it considers civil enforcement by the states as well as the federal govern-

¹⁹ Cf. Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323, 326 (2003) (stressing the need for functional and contextual analyses of accountability and independence for courts).

²⁰ For a sampling of recent work touching on problems of accountability for criminal prosecutors, see Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PENN. L. REV. 959 (2009); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 S.M.U. L. REV. 593 (2014); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2008); cf. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015).

²¹ The consequences of civil and criminal law enforcement are different, as are the purposes. Civil sanctions are primarily financial, whereas criminal sanctions can include a loss of liberty and trigger a cascade of collateral consequences. Although criminal sanctions sometimes are financial in nature, we can still distinguish between civil and criminal fines based on the goal of the sanction and the message it carries. Criminal sanctions carry a particular stigma, and their function may be to punish the defendant rather than to compensate the victim or deter further wrongdoing. See *infra* notes 69–70 and accompanying text.

The criminal and civil contexts also differ in the sources and extent of enforcement discretion. Part of the story here is about politics. As countless others have observed, the politics of crime control are starkly, perhaps uniquely, one-sided. The result is that the scope of criminal law is pushed ever-wider—with a corresponding expansion of prosecutors' discretion. Interest group pressures on the civil side are more balanced, with regulated entities enjoying the upper hand in many areas. That dynamic increases the potential for narrowly drawn civil statutes (or regulations) that leave relatively fewer policy questions in the hands of enforcers. See *infra* section III.A.2.

Other aspects of the relevant institutional structures cut in the other direction, however, vesting more discretion in civil enforcers than their criminal-law counterparts. For example, it is more common in the civil context for investigative and "prosecutorial" functions to be combined in one entity rather than divided across institutions (e.g., police department and district attorney's office). The consolidation of investigation and enforcement arguably increases the power of enforcement agencies by removing a potential outside check.

ment. It does so, in part, to illustrate the range of approaches U.S. legal systems have taken to managing the relationship between public enforcement and the public will. Such variation is not itself a bad thing. On the contrary, the optimal contours of political accountability may differ from one jurisdiction to the next, depending on how each government conceives of the enforcement function. I return to this point in the Conclusion. One thing is clear, however. Our current approaches to enforcement are far from optimal.

I

CHARTING ACCOUNTABILITY: WHY, TO WHOM, AND FOR WHAT?

What role should notions of accountability, or responsiveness to the populace, play in civil enforcement? Under what circumstances—if any—should public enforcers consciously disregard public preferences? To answer these questions, we first need to understand where enforcement, and accountability, fit in our system of government. This Part focuses on accountability; the body of the Article examines how the concepts described here apply to enforcement.

A. Political Accountability and Representation

The size and scope of modern society makes direct democracy infeasible. Instead, the people govern via their political representatives. It is through representation that the people are made “present” in government.²² But of course the people are not truly present; they are not doing the work of governance themselves. This duality at the core of the concept of representation—the requirement that the people simultaneously be present and not present—has occupied generations of political theorists. Yet the leading theories of representation share a common core: for representatives to be “democratic,” they must be *authorized* in some way by the people, to act on the people’s behalf, and there must be some means by which the people can hold their representatives *accountable* for their actions.²³

Elections loom large in this framework.²⁴ Elections enable the people to select their representatives, and to reward or

²² See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 8–9 (1967).

²³ See, e.g., Andrew Rehfield, *Towards a General Theory of Political Representation*, 68 J. POL. 1, 1–2 (2006) (discussing authorization and accountability as indispensable to most conceptions of democratic representation).

²⁴ See BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 6 (1997) (“The central institution of representative government is election . . .”); RICHARD

sanction them for their conduct in office. And, because elections are recurring, they “allow[] voters to influence the decisions of their representatives” on an ongoing basis: “[A]t any point in time it is in the interest of government to take into account in its *present* decisions the future judgment of voters on those decisions.”²⁵ In this way, elections ensure that representative government is responsive to the interests of the represented.²⁶

But political accountability is not just about elections, or anticipated sanctions—*holding* representatives to account. Conventional definitions of accountability also suggest a critical role for explanation and justification—*calling* government to account. Indeed, “[f]orcing people to explain what they have done is perhaps the essential component of making them accountable. . . . [T]he core of accountability becomes a dialogue between accountors and account-holders, using a shared ‘language of justification.’”²⁷

Accountability, understood to entail both holding to account and calling to account, promotes various democratic values. As a conceptual matter, political accountability is constitutive of political representation; it makes it possible to talk about government “by the people.”²⁸ More instrumentally, accountability is a means to an end—a way of ensuring that government representatives stay “on the virtuous path,” acting in the interests of the people.²⁹ Accountability also fosters

MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 41 (2003) (“In a representative democracy, the core accountability mechanism is the general election, at which an incumbent government presents itself to the citizens and seeks a renewal of its mandate to govern.”); PITKIN, *supra* note 22, at 234 (“[W]e tend to feel that [representative government] is impossible without elections.”)

²⁵ MANIN, *supra* note 24, at 175, 178.

²⁶ See, e.g., Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 389 (2008) (explaining that on the “standard account” of representative democracy, “electoral mechanisms ensure some measure of responsiveness to the people”).

²⁷ See MULGAN, *supra* note 24, at 9 (internal citations omitted); see also Jeremy Waldron, *Accountability: Fundamental to Democracy* 5 (N.Y.U. Pub. Law & Legal Theory Research Paper Series, Paper No. 14–13, 2014), <http://ssrn.com/abstract=2410812> [<https://perma.cc/F5GE-34YE>] (arguing that “it goes to the essence of the political relationship . . . for the people to demand an account [from government]”).

²⁸ See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 532–33 (1998) (describing the conventional view).

²⁹ See MANIN, *supra* note 24, at 117 (describing Madison’s view of frequent elections as the “most effectual precaution to keep [representatives] virtuous” (internal quotation marks omitted)).

democratic citizenship by encouraging public deliberation about and participation in governance.³⁰

For all these reasons, political accountability is central to most accounts of representative democracy, “the *sine qua non* of legitimacy in government action.”³¹ Yet it does not follow that all government action must be accountable, or accountable in the same way or to the same extent. To begin with, it is essential to distinguish between different types of accountability. Accountability is a relational concept; it is meaningless unless one specifies *to whom* the relevant actor is accountable. As the discussion so far should make clear, my focus here is on political accountability—accountability of government to the people. Political accountability can be direct, as in the case of elected officials. It can also be indirect, or mediated, as in the case of political appointees.³² That is, if the relevant actors are not themselves elected, they may answer to elected officials, or their conduct may be controlled in various ways by representative forces.³³ In either case, the key—definitionally speaking—is that the “account holder” is the people themselves.³⁴

The more difficult question concerns the appropriate balance between goals of accountability, representation, and responsiveness, on the one hand, and complementary values of

³⁰ See MULGAN, *supra* note 24, at 12–13 (“Accountability forces members of the government into dialogue with their citizens and therefore contributes directly to the ongoing debate about the public good which advocates of deliberative democracy identify as the essential feature of a democratic society.”).

³¹ Brown, *supra* note 28, at 532.

³² See, e.g., MULGAN, *supra* note 24 at 31 (“Political accountability can . . . include accountability both within the executive branch to the president as well as to Congress and to sections of the public at large.”).

³³ Waldron, *supra* note 27, at 14 (noting that “accountability in modern democracies is often mediated,” as where a civil servant answers to a supervisor who answers to an elected official, who in turn answers to voters).

³⁴ For purposes of this Article, therefore, I bracket questions of “administrative” or “bureaucratic” accountability, which concern hierarchical controls *within* government institutions (for example, the “accountability” of a line officer to her supervisor). MULGAN, *supra* note 24, at 35 (“[I]n the United States, the accountability of officials to the president and Congress is well described as *political* while their accountability to each other may be seen as *bureaucratic* or *professional*.”). That is not to deny the practical importance of such forms of accountability. One might sensibly conclude that the realities of contemporary political life render meaningful political accountability a “myth,” making administrative accountability the only viable option. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2134–36 (2005). Before embracing that descriptive claim in the context of enforcement, however, we first should ask the normative question: what role *should* the public play in public enforcement? Armed with a theory of why political accountability might be valuable for enforcement, we can then assess the efficacy of our existing mechanisms of accountability. If administrative accountability turns out to be the only game in town, at least we will know whether that is a feature or a bug.

independence, expertise, and predictability on the other. American democracy has never pursued political accountability to the exclusion of all else. Instead, the balance shifts depending on the government function in question.

B. The Accountability-Independence Tradeoff

Accountability tends to hold pride of place in the legislative context,³⁵ reflecting the democratic principle that “all affected by collective decisions should have an opportunity to influence the outcome.”³⁶ Because legislation is generally applicable, it is “impracticable” that everyone affected by a law “should have a direct voice in its adoption.”³⁷ We the People participate in the legislative process through our representatives, and our “rights are protected in the only way that they can be in a complex society, by [our] power, immediate or remote, over those who make the rule.”³⁸ Political accountability is therefore enshrined in the federal and state constitutions, which carefully prescribe methods for popular elections of legislators. As we have seen, elections “are at the core of the American political system,” at least where legislation is concerned.³⁹ A central goal of elections, in turn, “is to accurately register the preferences of the relevant electorate.”⁴⁰

Adjudicative proceedings are subject to a very different set of norms. In adjudication, due process requires that the affected individuals have notice of the proceeding and an opportunity to be heard.⁴¹ Due process also demands that government officials who perform adjudicative tasks be neutral

³⁵ Even in the legislative realm, accountability is tempered by an impulse toward independence. See, e.g., John M. de Figueiredo & Edward H. Stiglitz, *Democratic Rulemaking*, in OXFORD HANDBOOK OF LAW & ECONOMICS (forthcoming) (manuscript at 9) (on file with authors) (“[T]he U.S. Constitution contains many elements designed to resist responsiveness to transitory shifts in majority preferences: for example, a challenging amendment procedure; a core separation of powers structure; and a bicameral legislature, with the Senate acting as ‘an anchor against popular fluctuations’” (quoting THE FEDERALIST NO. 63 (James Madison))).

³⁶ Urbinati & Warren, *supra* note 26, at 395.

³⁷ *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

³⁸ *Id.*

³⁹ RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 1 (1980) (“[Elections] are the way we choose government leaders, a source of government’s legitimacy, and a means by which citizens try to influence public policy.”).

⁴⁰ Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 608 (2007).

⁴¹ See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“[T]here can be no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

and impartial—favoritism toward one or the other party is disqualifying, and outside influences are strictly curtailed.⁴² Unlike legislators, adjudicators are not supposed to be responsive to popular preferences. We expect judges to “apply the law without fear or favor”⁴³ and, when necessary, to “stand up to what is generally supreme in a democracy: the popular will.”⁴⁴ As the Supreme Court has explained, “[t]his requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.”⁴⁵

This neat dichotomy between legislation and adjudication is far too simple, of course. As countless others have observed, the lines between legislation and adjudication are blurry at best.⁴⁶ Legislation may be narrowly drawn, targeting identifiable individuals and groups.⁴⁷ And, particularly where adjudicative decisions are subject to *stare decisis*, the decisions in individual cases may have wide-ranging, prospective effects. In our post-Realist world, we know that adjudicators do more than apply existing law in a mechanical, pre-political way.⁴⁸ Adjudicators often have no choice but to make law—sometimes provoking accusations of “legislating from the bench.”⁴⁹

Despite these complications, the distinction between legislation and adjudication remains central to our legal system.

⁴² See *Marshall v. Jerrico*, 446 U.S. 238, 243 (1980).

⁴³ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015).

⁴⁴ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

⁴⁵ *Marshall*, 446 U.S. at 242.

⁴⁶ See, e.g., JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 16–21 (1927) (problematizing the litigation/adjudication divide); Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 260–65 (1938) (same).

⁴⁷ For extended discussions of “special legislation” and arguments for a requirement of legislative generality, see Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQUETTE L. REV. 625 (2014); Evan C. Zoldan, *Privilege and Punishment: A Failure of Equal Protection* (Jan. 15, 2016) (unpublished manuscript) (on file with author).

⁴⁸ See, e.g., Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Non-Delegation Doctrine*, 81 S. CAL. L. REV. 405, 423–40 (2008) (discussing judicial lawmaking and the influence of the Realists).

⁴⁹ See Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 188–89 (2007) (examining claims that judges “legislate from the bench”).

Nowhere is this more clear than in the administrative state.⁵⁰ Administrative agencies have provoked nearly endless scholarly handwringing and debate by combining legislative and adjudicative functions in a body that is neither quite as accountable as a legislature nor quite as independent as a court. Although agencies have the power to enact regulations that operate much like legislation, they are not subject to the same democratic checks as elected legislators. This institutional structure, scholars have argued, “presents a serious legitimacy problem: How can we ensure the democratic responsiveness of the unelected administrative bureaucracy?”⁵¹ Agency adjudications present a different kind of legitimacy problem because administrative adjudicators lack the insulation we typically associate with judges. How can we ensure the fairness and neutrality of a judge who works for the same agency that is acting as regulator and prosecutor?⁵²

Alan Morrison sums all of this up in one pithy sentence: “Administrative agencies are just like legislatures and courts—except when they’re not.”⁵³ Notice what is missing from this picture, however: enforcement. Agencies do not just make rules and adjudicate disputes. They also act as enforcers. Agencies conduct investigations, choose targets, and initiate enforcement proceedings in judicial or administrative venues. Yet enforcement has inspired far less attention than rulemaking or adjudication. Like other agency functions that fall outside those better-known boxes, enforcement is simply “committed to agency discretion” and left largely unregulated.⁵⁴

Enforcement is also remarkably under-theorized. Notwithstanding all the attention that has been heaped on questions of democratic accountability and decisional independence when

⁵⁰ See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 10 (5th ed. 2009) (describing the distinction between rulemaking and adjudication as “perhaps the most critical distinction in all of administrative law”).

⁵¹ Sidney Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 580 (2011).

⁵² The Administrative Procedure Act responds to this challenge by “separat[ing] adjudication from other agency functions in the interest of fairness, walling it off from ‘[p]ressures and influences properly enough directed toward officers responsible for formulating and administering policy.’” Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1143 (2014) (quoting S. Rep. No. 79-752, at 3 (1945)).

⁵³ Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They’re Not*, 59 ADMIN. L. REV. 79, 80 (2007).

⁵⁴ See Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 454 (1986).

government regulates or adjudicates, we lack equivalent theories for enforcement. This Article seeks to fill that gap.

II

ACCOUNTABILITY AND INDEPENDENCE IN PUBLIC ENFORCEMENT

To the extent that commentators have focused on accountability for civil law-enforcement, they have used it as a means of comparison. Accountability is a key feature distinguishing public enforcement—that is, enforcement that is controlled by the government—from litigation by private plaintiffs and attorneys.⁵⁵ Private parties may purport to represent the public interest in enforcement actions, but the representation is, at best, virtual. Critics emphasize that “neither the citizens bringing private enforcement suits nor the judges who decide them are subject to electoral discipline.”⁵⁶ By contrast, these same critics assert, government agencies “are accountable to the electorate . . . through the President and, more indirectly, through congressional oversight.”⁵⁷ Thus, the argument goes, “private enforcement may undermine a valuable democratic feature of American governance.”⁵⁸

The critique of private enforcement assumes, as a positive matter, that public enforcers are accountable to “the people” in some meaningful way; and, as a normative matter, that they ought to be. But the assumptions are just that—assumptions. Rarely does anyone pause to ask whether public enforcers re-

⁵⁵ See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 637–38 (2013) (describing a common line of critique of private enforcement that “proceeds from a . . . basic pair of observations: public enforcers are politically accountable actors. Private enforcers are not.”).

⁵⁶ Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 119 (2005).

⁵⁷ *Id.*; see also Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 8 (1996) (arguing that “some combination of congressional and presidential oversight” ensures that public enforcement does not “stray[] too far from the balance point that conforms with the preferences of the electorate”).

⁵⁸ Stephenson, *supra* note 56, at 119; see also Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV. L. & POL’Y FORUM 39, 49 (2001) (arguing that private enforcers “face no significant political repercussions for setting unwise enforcement policies”); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1801–04 (1993) (critiquing private rights of action on grounds of accountability, and arguing that “[t]he desideratum of accountability . . . militates for executive involvement in enforcing all laws passed by Congress”); Pierce, *supra* note 57, at 12 (criticizing private rights of action for “lack of political accountability for important policy decisions”).

ally are accountable; or whether, and to what extent, they should be.

This Part develops a theory of accountability for public enforcement. Using an analogy to lawmaking, subpart A begins by making the normative case for accountability. Subpart B complicates the picture by likening enforcement to adjudication and highlighting the difficulties with a system of enforcement that simply channels public opinion. Subpart C proposes a framework for reconciliation. The key move is to think about public enforcement, not in isolation, but as one of the ways our government governs us. If the familiar notion that public enforcement “represents” the public interest means anything, I argue, it must refer to a form of political representation. Democratic theorists long have wrestled with questions about the optimal relationship between government and the public will, and their answers are enlightening for enforcement. Understanding enforcement as political representation makes clear that public preferences *do* have a role to play in shaping public enforcement. In areas (or on issues) where citizens are engaged and well informed, it becomes difficult to argue that an official is representing them if her actions are consistently at odds with their preferences. But in the many areas where citizens are uninformed or uninterested, a representative may be justified in going against their wishes.

A. The Case for Accountability

In the three-branch model of American government, enforcement is the province of the executive.⁵⁹ Article II of the federal Constitution obligates the President to “take [c]are that the [l]aws be faithfully executed”—a function that all agree includes enforcement.⁶⁰ Article II also contains detailed provisions for elections, plainly contemplating that the President will answer to the people.⁶¹ The President, in turn, oversees the operation of the administrative state, including enforcement. Though scholars continue to debate whether the President is empowered to direct agency action, there is no doubt that he or she has the power to appoint and remove top agency officials, and at least to oversee administrative policy.⁶²

⁵⁹ Heckler v. Cheney, 470 U.S. 821, 832 (1985).

⁶⁰ U.S. CONST., art. II, § 3.

⁶¹ *Id.* § 1.

⁶² Debates over the “unitariness” of the federal executive are longstanding. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5 (1994) (“Whether the founders framed a strongly unitary executive, or whether we should continue to recognize what they framed, is not a

In most states, enforcement authority resides in the attorney general, who typically is elected independently.⁶³ The provisions for direct election of the states' chief enforcers—sometimes called “the [p]eople’s [l]awyer[s]”⁶⁴—might suggest that the case for accountability and popular control is stronger at the state level. Nevertheless, it is worth recalling that many state constitutions also provide for the election of judges.⁶⁵ As recent cases have made clear, it does not follow from the fact of elections that judges must be accountable to the people in precisely the same way, and to the same degree, as other elected officials.⁶⁶ While elections provide a floor, they leave ample room to balance responsiveness and autonomy.⁶⁷ For example, it is coherent to say that elected judges ought to respond to public pressures when dealing with some kinds of decisions but not others.⁶⁸ So, too—perhaps—for elected AGs.

In short, the federal and state constitutions put accountability squarely in the frame for enforcement, but provide little guidance on where to draw the line between healthy accountability and undue influence. Rather than pondering accountability in the abstract, we need to ask, *accountability for what?* What do we want political accountability to *accomplish* in the context of public enforcement? Thinking about enforcement

new debate.”). Compare, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 594–96 (1994) (arguing that the President alone holds the executive power and thus that he can control or act in the place of agency officials), with Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 698 (2007) (defending the “oversight” view). On the appointment and removal powers, see *infra* notes 179–91 and accompanying text.

⁶³ See *infra* note 242 and accompanying text.

⁶⁴ JIM MATTOX, TEXAS ATTORNEY GENERAL: THE PEOPLE’S LAWYER, THE MATTOX ADMINISTRATION, 1983-1990, at 86 (1990) (suggesting that attorneys general “have only one client—the people, or the state” and referring to the office as the “People’s Lawyer”).

⁶⁵ See, e.g., Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063–64 (2010).

⁶⁶ Williams-Yulee v. Florida Bar, 135 S. Ct. 1673, 1668 (2015) (“A State’s decision to elect judges does not compel it to compromise public confidence in their integrity.”).

⁶⁷ See Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1232 (2008) (“[U]nlike other political contests, judicial elections must strike a balance between assuring that judges are accountable and protecting their ability to be fair and independent.”).

⁶⁸ See, e.g., Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 3, at 9, 29 (“There are reasons to think that appellate courts, whose primary concern is legal questions (and as one moves to high courts, legal questions in which policy looms large), should—as a normative matter—be more tied to public opinion than trial courts.”).

and accountability in more instrumental terms can help identify where accountability is most needed, and most worrisome.

As this subpart explains, functional considerations make a powerful case for accountability. Enforcement can be understood as a form of policymaking, and enforcers—both public and private—have significant discretion in their choices as to both means and ends. What distinguishes public enforcement from the private analogue is the promise that government can and will seek to vindicate the broad public interest, rather than focusing enforcement on private objectives. Measures designed to secure meaningful accountability for public enforcement would give the people an opportunity to shape enforcement undertaken in their name, and reinforce the link between public enforcement and the public interest.

1. *Enforcement as Discretionary Policymaking*

Why do we rely on government officials to enforce the law? This question may seem elementary, but it is critical. We have seen that the optimal balance between independence and accountability shifts from one governmental function to the next. To understand accountability in the enforcement context, then, we first have to understand enforcement.

Begin with the functions of enforcement, generally. Enforcement can, of course, compensate victims and otherwise redress the harms wrought by illegal conduct. But the more fundamental *social* purpose of enforcement is deterrence.⁶⁹ By uncovering and sanctioning legal violations, enforcement forces violators to internalize the costs of their conduct and so deters further misconduct by defendants and similar actors.

The optimal level of deterrence (and, thus, of enforcement) will depend on the terms of the relevant law and the available sanction.⁷⁰ Where laws are carefully drafted and sanctions match harm, complete deterrence may be warranted, and enforcers should pursue every violation. In many areas, however, optimal deterrence is less than complete.⁷¹ Perhaps the law captures conduct that is not really harmful or that cannot be

⁶⁹ See, e.g., Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 582 (1997) (“The social benefits of suit inhere in the deterrent effect that suit has on the exercise of precautions by injurers and thereby on the frequency of harm.”).

⁷⁰ For a succinct explanation of the optimal deterrence approach, see Max Minzner, *Why Agencies Punish*, 53 Wm. & MARY L. REV. 853, 859–61 (2012).

⁷¹ Adler, *supra* note 58, at 62 (“Optimal enforcement is nearly always less than complete enforcement.”).

deterred efficiently.⁷² Or perhaps the available sanction swamps any actual harm.⁷³ In such circumstances, we rely on enforcers to practice “discretionary nonenforcement”—to choose their battles and, where appropriate, pull their punches.⁷⁴

Enforcement, therefore, is an important form of policymaking. Enforcement may not make law in a formal sense, but—whether public or private—enforcement profoundly shapes the “law in action.”⁷⁵ And in most cases, enforcement entails a substantial element of discretion, as enforcers have to determine whether to proceed against any given violation, and if so, what sanctions to seek.⁷⁶

The policy-laden nature of enforcement—and the connection to lawmaking—is even more obvious when enforcers make generalized decisions about what types of offenses to prioritize or ignore. The Obama Administration’s deferred-action programs offer recent examples. In 2012 and again in 2014, President Obama announced that immigration officials would exercise their “prosecutorial discretion” to grant “deferred action”—that is, a temporary reprieve from deportation—to certain immigrants who otherwise might be subject to enforcement actions.⁷⁷ The announcements came on the heels

⁷² See, e.g., Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1365 (2013) (emphasizing concerns about over-enforcement in areas where “the law is vague or overbroad”); Shavell, *supra* note 69, at 582–83 (discussing situations where “suit is excessive” because “there is no deterrent effect of suit”).

⁷³ See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 15 (1975) (describing risks of over-enforcement where sanctions exceed the social cost of illegal activity).

⁷⁴ *Id.* at 38–41.

⁷⁵ Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 699 (2011); accord Andrias, *supra* note 12 at 1045–46.

⁷⁶ See J.R. DeShazo & Jody Freeman, *Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1453 (2003) (“[A]gencies usually retain significant enforcement discretion even when Congress carefully delineates their substantive mandates. In practical terms, agencies frequently determine the extent to which a law will be binding, and upon whom.”); Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1231–32 (2012) (“[E]nforcement inherently necessitates some measure of discretion, requiring decisions to be made about how and when laws should be enforced.”).

⁷⁷ Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 125 YALE L.J. 104, 138–41 (2015). For transcripts of the announcements, see Remarks by the President on Immigration, White House Office of the Press Secretary (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<http://perma.cc/M4P3-9ZGY>] (announcing Deferred Action for Childhood Arrivals, which applies to undocumented immigrant children who were brought to the U.S. by their parents); Remarks by the President in Address to Nation on Immigration, White House Office of the Press

of Congress's failure to enact proposed legislation that would have accomplished largely the same goals.⁷⁸ Critics argued that the programs constituted an abdication of the President's duties under the Take Care Clause, and also violated the Administrative Procedure Act's procedural requirements for rulemaking.⁷⁹ Though vigorously defending the legality of the deferred-action programs, the President was forthright about what prompted them: "[T]o those members of Congress who question my authority . . . or question the wisdom of me acting where Congress has failed, I have one answer: Pass a bill."⁸⁰

Consider a different example, involving an affirmative enforcement initiative rather than a policy of nonenforcement. In his recent book on civil enforcement by state AGs, political scientist Paul Nolette describes coordinated efforts by AGs to change the way the pharmaceutical industry sets prices for prescription drugs, and how it advertises them.⁸¹ Working together through multistate litigation, like-minded AGs took aim at, and ultimately disrupted, settled industry practices such as direct-to-consumer advertising and the marketing of off-label uses. The litigation resembled regulation in both purpose and effect.⁸² As Nolette emphasizes, "[t]he policies created through multistate settlements have included several that industry critics had proposed in Congress but never successfully navigated the legislative process. . . . The settlement provisions were also

Secretary (Nov. 20, 2014), <https://www.whitehouse.gov.the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<http://perma.cc/TTE7-Y2DG>] [hereinafter 2014 Remarks] (announcing Deferred Action for Parents of Americans, which grants temporary relief to law-abiding parents of U.S. citizens and certain lawful permanent residents).

⁷⁸ For a history and defense of the programs, see Cox & Rodriguez, *supra* note 77, at 130–42.

⁷⁹ See generally, e.g., Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 199, 219 (2015) (characterizing Obama's immigration policies as "flout[ing] the duties imposed by the Take Care Clause"); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1227–37 (2015) (arguing that the programs require notice-and-comment rulemaking under the APA); Price, *Enforcement Discretion*, *supra* note 12, at 757, 759–61 (arguing that Obama's "immigration policy appears difficult to square with a proper conception of executive duty"). Both claims were presented in a suit by twenty-six states seeking to enjoin the programs. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015). The court of appeals agreed with the states, and its decision was affirmed by an evenly divided Supreme Court. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

⁸⁰ 2014 Remarks, *supra* note 77.

⁸¹ PAUL NOLETTE, *FEDERALISM ON TRIAL* 43–87 (2015).

⁸² See *id.* at 23.

a direct response to the FDA's deregulatory posture toward drug marketing."⁸³

These examples illustrate the functional similarities between regulation and enforcement: the two forms of agency action will sometimes be alternate means to the same end. If an agency wants to adjust the regulatory status quo in some way—to impose a new demand on regulated entities, for example—it can amend the relevant regulations or it can ramp up its enforcement efforts.⁸⁴ As a practical matter, the consequences for regulated parties may be largely indistinguishable, particularly where enforcement results in orders or agreements requiring the defendant to change its behavior going forward. As one AG put it, “[a]ttorneys general can do more damage in a heartbeat than legislative bodies can.”⁸⁵ This feature of enforcement has inspired the label, “regulation-by-litigation”—a pejorative used to call into question the legitimacy of particular enforcement initiatives.⁸⁶

2. *The Promise and Peril of Public Enforcement*

The critique of enforcement as regulation-in-disguise is by no means limited to public enforcement; it extends with equal force to enforcement by private parties and private attorneys. But, while both public and private enforcement have the capacity to move policy, they may not move it in the same direction. Because public and private enforcers differ in various respects, we can expect them to exercise their discretion in different ways, to pursue different targets and prioritize different goals.⁸⁷ These differences go to the heart of why *We the People*

⁸³ *Id.* at 80.

⁸⁴ See Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2069, 2126 (2015) (“In many cases, actions labeled as ‘enforcement’ decisions really are substantive regulatory decisions.”).

⁸⁵ Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014) (quoting Colorado AG John W. Suthers) http://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html?_r=0 [<http://perma.cc/WW9L-2NFP>].

⁸⁶ ANDREW P. MORRIS ET AL., REGULATION BY LITIGATION 48 (2009) (“The final outcome of regulation-by-litigation looks an awful lot like . . . regulation-by-rulemaking: a set of detailed rules that constrain future behavior.”)

⁸⁷ For recent discussions of the differences between public and private enforcement, see, for example, Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661–71 (2013); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1924–43 (2014) [hereinafter Engstrom, *Pathways*]; Lemos, *Privatizing*, *supra* note 16, at 524–30. Seminal works include Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Landes & Posner, *supra* note 73; A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

rely on public enforcement as we do, and highlight the need for accountability.

Most accounts of private litigation begin from a common premise: private enforcement is fueled by the financial incentives of litigants and their lawyers.⁸⁸ On that view, a plaintiff will sue if, and only if, her expected recovery exceeds the costs of litigation.⁸⁹ Likewise, a private attorney will take a case if, and only if, the expected payoff exceeds the cost.⁹⁰ To be sure, commentators sometimes acknowledge that private litigants may be motivated by goals other than money—goals such as revenge, a desire to be heard, or to have one’s “day in court.”⁹¹ Like the financial interests that dominate most accounts, however, these non-financial interests share a common characteristic: they are personal, individualized, private.⁹²

At least since Steven Shavell’s famous article describing the “fundamental divergence between the private and the social motive to use the legal system,” it has been taken as gospel in the enforcement literature that private litigation may promote private interests at the expense of the public interest.⁹³ Public enforcement is different—or at least it can be. Public enforcement agencies are not for-profit businesses; they need not break even in every case, much less maximize recoveries. Government attorneys are salaried, and their annual take-home is not connected in any immediate way to the quantity or quality of cases they choose to pursue, or the size of the judgments they recover.⁹⁴

⁸⁸ See, e.g., Engstrom, *Pathways*, *supra* note 86, at 1924 (noting the centrality of “[a]ssumptions about the essential profit motivation of private enforcers”).

⁸⁹ See Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 796–98 (2011) (describing the conventional economic litigation model).

⁹⁰ See *id.* at 790.

⁹¹ E.g., Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 19–23 (2000) (discussing litigants’ noneconomic motives).

⁹² See Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2200 (2010) (“By definition, a private enforcer is incentiv[iz]ed to maximize her private welfare. . . .”). The self-interested nature of private enforcement should not be overstated. Among other things, the conventional account ignores the important strand of private litigation known as “public interest law,” which (as the name suggests) understands itself as serving the public interest and typically is not for profit. Attention to public interest lawyering makes clear that there is nothing inherent in the nature of private enforcement that requires that it turn on narrow self-interest, much less financial interest. But public interest lawyering accounts for only a small fraction of the private legal market. Most private enforcement can be explained by the private incentives emphasized on the conventional account.

⁹³ Shavell, *supra* note 69, at 581.

⁹⁴ See Landes & Posner, *supra* note 73, at 15 (“[T]he public enforcer is not constrained to act as a private profit maximizer.”).

Government attorneys also serve different kinds of clients than their counterparts in the private bar. The clients in public enforcement actions typically are government officials and institutions who are themselves bound to serve the public interest.⁹⁵ And, in some cases, the only “client” is the public itself.⁹⁶ When a state attorney general decides to pursue litigation seeking to redress some harm to the state’s citizens, for example, there is no agency to act as intermediary between the public and the attorney. The attorney acts in the name of the state and its citizens, and her obligation is to the public generally.

Thus, while public enforcers, like their private counterparts, must weigh the expected costs and benefits of every enforcement action, their considerations are different—or at least they can be. Whereas private enforcers focus on *private* costs and benefits, public enforcers can take account of the broader *social* consequences of the case, including costs and benefits to defendants, third parties, and the system as a whole.⁹⁷ Public enforcement, in other words, can represent the public interest.

Perhaps this is all that needs to be said to make the case for accountability for public enforcement. Private litigation will not dependably serve the public interest; some interests will be left out. We need some way for the public itself to be represented in enforcement. Yet it seems plain that the “representation” will not be in the nature of the traditional lawyer-client relationship. As with law-making, it is impracticable for the whole of the people to band together to pursue litigation. Nor can we collectively monitor and instruct an attorney, or replace her midstream if we disapprove of her litigation choices. Instead, if the government is to represent us in enforcement, the representation must be *political*. As Part I explained, political

⁹⁵ Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 269 (2000) (“Whether one views the client as the government, a government agency or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public.”); Rubenstein, *supra* note 8, at 2138 (“Many public attorneys . . . consider ‘the public’ or ‘the public interest’ as their real client in interest; the agency or government official to whom they report is simply an intermediary form of that principal.”).

⁹⁶ See NAT’L ASS’N OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 83 (Emily Myers ed., 3d ed. 2013) [hereafter NAAG] (explaining that, in various areas, AGs “have been given independent enforcement duties to advance and to protect ‘the public interest’ through litigation”).

⁹⁷ See, e.g., Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2000) (“It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice . . .”).

representation typically demands political accountability. That is, this sort of institutional arrangement—with government actors engaging in discretionary policymaking in service of the public—triggers the “basic normative intuition that lies at the heart of most contemporary democratic theories: those potentially affected by a collective decision should have opportunities and capacities to influence that decision.”⁹⁸

The argument becomes stronger still if we consider the realities of public enforcement, acknowledging that various forces can skew public enforcement away from the pursuit of the public interest. Like other government functions, public enforcement may be diverted by enforcement officials’ own self-interest, or by narrow private interests.⁹⁹

Commentary on the tradeoffs between public and private enforcement often emphasizes the risk that government attorneys may prioritize cases that advance their personal or professional interests.¹⁰⁰ Public “attorneys, like most people, recognize that their job performance today affects their career opportunities tomorrow.”¹⁰¹ The consequences are hard to predict. Depending on their personal preferences and career plans, attorneys may relish the challenge of high-profile cases that are likely to garner attention,¹⁰² or they may prefer to focus on smaller cases that are easy to win and that will fly below the political radar.¹⁰³ The important point for present

⁹⁸ Montanaro, *supra* note 18, at 1094; *cf.* Wright, *supra* note 20, at 581 (“When government officials have discretion, the rule of law also requires that they be accountable.”).

⁹⁹ *Cf.* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 496 (2003) (emphasizing concerns about “the corrupting forces that the constitutional structure is designed to inhibit: private interest and governmental self-interest”).

¹⁰⁰ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 543 (2001) (noting that, “with the absence of direct political accountability,” federal prosecutors may prefer “prosecutions that further the prosecutor’s own professional development, or prosecutions that are especially interesting or fun”).

¹⁰¹ Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys’ Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 277 (2002).

¹⁰² See JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 74, 204 (1978) (reporting that Assistant U.S. Attorneys who anticipated moving into private practice tended to prefer complex, high-profile cases); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 812 (1999) (describing U.S. Attorneys’ offices as “way stations for lawyers seeking to advance their careers with conspicuous litigation victories against well-represented targets”).

¹⁰³ See, e.g., Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1444–45 (1998) (describing how career government attorneys tend toward uncontroversial cases).

purposes is that there is no necessary connection between the self-interest of enforcement officials and the public interest in effective enforcement.

The risk that enforcement will be skewed by *private* influence is at least as strong, though it has received less attention. In the context of law making—and particularly administrative regulation—concerns about private influence have inspired various mechanisms designed to minimize the risk that government will be “captured” by organized interests.¹⁰⁴ The concept of capture is notoriously slippery, but a good working definition understands capture as “the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.”¹⁰⁵ Early analyses of capture tended to focus on the potential for over-regulation, but more recent scholarship has emphasized the corollary risk of so-called “corrosive” capture, whereby “organized firms render regulation less robust than intended in legislation or than what the public interest would recommend.”¹⁰⁶

The emphasis on regulation in these definitions is not mere happenstance. Most commentary on capture focuses on the government’s law-making functions, downplaying enforcement.¹⁰⁷ Yet several features of enforcement make it especially susceptible to capture, particularly of the “corrosive” type.

Enforcement actions frequently reflect an asymmetric pattern, with the costs of enforcement falling on a narrow band of defendants and the benefits shared widely by the “inattentive public.”¹⁰⁸ That pattern facilitates capture. Well-known collective action problems make it hard for large groups to organize, particularly when the costs (or benefits) to each individual

¹⁰⁴ See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (discussing mechanisms to reduce agency capture).

¹⁰⁵ PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 13 (Daniel Carpenter & David A. Moss eds., 2014) [hereinafter PREVENTING REGULATORY CAPTURE].

¹⁰⁶ *Id.* at 16.

¹⁰⁷ For an exception, see Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 126–31 (2002).

¹⁰⁸ Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 879 (2014) (“Enforcement is often invisible to those who benefit from it—in public choice terms, enforcement typically works to the advantage of the ‘inattentive public[.]’” (quoting R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 68 (1990))).

are negligible.¹⁰⁹ Smaller groups can organize more easily, and they have ample incentive to try to influence government action that affects them directly.¹¹⁰

Enforcement power also tends to be held, at least in the first instance, by specialized agencies as opposed to generalists.¹¹¹ For a variety of reasons, generalist institutions tend to be less susceptible to capture than specialists. By definition, generalist institutions deal with a range of issues, which means that they hear from a range of interests. The resulting cacophony makes it difficult for any one interest to wrest control of the institution's decision making. Special interests also get less bang for their buck with generalists, because even if they are successful, the benefits of capture "are diluted by the wide range of matters that are of no concern to a particular special-interest group."¹¹² Specialized agencies, by contrast, deal with the same issues over and over, meaning that they consistently interact with the same set of players.¹¹³ From an interest-group perspective, that structure both reduces the costs and increases the benefits of capture.¹¹⁴

Finally, capture may be especially difficult to detect in the context of enforcement. In order for any claim of capture to make sense, it is not enough to identify government action that aligns with a certain interest (e.g., that of the regulated industry). One must also identify the counterfactual: the public interest that the institution in question is not serving.¹¹⁵ That is hard to do in the best of times, but it is particularly challenging when dealing with discrete enforcement decisions. Even if one can identify the public interest at the level of platitude—"it is in the public's interest to promote competition"—it is extraordinarily difficult to show that the public interest would be better served by the agency going after one defendant rather than another, or seeking this remedy rather than that one.

Not only does this feature of enforcement make it difficult to spot capture when it happens, but it also makes it easier for would-be defendants to persuade public enforcers to look the

¹⁰⁹ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOOD AND THE THEORY OF GROUPS* (1965).

¹¹⁰ See generally *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1980).

¹¹¹ See *infra* section III.A.1.

¹¹² Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 *GEO. L.J.* 1337, 1362 (2013).

¹¹³ See *id.* at 1341.

¹¹⁴ See Minzner, *supra* note 84, at 2136–59 (describing special risks of capture for specialized enforcers).

¹¹⁵ See Daniel Carpenter, *Detecting and Measuring Capture*, in *PREVENTING REGULATORY CAPTURE*, *supra* note 105, at 57, 58.

other way in their cases. As recent commentary has emphasized, the risks of capture may be pronounced in circumstances where government officials can tell themselves that they are doing the right thing. “Most corrupt acts don’t take the form of clearly immoral choices. People fight those.”¹¹⁶ Yet even officials who embrace their duty to serve the public interest may be swayed by the “soft pressures” of so-called “cultural,”¹¹⁷ “social,”¹¹⁸ and “informational”¹¹⁹ capture. Officials acting in good faith “might depend on information from the affected entities and lack the means or ability to review that information skeptically. Or the agency might come to see the world the way that its regulated entities do.”¹²⁰ The upshot is that government officials, including enforcers, “might make decisions because their conception of the public interest has been colonized by industry.”¹²¹ Notably, those decisions often will *also* serve the self-interest of government enforcers.¹²² As suggested above, government attorneys may hope to secure post-government employment in the regulated industry, or they may prefer to avoid particularly difficult and contentious cases that threaten to eat up time and effort with no guarantee of success. Enforcers likewise may be anxious to please their overseers with impressive statistics of cases won and settlements secured. For all these reasons, battling a powerful and highly motivated defendant may seem decidedly unattractive.¹²³ In such circumstances, well-meaning enforcers may be swayed by

¹¹⁶ Steve Randy Waldman, *Sympathy for the Treasury*, INTERFLUIDITY (Nov. 5, 2009), <http://www.interfluidity.com/posts/1257407150.shtml> [<http://perma.cc/N5QP-KWYE>]; see James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE, *supra* note 105, 71, 94 (“Most regulators probably do not see themselves as trading influence for material gain.”).

¹¹⁷ Kwak, *supra* note 116, at 93.

¹¹⁸ Steven M. Davidoff, *The Government’s Elite and Regulatory Capture*, N.Y. TIMES, (June 11, 2010), <http://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture> [<http://perma.cc/HPR7-WF5D>] (“These men and women may believe they are doing their best, but their worldview is affected by the people they interact with.”).

¹¹⁹ Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).

¹²⁰ Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1 (Nov. 20, 2010).

¹²¹ Kwak, *supra* note 116, at 79.

¹²² See *id.* at 75 (explaining that “[t]he motive force in traditional theories of capture is material self-interest” and discussing how self-interest may interact with other, more subtle and less rational influences).

¹²³ See Lemos & Minzner, *supra* note 108, at 890 (“[F]or enforcement lawyers who do not intend to move on [to private practice], simple cases with small penalties may be more attractive than riskier cases with potentially larger rewards.”).

claims that the hardest cases, or the strongest sanctions, would not actually promote the public interest.

This analysis suggests that the risk of capture in the enforcement context is real, and worthy of study in its own right. It also serves to underline the functional importance of accountability for public enforcement. Accountability can tether public enforcement to the public interest. That is, accountability can help ensure that public enforcers do indeed focus on the full social consequences of enforcement, rather than emphasizing the more narrow, parochial, and financial concerns that dominate private enforcement. Political accountability is not the only means to that end, of course. Ethical and professional rules compel attorneys to work in service of their clients' interests, and—as noted—the relevant “client” for government attorneys is often the public itself.¹²⁴ Bureaucratic controls, including office policies and norms, can help reinforce that focus.¹²⁵ But institutional structures designed to link enforcers to the public they purport to represent, or to political representatives who are themselves connected to the public, also can work to cement the connection between public enforcement and the public interest.

B. Enforcement and Independence

I have argued that accountability is critical—for reasons both conceptual and consequential—if public enforcement is to “represent” the public interest. But there is a potential problem. The goal of accountability is to make government responsive to the public. In the context of enforcement, however, there is something unsettling about the notion that the government's actions will channel the public will. Criminal-law scholars have noted this tension when writing about elected prosecutors.¹²⁶ What civil-law scholars have assumed is democratic, these scholars have seen as dangerous.

¹²⁴ See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2014) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation”); *id.* at r. 1.3 cmt. 1 (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”); see also *supra* notes 55–56 and accompanying text (discussing the client in public enforcement).

¹²⁵ For commentary emphasizing the importance of internal mechanisms such as “hierarchy controls, institutional norms, and professionalism” in shaping agency behavior, see Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 1 (2013); Shapiro & Wright, *supra* note 51, at 581.

¹²⁶ See, e.g., Richman, *supra* note 20, at 957–58; see also Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 869 (2004)

This subpart seeks to unpack the intuition behind the unease. I suggest that worries about undue public influence reflect two related sets of considerations. First, responsiveness to public opinion threatens to undermine values associated with the rule of law and related norms of neutrality. Second, there may be good reasons to worry that public opinion about enforcement will be ill-informed, or based on illegitimate considerations such as bias or animus toward particular groups or individuals. These concerns are important, and they should shape the way we organize and manage public enforcement. But it is equally important to recognize that enforcement is not *sui generis* in these respects. Instead, as the next section explains, the challenge described here is merely one manifestation of a broader puzzle in democratic theory about the appropriate role of the political representative.

1. *The Analogy to Adjudication*

The discussion above likened enforcement to lawmaking. Yet certain aspects of enforcement seem more akin to adjudication, triggering norms that may seem to be at odds with accountability—norms like impartiality and independence of judgment.

The adjudicative aspects of enforcement are most evident in the context of settlement. The overwhelming majority of enforcement actions are settled, typically with minimal (if any) judicial oversight or involvement.¹²⁷ As a practical matter, then, enforcers often determine not only which actions to pursue but also how to resolve them. In such cases, enforcers are not just advocates for one side; they have substantial responsibility for deciding what outcome is fair and just, all things considered.¹²⁸

(describing the view that “whatever else prosecutors do, they should act nonpolitically” and noting that “this view of neutrality appears to be inconsistent with the separate notion that prosecutors should execute the public’s will, rather than their own”).

¹²⁷ See, e.g., Farber & O’Connell, *supra* note 52, at 1172 (“[A]pproximately 90% of the Securities and Exchange Commission (SEC)’s and 80% of the Equal Employment Opportunity Commission (EEOC)’s and Federal Trade Commission (FTC)’s enforcement actions are settled.”); Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies’ Programs*, 52 ADMIN. L. REV. 1345, 1368–69 (2000) (“The huge majority of administrative enforcement proceedings settle; in these cases, there is no formal hearing and no possibility of judicial review. . . .”).

¹²⁸ Cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) (“In the current era dominated by [criminal] pleas instead of trials, federal prosecutors are not

Though it is difficult to overstate the significance of settlement, the analogy to adjudication holds even if we ignore the reality of how cases are resolved and focus solely on the choice of targets. Discrete decisions about which offenders to pursue or which remedies to seek implicate the interests of identifiable individuals or firms.¹²⁹ The question is not what the law should be going forward, but whether and how existing law should be applied to a particular set of facts. Unlike judges, enforcers may assess those questions from an advocate's perspective, but their evaluation shares more in common with the work of adjudicators than that of legislators crafting prospective, generally applicable law.

Consider, in this regard, the reasons the Court has offered for permitting states with elected judiciaries to adopt more robust regulations for judicial elections than the First Amendment would permit for "political elections."¹³⁰ When dealing with elections for "politicians," the Court has brushed aside the argument that Congress and the states ought to be able to regulate campaign contributions and expenditures with a view to minimizing, or equalizing, the influence of financial supporters. In the Court's view,

[f]avoritism and influence are not . . . avoidable in representative politics It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.¹³¹

Not so for judges. The Court has acknowledged that states have a compelling interest in guarding against "corruption" of government.¹³² Because the nature of the judicial office differs from that of a political office, so too do the considerations of

merely law enforcers. They are the final adjudicators in the vast majority of cases.").

¹²⁹ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2363 (2001) (arguing that the different due process rules for lawmaking and adjudication turn on "a distinction between relatively open-ended policymaking . . . and relatively circumscribed resolution of discrete claims involving identifiable firms or individuals"); see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (distinguishing, similarly, between "polycentric" and "bipolar" disputes).

¹³⁰ See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015).

¹³¹ *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

¹³² See *Williams-Yulee*, 135 S. Ct. at 1673.

what will corrupt it. The Court has held that “ingratiation and access . . . are not corruption” in the political context, but instead “embody a central feature of democracy.”¹³³ The judicial context is different, however: “In deciding cases,” the Court has insisted, “a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors.”¹³⁴ Thus, “[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity.”¹³⁵

Much of what the Court has said about judges could also be said about enforcers. For instance, in upholding state laws prohibiting candidates for judicial office from personally soliciting campaign contributions, the Court observed that “personal solicitation by a judicial candidate ‘inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate.’”¹³⁶ A similar risk arises in the enforcement context. Consider a recent example. In early 2013, attorneys general from more than thirty states opened an investigation into possible false advertising and deceptive marketing by the company that produces 5-Hour Energy, a caffeinated drink.¹³⁷ According to the company, it then began to receive requests for campaign contributions to the AGs involved in the investigation.¹³⁸ Executives likened the solicitations to demands for “ransom.”¹³⁹ To be sure, that account is self-serving and ought to be taken with a healthy dose of salt. But whether solicited or not, records show that 5-Hour Energy contributed more than \$280,000 to various AG’s political funds in 2013 and 2014.¹⁴⁰

Stories like this have special bite in the contexts of enforcement and adjudication, where government officials are called upon to make decisions involving discrete and identifiable individuals and groups. Though the realities of privately funded election campaigns might trigger concerns about favoritism or vindictiveness in any circumstance, those concerns are more

¹³³ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (internal quotation marks omitted).

¹³⁴ *Williams-Yulee*, 135 S. Ct. at 1667.

¹³⁵ *Id.* at 1666.

¹³⁶ *Id.* at 1668 (quoting *Simes v. Ark. Judicial Discipline & Disability Comm’n*, 247 S.W.3d 876, 882 (Ark. 2007)).

¹³⁷ Lipton, *supra* note 85.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

mented when government acts through generally applicable legislation or regulation. Even if campaign contributors have special access to and influence over law-makers, the fruits of their labors will spill over to others: Any law will affect campaign supporters and opponents alike. In the enforcement context, by contrast—as with judging—it is possible to imagine the worst sort of pay-to-play scenario, in which political supporters are treated with favor and opponents are punished.¹⁴¹

The mere potential for such a scenario threatens to undermine the public's confidence in the neutral administration of justice.¹⁴² Although enforcers' status as advocates means that they are not held to the same "rigid" requirements of neutrality as judges,¹⁴³ they are obliged to be advocates for the public interest, broadly—not for contributors or any other private interests. Indeed, courts long have held that government attorneys must be "impartial" in at least two respects: "they must seek truth and not merely obtain convictions," and their "charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals."¹⁴⁴

Perhaps not surprisingly, most discussions of this question focus on criminal prosecutions, where "liberty itself may be at stake."¹⁴⁵ Yet the Supreme Court has recognized that enforcement decisions in civil cases can "result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated."¹⁴⁶ It has therefore made clear that

¹⁴¹ This concern is not limited to states with elected AGs. At the federal level, some studies indicate that campaign contributions to and lobbying of key members of Congress reduce the likelihood of SEC enforcement. See Urska Velikonja, *The Political Economy of Financial Regulation*, 50 GA. L. REV. 17, 38–39 (2015).

¹⁴² Cf. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) ("[T]he public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors.").

¹⁴³ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

¹⁴⁴ *State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000); see *People v. Eubanks*, 927 P.2d 310, 315–16 (Cal. 1996) ("[T]he district attorney is expected to exercise his or her discretionary functions in the interest of the People at large, and not under the influence or control of an interested individual."); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (explaining that a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant"); *Commonwealth v. Tabor*, 384 N.E.2d 190, 196 (Mass. 1978) ("In view of his great responsibilities, a district attorney may not compromise his impartiality."); see also *Young v. U.S. ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) ("[W]e must have assurance that those who would wield [the prosecutorial] power will be guided solely by their sense of public responsibility for the attainment of justice.").

¹⁴⁵ *Young*, 481 U.S. at 810.

¹⁴⁶ *Marshall*, 446 U.S. at 249.

there are limits on the permissible “partisanship” of government attorneys in civil and criminal cases alike.¹⁴⁷ It follows—to paraphrase what the Court has said of judges—that a government attorney “is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors” in selecting cases for enforcement.¹⁴⁸

2. *The Uneasy Role for Public Opinion*

The 5-Hour Energy story might be understood as capture redux—an example of private influence (or enforcer self-interest) threatening to trump the public interest. I want to suggest, however, that the lesson goes deeper than that. That is, the analogy to judging ought to give us pause about *public* influence, too.

Imagine that government officials have access to a public-opinion poll on some question. What role—if any—should the results of the poll play in the officials’ decision-making process? Most commentators would agree that an opinion poll could be a legitimate input for a legislative decision, though they might disagree over whether legislative representatives could justify their decisions *solely* by reference to public opinion.¹⁴⁹ If the officials in question were judges, the consensus would likely shift from approval to disapproval.¹⁵⁰ What about enforcement? Could a government enforcer properly base the decision to pursue a particular target, or seek a particular sanction, on the results of a public opinion poll? The answer to this question seems to fall somewhere between the answer for legislators and for judges, and—revealingly—the reasons for hesitation are similar to the reasons we might give in the judicial context.

First, many laws are designed to protect individuals from majority will. Anti-discrimination laws are the clearest, but hardly the only, examples. To allow enforcement of those laws

¹⁴⁷ *Id.* at 247–49.

¹⁴⁸ *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015).

¹⁴⁹ This disagreement proves to be important for enforcement; we will return to it below. See *infra* subpart II.C.

¹⁵⁰ See, e.g., Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Ass’n Comm’n on Separation of Powers and Judicial Independence*, Washington, D.C., December 13, 1996, 12 ST. JOHN’S J. LEGAL COMMENT 69, 70 (1996) (“Individual judicial independence . . . embodies the concept that individual judges decide cases fairly, impartially and according to the facts and the law, not according to . . . the latest [public] opinion poll.”); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 969 (2007) (arguing that judges must be independent of “popular passions”).

to turn on majority preferences would pervert their purpose and undermine their efficacy. As the Supreme Court once put it, one's "rights may not be submitted to vote; they depend on the outcome of no elections."¹⁵¹ The Court was talking about the judging, of course. But cases do not simply materialize on courts' dockets; they come to judges because a plaintiff (public or private) chooses to assert the right in question. If enforcement decisions were controlled by popular demand, our law would suffer just as surely as if judicial decisions were generated by a vote of the people.

Second, enforcement decisions may be highly discretionary, but they need not be standardless.¹⁵² One of the conventional markers of a judicial abuse of discretion is the failure to consider relevant considerations, or the reliance on irrelevant considerations.¹⁵³ Similar notions can inform enforcement. Analysis of the law being enforced, and the purposes that animate it, will often generate a range of factors to guide the exercise of discretion. And the goal of deterrence itself supplies a framework for decision. The easiest case for our hypothetical public-opinion poll is one in which the poll sheds light on the deterrence calculus, or informs a consideration that positive law deems relevant—for example, by conveying information about the harm caused by certain conduct. Even in that case, though, public opinion is one factor in the enforcement calculus, and it might be outweighed by competing considerations. To treat public opinion as an independently sufficient basis for decision, without carefully weighing the purposes of the relevant law or how best to promote deterrence, would undermine the core function of public enforcement: to serve the public interest.

Third and closely related, enforcement decisions are also *legal* decisions.¹⁵⁴ That's most obvious when enforcement initiatives depend on particular interpretations of the statutes in question. Yet even when enforcers are working within the metes and bounds of a concededly permissible interpretation, their choices about which offenders to pursue or which sanctions to seek can have profound consequences for what the law means in practice. Those choices should rest on principle, not

¹⁵¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

¹⁵² *Green & Zacharias*, *supra* note 126, at 842.

¹⁵³ *See generally* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 47–51 (2000).

¹⁵⁴ *See* Mila Sohoni, *Crackdowns*, VA. L. REV. (forthcoming 2017) (manuscript at 40) (on file with author) (arguing that "programmatic enforcement decision(s)" are "fundamentally . . . act(s) of *interpretation*").

will; they should not be arbitrary.¹⁵⁵ Our commitment to the rule of law entails a commitment to treating like cases alike. Where that is impossible (perhaps because resource constraints or concerns about over-enforcement prevent enforcers from pursuing all offenses of a certain type) the reasons for selecting one case rather than another should be—at the very least—capable of generalization.¹⁵⁶ Again, public opinion may sometimes reflect such reasons. But a theory of enforcement that works for one case only cannot be squared with the values of consistency, predictability, and fair notice that underlie the rule of law.

Finally, public opinion will often be misinformed or uninformed. It may rest on false premises about the law or the conduct in question, or on considerations that the law deems irrelevant. The public may lack the information, and the experience, that enforcers can access. Worse, public opinion may be based on considerations that the law places off-limits: racial bias, for example, or personal animus. These concerns are heightened in case-specific decisions with identifiable targets. The general public will rarely have the information and expertise necessary to gauge whether law-enforcement goals would be better served by pursuing one case rather than another. Meanwhile, the more targeted the decision, the greater the risk of bias and other improper motivations. As then-Professor Elena Kagan once wrote, “it is in this area, because so focused on particular individuals and firms, that the crassest forms of politics (involving, at the extreme, personal favors and vendettas) pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking.”¹⁵⁷ Kagan was arguing against presidential control of discrete enforcement decisions—an exception to her general endorsement of “presidential administration.”¹⁵⁸ But the concern extends

¹⁵⁵ Cf. Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473 (2007).

¹⁵⁶ Cf. Sohoni, *supra* note 154, at 41–42 (using rule-of-law values to support a vision of “faithful” enforcement that “reflect[s] the enforcer’s honest and disinterested belief that enforcement at that level is the best way to enforce the law—where ‘best’ is measured not only by the literal text of the statute, but also by the law’s purpose and context, by the public interest, and by constitutional values”).

¹⁵⁷ Kagan, *supra* note 129, at 2357–58; accord Andrias, *supra* note 12, at 1071–72 (raising similar concerns about presidential control of discrete enforcement decisions).

¹⁵⁸ Kagan, *supra* note 129, at 2357 (acknowledging that the limitation is “untraditional” since “[r]esolution of prosecutorial questions usually is conceived as lying at the heart of the executive power vested in the President”).

beyond presidential meddling, and is not limited to “personal favors and vendettas.”¹⁵⁹ Depending on its basis, broad-based public sentiment can also be an illegitimate justification for enforcement. Much as we would decry a judicial decision based on the public’s desire to punish a particular defendant, we should disapprove of enforcement decisions that echo the angry mob.

C. Enforcement as Political Representation

All of this helps explain why it is rarely a compliment to describe enforcement as “political.”¹⁶⁰ But here we find ourselves at a seeming impasse, for enforcement is political—undeniably, unavoidably so. Ours is not the German system of mandatory prosecution, under which enforcers are expected to pursue every violation.¹⁶¹ And that is not an oversight, or an evil made necessary by limited resources. We *depend* on public enforcers to exercise discretion, to translate what are often overbroad or rigid statutes and regulations into workable rules for real life.

One possible response to this conundrum is to emphasize the distinction between broad policy and case-specific decision making that Kagan and others have drawn in the context of presidential control of enforcement. Perhaps policy decisions should be responsive to public pressures, but case-specific decisions insulated from them. The difficulty is that the line between policy-formation and -application is fuzzy at best. Policy decisions are—in a sense—simply the aggregation of individual enforcement decisions. Some policy questions may not even occur to enforcers unless and until they are confronted with

¹⁵⁹ *Id.* at 2358.

¹⁶⁰ See, e.g., Lincoln Caplan, *Hyper Hacks: What’s Really Wrong With the Bush Justice Department*, SLATE (Mar. 14, 2007), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/03/hyper_hacks.html [<https://perma.cc/LU37-XTS5>] (criticizing the second Bush Administration for its “disdain for the nonpolitical tradition of federal law enforcement”); Michael W. Dolan, *Political Influence on the Department of Justice: Are the Pressures Only External?*, 9 J.L. & POL. 309, 312 (1993) (“Rare is the federal prosecutor who has not been described by his or her enemies as politically ambitious”); William Safire, *Guarding the Guardians*, N.Y. TIMES, Feb. 24, 1986, at A15 (criticizing “political prosecutors who will do anything for publicity”).

¹⁶¹ See Sara Sun Beale, *Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control*, in DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT 27, 44–45 (Michele Caianiello & Jacqueline S. Hodgson eds., 2015) (describing the German system of prosecution).

cases that pose the questions. Individualized enforcement decisions may *be* decisions about policy, and vice versa.¹⁶²

I want to offer a different way forward. If we think about enforcement as part of a larger system of governance, we can recognize the tension sketched in this Part as a familiar one. A similar ambivalence about the relationship between government action and the public will is reflected in age-old debates about the nature of political representation. As noted, elections are critical to most theories of political representation: elections promote accountability, which in turn encourages government officials to promote the interests of the people they ostensibly represent. But suppose we are some years out from an election—say, three years into a six-year term. What does it mean to say that a community is being represented *well* or *poorly*? Should representatives follow the wishes of their constituents, or should they exercise autonomous judgment in service of their constituents' welfare?¹⁶³

The challenge identified in this Part seems incurable only if one insists that representation—and accountability, which promotes meaningful representation—obligates officials to follow their constituents' wishes, full stop. But few theorists take that position. Some argue, as a conceptual matter, that the duty of the representative is to pursue her constituents' objective interests, regardless of what the constituents say they want at any given moment.¹⁶⁴ Others argue that the empirical reality is that constituents are rationally uninformed about most issues that government must confront, and in such circumstances the representative has little choice but to exercise autonomous judgment. Still others take a more nuanced view, acknowledging that representation has gone astray if it departs

¹⁶² Cf. Andrias, *supra* note 12, at 1101–02 (acknowledging that “presidential involvement should not be verboten” when “policy is made through individual enforcement actions or when an individual enforcement action has broad-reaching and likely recurring policy consequences”).

¹⁶³ See PITKIN, *supra* note 22, at 145 (describing this as “the central classic controversy in the literature of political representation”).

¹⁶⁴ This approach, often associated with Edmund Burke, is sometimes called the “independence” or “trusteeship” model of representation. See Andrew Rehfield, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 214–15 (2009). See also Jane Mansbridge, *Clarifying the Concept of Representation*, 105 AM. POL. SCI. REV. 621, 621 (2011) (defending a theory of “gyroscopic” representation in which representatives exercise self-reliant judgment and are relatively unresponsive to ex post sanctions). Mansbridge distinguishes her theory from Burke’s more elitist version on the ground that, unlike Burke, she does not suggest that “the representative has more wisdom, intelligence, or prudence than the voter.” *Id.* at 623.

repeatedly from the wishes of the represented, but insisting nevertheless that a representative need not—and should not—slavishly follow her constituents' preferences in every instance. This approach is exemplified in Hanna Pitkin's famous work on the concept of representation. Pitkin argues that political representation "means acting in the interest of the represented, in a manner responsive to them."¹⁶⁵ Normally, that will mean that representatives must act in accordance with the preferences of their constituents—when constituents have preferences, that is. But not always. "[L]eadership, emergency action, action on issues of which the people know nothing are among the important realities of representative government. They are not deviations from true representation, but its very essence."¹⁶⁶ Thus, for Pitkin, the representative's ultimate obligation is to do what is good for her constituents, not to follow their every wish.¹⁶⁷ To be sure, constituents' wishes are relevant to their interests, and in most cases the two will be aligned.¹⁶⁸ "Consequently," Pitkin explains, "the representative also has an obligation to be responsive to those wishes. He need not always obey them, but he must consider them"¹⁶⁹ And, importantly,

when a representative finds himself in conflict with his constituents' wishes, this fact must give him pause. It calls for a consideration of the reasons for the discrepancy; it may call for a reconsideration of his own views. It is not sufficient for him to choose; it is necessary that the choice be justifiable.¹⁷⁰

Contemporary theorists continue to debate the meaning of representation, but most join Pitkin in rejecting the most extreme "mandate" or "delegate" view, under which the representative is duty-bound to follow—and, where necessary, to solicit—constituents' views.¹⁷¹ Like Pitkin, they recognize that

¹⁶⁵ PITKIN, *supra* note 22, at 209–10.

¹⁶⁶ *Id.* at 163.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 162.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 163–64.

¹⁷¹ See, e.g., Manin, *supra* note 24, at 163 (emphasizing that "[r]epresentative systems do not authorize (indeed explicitly prohibit) two practices that would deprive representatives of any kind of independence: imperative mandates and discretionary revocability of representatives (recall)"); Rehfield, *supra* note 164, at 214 ("No one expects there to be an exact correspondence between [the laws of a nation and the preferences of the citizens governed by them]. . . . As long as . . . deviations do not become the norm (in which the law routinely fails to correspond to citizen preferences), they fit well within broad conceptions of democracy."); Urbinati & Warren, *supra* note 26, at 398 ("Elections establish the

constituent preferences are an important policy input. Genuine representation means that representatives will not lightly depart from their constituents' wishes.¹⁷² Decisions that deviate from public preferences are permissible, but they must be capable of justification in terms of the public interest.¹⁷³

Though couched in terms of representation, this approach extends to questions of accountability. Accountability, after all, is a means of securing effective representation. Depending on how one conceives of representation, accountability need not be equated with mindless obedience to the public will. As Jeremy Waldron puts it, "[i]nstruction is one thing; accountability is another."¹⁷⁴

As applied to enforcement, the advantage of this approach is that it allows us to incorporate the concerns identified in the previous section—the risk of favoritism for certain parties or animus toward others; the likelihood that public opinion on enforcement will be uninformed or misinformed; the possible tension between majority preferences and the purposes of the law being enforced; and so on—*into*, rather than in opposition to, a theory of representation and accountability. The considerations that make fealty to public preferences worrisome in some instances are also precisely the types of considerations that could justify a deviation from the public's wishes.¹⁷⁵ It does not follow, however, that the public's wishes are, or should be, irrelevant. We can say, coherently, that public enforcement must be accountable, that it must take account of public preferences and respond to those preferences, without endorsing the notion that enforcement decisions should be governed by public opinion polls. Enforcement decisions

nonindependence of the representative from the represented in principle, although in practice, representative institutions require enough autonomy to carry out their political functions, which will require bodies that can engage in deliberative political judgments."); cf. Brown, *supra* note 28, at 555 ("One hardly incites controversy today to say that the [U.S.] Constitution does not envision a pure democracy in which elections serve only to translate popular will into law.").

¹⁷² See MANIN, *supra* note 24, at 170 ("Representatives are not required to act on the wishes of the people, but neither can they ignore them It is the representatives who make the final decisions, but a framework is created in which the will of the people is one of the considerations in their decision process.").

¹⁷³ Rehfield, *supra* note 164, at 214 ("[W]e must always justify and explain cases in which law deviates from citizen preferences").

¹⁷⁴ Waldron, *supra* note 27, at 22.

¹⁷⁵ See PITKIN, *supra* note 22, at 210–12; Rehfield, *supra* note 164, at 214 ("[D]eviations [from public preferences] may be justified for familiar reasons: citizens often have no formed views on what the law should be; . . . their preferences may not conform to their true interests and will change over time, or their preferences may be trumped by more important principles of justice (including, but not limited to, the protection of minority rights).").

should not be blind to public opinion in the way we might imagine for judicial decisions. Yet, at the same time, the targeted and retroactive nature of enforcement—the features that prompt calls for “neutrality”—may provide stronger justification for departures from public preferences than would be appropriate in the legislative context.

To be sure, it will not always be easy to identify the proper balance between responsiveness and autonomy in practice. For example, reasonable minds may disagree over whether public opinion on a given issue is misinformed, or simply reflects an alternate vision of the public good that enforcers should take seriously. The virtue of this conception of enforcement is not that it will resolve all disagreements over the legitimacy of particular enforcement efforts, but that it helps us identify what we should be arguing about.

III

ENFORCEMENT ACCOUNTABILITY IN PRACTICE

Understanding public enforcement as political representation helps resolve the theoretical tension described in the previous Part. But it also highlights the enormous *practical* challenge of designing effective accountability mechanisms for enforcement. This Part begins that work, examining our existing laws and institutional structures to assess whether, and to what extent, public enforcement is accountable in fact. Though I offer several suggestions for reform, the primary goal of this and the following Part is to expose the inadequacies in our current treatment of enforcement. As things stand, there is little cause to believe that public enforcement will be responsive to the public it ostensibly represents. Making matters worse, there is good reason to fear that public enforcement will be influenced by narrow private interests. Returning to the risk of capture described above, Part IV shows that our existing system is doubly flawed: while enforcement is largely inaccessible to the public, it is vulnerable to private pressures.

A. Federal Enforcement: Political Controls

No federal enforcers are elected. In the absence of elections, U.S. law and policy tend to fall back on more indirect means of promoting political accountability. That strategy is on full display in federal administrative law and scholarship,

where accountability has been a central preoccupation.¹⁷⁶ In the regulatory context, the dominant response to the “serious legitimacy problem” posed by lawmaking by unelected bureaucrats has been to emphasize the connection between agency personnel and elected officials—the President and members of Congress—who are in a position to influence or control agencies’ work.¹⁷⁷ This section considers analogous mechanisms in the context of enforcement. It shows that the political controls that we rely on to legitimize administrative regulation are significantly weaker for enforcement.

1. *The President*

The unitary structure of the federal executive means that enforcement authority rests with the President and his or her subordinates. The actual work of enforcement is handled by specialized agencies or the generalist Department of Justice (DOJ). And, as is true in the context of regulation, the connection to the President varies in strength depending on whether the agency in question is categorized as “independent” or “executive.”¹⁷⁸

Most high-ranking federal enforcers are political appointees. The President appoints agency heads with the advice and consent of the Senate.¹⁷⁹ In the case of independent agencies, presidential appointments are constrained by bipartisanship requirements and staggered terms for commissioners.¹⁸⁰ The President also appoints key personnel at DOJ, including the Attorney General, the Deputy and Assistant Attorneys General, and the ninety-three U.S. Attorneys.¹⁸¹ Most of the legal work

¹⁷⁶ See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1659 (2004) (describing the “‘accountability theory’ of administrative law, which seeks to subject agency decision-making to the control of politically accountable officials” and has been used since the 1970s “to conform agency decisionmaking with the notion, widespread in broader constitutional theory, that popular rule is the cornerstone of democratic legitimacy”).

¹⁷⁷ Shapiro & Wright, *supra* note 51, at 580.

¹⁷⁸ See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (discussing the distinction between executive and independent agencies).

¹⁷⁹ U.S. CONST. art. II, § 2; see Farber & O’Connell, *supra* note 52, at 1152 (“[A]gency heads contribute to the political accountability rationale for agency deference through their assumed connection to the President and Congress . . .”).

¹⁸⁰ See Datla & Revesz, *supra* note 178, at 792–99 (citing multi-member structure and partisan balance requirements as two indicia of independence).

¹⁸¹ CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., RL30959, *PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 42–43* (2016).

at specialized agencies is handled by the agency's general counsel and staff, though some agencies have special divisions devoted to enforcement.¹⁸² The general counsel is a presidential appointee in all executive agencies; in the independent agencies, some general counsels are picked by the agency's leadership and some are appointed by the President.¹⁸³ Even where agency general counsel is formally nominated by the President, however, "[m]ore often than not . . . the general counsel is effectively selected by the head of the agency, to whose judgment the president defers. Thus, the counsel's loyalties may run primarily to the agency head and secondarily to the president."¹⁸⁴

High-ranking enforcement officials also differ in terms of their protection from removal: some may be removed by the President at will, others only for cause.¹⁸⁵ Here, too, the distinction typically follows the line between executive agencies and independent agencies. U.S. Attorneys, for example, "serve at the discretion of [] the President"¹⁸⁶ and may be removed at will.¹⁸⁷ President George W. Bush made use of that power in 2006, when he fired seven U.S. Attorneys for reasons that seemed to have little to do with performance and everything to do with partisan politics.¹⁸⁸ The firings provoked a heated controversy and ultimately congressional hearings and an investigation by the DOJ's Inspector General.¹⁸⁹ Critics argued that the President had violated longstanding norms against politicizing the DOJ, which permitted "en masse replacement of U.S. Attorneys at the time of a partisan change of administration, but barred targeted removal midstream."¹⁹⁰ But the law remains unchanged: U.S. Attorneys may be removed from of-

¹⁸² See generally Michael Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 143, 143 (Cornell W. Clayton ed., 1995) (exploring the role of the agency general counsel).

¹⁸³ See *id.* at 147.

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (describing the constitutional framework for the President's removal authority).

¹⁸⁶ *Mission*, OFFICE OF THE UNITED STATES ATTORNEYS <http://www.justice.gov/usao/mision> [<https://perma.cc/9NBU-8Z92>] (last updated Sept. 22, 2016).

¹⁸⁷ See, e.g., *Parsons v. United States*, 167 U.S. 324, 343 (1897) (holding that U.S. Attorneys have no tenure protection).

¹⁸⁸ For a detailed analysis of the U.S. Attorney firings, see generally U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008) [hereinafter OIG REPORT].

¹⁸⁹ See *id.* at 1-5.

¹⁹⁰ Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1202 (2013).

fice for virtually any reason, including their decisions in individual cases.¹⁹¹

Below the very top level of enforcement officials, elections and political appointments fade away. Most of the day-to-day work is done by civil servants, often careerists who stay in their jobs through changing presidential administrations.¹⁹² Depending on the agency (and sometimes the issue), career attorneys may have substantial autonomy over enforcement choices, or may have to run proposed actions up the flagpole to agency brass before moving forward.

The bureaucratic structure sketched here—political appointees at the top of the hierarchy, with civil servants performing much of the critical work—is precisely what prompts concerns about democratic legitimacy in the regulatory context.¹⁹³ As Part I suggests, scholars have produced a veritable mountain of commentary grappling with the challenges of accountability in the modern administrative state. One response has been to strengthen the connection between regulatory policy and the President, primarily by formalizing centralized executive review of agency regulations via the Office of Information and Regulatory Affairs (OIRA).¹⁹⁴ Such review is considered a key source of political accountability for federal agencies.¹⁹⁵

The existing tools of regulatory review apply only to regulation, however. Enforcement looks downright anarchic by comparison. That claim may seem odd, as centralization is typically listed (along with accountability) as one of the characteristics that distinguish public enforcement from the private

¹⁹¹ See OIG REPORT, *supra* note 188, at 202–03, 205–09 (discussing evidence that U.S. Attorney Daniel Bogden was removed because (among other reasons) “[d]espite the national focus the Attorney General requested for offices to place on the federal crime of obscenity, which coarsens society, the USA failed to support the Department’s prosecution of a case that was developed within his district”).

¹⁹² See Herz, *supra* note 182, at 148 (discussing the role of career attorneys in agency general counsel offices).

¹⁹³ See, e.g., de Figueiredo & Stiglitz, *supra* note 35, at 2 (noting “a fundamental normative question that has occupied scholars since the inception of the administrative state: in what sense can administrative rulemaking be ‘democratic’ if we do not elect the individuals writing the rules?”).

¹⁹⁴ See Farber & O’Connell, *supra* note 52, at 1162–69 (describing the scope and details of OIRA review).

¹⁹⁵ Proponents argue that OIRA review “promotes responsiveness to the policy preferences of the general public.” Kagan, *supra* note 129, at 2333. Agency employees likewise report that the President plays a “democratizing role” in agency regulation. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 89–90 (2006).

alternative.¹⁹⁶ And at first blush, public enforcement within the federal system does appear to be centralized, because most litigation authority is vested in one institution: the DOJ. Unless they have explicit statutory authority to do so, agencies may not litigate cases themselves or hire outside (non-DOJ) lawyers to do the work.¹⁹⁷ Like centralized regulatory review, DOJ's control of federal litigation can be understood in terms of accountability. Centralization channels litigation decisions through Main Justice—an institution close to the President both physically and philosophically. Because the Attorney General “sees the big picture—and sees it with the same eyes as the President—centralization ensures that the lawyering is consistent with the broader policy concerns of the Administration.”¹⁹⁸

Yet closer inspection reveals significant limitations in DOJ control as a means of securing political accountability for public enforcement. To begin with, DOJ's influence only works in one direction—to dampen enforcement. DOJ can refuse to pursue an enforcement action the relevant agency has proposed, but there is little DOJ can do if the agency itself has opted not to take action.¹⁹⁹ The rule of DOJ control is also riddled with exceptions. As Neal Devins and Michael Herz have shown, “Congress has significantly eroded the Attorney General's role as chief litigator for the United States, vesting at least some independent litigating authority in approximately three-dozen governmental entities.”²⁰⁰ To name just a few examples, the Department of Labor, the Securities and Exchange Commission, and the Federal Trade Commission all have authority to litigate civil enforcement actions themselves.²⁰¹ Although independent litigating authority is more common for

¹⁹⁶ See, e.g., Landes & Posner, *supra* note 73, at 39 (discussing the implications of “the existence of a public monopoly of enforcement”).

¹⁹⁷ Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 J. CONST. L. 558, 560–61 (2003); see also 28 U.S.C. § 516 (2012) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

¹⁹⁸ Herz & Devins, *supra* note 127, at 1346.

¹⁹⁹ See Devins & Herz, *supra* note 197, at 562–63.

²⁰⁰ *Id.* at 561.

²⁰¹ See Marshall J. Berger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1236–94 (2000) (cataloguing litigation authority among independent agencies, boards, and commissions).

independent agencies than executive agencies,²⁰² there is little rhyme or reason to the existing patterns. Instead, “the scope (and indeed, the very existence) of independent litigation authority seems more haphazard than purposeful.”²⁰³

Complicating matters further, it is essential to distinguish between litigation authority and *enforcement* authority. The latter includes the authority to undertake enforcement actions that do not end up in court—including administrative proceedings. Administrative proceedings are, by a long stretch, the dominant form of enforcement by federal agencies.²⁰⁴ DOJ plays no role in administrative enforcement; decision-making authority lies in the hands of each agency.²⁰⁵

Equally important, there is no established process of centralized executive-branch review of more generalized decisions about enforcement *policy*—that is, broader determinations about what types of offenses to prioritize or deemphasize, as opposed to decisions to litigate or appeal a particular case. As Kate Andrias has detailed, there are no systems in place that resemble (even roughly) the formal system of centralized regulatory review.²⁰⁶ The consequence is that the President’s role in enforcement policy is largely ad hoc and invisible.

Of course, ad hoc influence is still influence, and presidents can and do shape enforcement policy through more informal means. But top-down oversight works as a tool of accountability only if the lines of influence, and their consequences, are visible to the public. In the enforcement context, however, transparency is the exception rather than the rule.

Study after study shows that enforcement changes as presidential administrations change.²⁰⁷ Antitrust scholars often refer to enforcement as a “pendulum” that swings back and

²⁰² Devins & Herz, *supra* note 197, at 564. By contrast, control of criminal prosecutions is much more tightly centralized than is control of civil enforcement. See *id.* at 561 (“DOJ is particularly dominant in criminal prosecutions.”).

²⁰³ Neal Devins, *Toward an Understanding of Legal Policy-Making in Independent Agencies*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS, *supra* note 182, at 143, 181–82.

²⁰⁴ Devins & Herz, *supra* note 197, at 566.

²⁰⁵ *Id.* (“With the rarest of exceptions, administrative enforcement proceedings are handled by agency attorneys. DOJ is simply not involved . . .”).

²⁰⁶ Andrias, *supra* note 12, at 1057–69.

²⁰⁷ See, e.g., Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 197–98 (1982) (finding variation in enforcement efforts of National Labor Relations Board, Federal Trade Commission, and Securities and Exchange Commission based on presidential administration in office); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 821–23 (1991) (finding significant effects on the behavior of seven agencies).

forth, particularly on the appropriateness of using antitrust law to police the behavior of dominant firms with outsize market power.²⁰⁸ Civil rights enforcement reflects a similar pattern,²⁰⁹ with studies documenting (among other things) changes in enforcers' relative emphasis on different types of discrimination—for example, racial or religious.²¹⁰

Other studies reveal changes in enforcement intensity. For example, a recent report showed that inspections by the Occupational Safety and Health Administration (OSHA) had remained relatively stable from the Bush to Obama administrations, but the number of citations issued for violations skyrocketed under Obama's leadership, increasing 167% during his first full year in office.²¹¹ The same report showed that the Obama EPA was pursuing more administrative enforcement actions under the Clean Air Act than the Bush EPA.²¹² However, while the EPA appeared to be assessing penalties more frequently under the Obama administration, the average penalty amount had decreased significantly since the Bush years.²¹³

The list could go on, but the point should be clear: Enforcement policies are anything but static, and the identity of the President matters a great deal. But the process by which the relevant information comes to light runs precisely backwards. As Part I explained, a core component of accountability is the ability of the public to "call [their representatives] to account," to obtain an explanation of public policies. We the People should not have to rely on scholarly empirical studies to learn of tectonic shifts in enforcement strategy, or to draw out rationalizations from the officials responsible.²¹⁴ At the very least,

²⁰⁸ See, e.g., William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 378 (2003) ("One common narrative of U.S. antitrust history depicts federal enforcement policy since 1960 as a swinging pendulum.").

²⁰⁹ See Selmi, *supra* note 103, at 1440–41 ("Since the passage of the Civil Rights Acts in the 1960s, each shift in political party has brought significant change in civil rights enforcement.").

²¹⁰ See Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 80–81 (2009) (describing a decrease in cases involving racial discrimination, and an increased focus on combatting religious discrimination, under the George W. Bush Administration); see also Kim, *supra* note 12, at 23–21 (detailing similar shifts in focus in the Department of Education's Office of Civil Rights).

²¹¹ OMB WATCH, THE OBAMA APPROACH TO PUBLIC PROTECTION: ENFORCEMENT 8 (2010).

²¹² *Id.* at 28.

²¹³ *Id.* at 28–29.

²¹⁴ See Waldron, *supra* note 27, at 7 ("What the agent owes his principal(s) in the first instance is an account of what he has been doing. Confronted with the

it is difficult to argue that federal enforcement is rendered accountable by virtue of the connection to the President when the President's influence is uncertain and unpublicized.

2. Congressional Oversight

Agency action also is subject to oversight and control by elected representatives in the legislature. Legislative oversight is important for several reasons. Most obviously, it offers an additional source of indirect accountability, a means for the people to influence enforcement via their legislative representatives.²¹⁵ But legislatures are also “the main public repositories of government information, through their statutory rights to receive reports from public bodies and their powers of independent interrogation and investigation. They . . . lay the foundation for much public debate, thus contributing to the broader public accountability of government.”²¹⁶

Here too, however, the lines of influence begin to fray as we move from regulation to enforcement.²¹⁷ Congressional attention to enforcement vacillates between spotty and non-existent. In some respects, the patterns are similar to what we see in the regulatory context. For example, legislative oversight is more robust during periods of divided government than when the same party controls both the legislative and executive branches.²¹⁸ Similarly, legislators are likely to attend more frequently to issues of high public salience. Thus, some agencies are recurring targets of legislative oversight, for both enforcement and regulation.²¹⁹ Others fly largely under the radar—that is, until outside events (such as a well-publicized scandal or disaster) bring them into the public eye.²²⁰

demand for such an account, the agent may not say: ‘Well, it is up to *you* to find out what I have been doing, and then you see if you can understand it and if you are in a position to assess it.’”)

²¹⁵ See MULGAN, *supra* note 24, at 40 (“Between elections, much accountability activity is focused on the legislature which has the constitutional power to scrutiniz[e] the actions of the executive through various channels.”).

²¹⁶ *Id.* at 46.

²¹⁷ Though the discussion here focuses on the relationship between federal agencies and Congress, much of it applies with equal force at the state level.

²¹⁸ See, e.g., Liu, *supra* note 210, at 87–88 (noting that Congress held no oversight hearings on civil rights enforcement during the four-year period of unified government under George W. Bush; “[a]fter control of Congress changed hands in 2006, legislative oversight became more vigorous”).

²¹⁹ See, e.g., Velikonja, *supra* note 141, at 23–28 (discussing increased congressional attention to the SEC in recent decades and arguing that the SEC is now “vulnerable to the political whims of congressmen”).

²²⁰ See Lemos & Minzner, *supra* note 108, at 879–83 (discussing variations in congressional scrutiny of different agencies).

Critically, though, while legislators have various means of influencing agency regulations before they become final, control over enforcement is almost entirely *ex post*, and less effective as a result. In the regulatory context, notice-and-comment procedures force agencies to reveal proposed rules before they are set in stone, giving interest groups and sympathetic legislators an opportunity to intervene.²²¹ Rules that delay the effective date of regulations for a specified period likewise “slow the regulatory process so that advocates of congressional viewpoints will have time to mobilize and influence policy outcomes.”²²² Enforcement decisions, by contrast, tend to be presented to the legislature as *faits accomplis*. Legislators may harangue the relevant agency officials after the fact, but there is little they can do to influence discrete enforcement decisions before they are implemented.

To be sure, the threat of future legislative reprisals may influence enforcers’ behavior in the present. This is, after all, how elections are thought to work. As described in Part I, “[t]he influence of elections spreads far beyond the election process through the indirect power of anticipated reactions.”²²³ So too, perhaps, with *ex post* legislative control of enforcement.

The difficulty is that the existing system of legislative control is neither designed nor used to promote meaningful accountability for public enforcement. Congress can, of course, change enforcement by changing the statutes that are being enforced. If agencies are pursuing violations that legislators do not deem blameworthy, the legislature can tighten up the relevant substantive provisions to remove those violations from the statute’s scope going forward. And if legislators are concerned about enforcement of marginal cases, they can craft statutes narrowly and carefully in the first instance. Though one should not be too sanguine about these possibilities—the literature on delegations to agencies highlights multiple reasons why legislation tends to be written in broad and ambiguous

²²¹ See generally Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 256–59 (1987); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442 (1989).

²²² de Figueiredo & Stiglitz, *supra* note 35, at 22; see also Congressional Review Act of 1996, Pub. L. No. 104–121, §§ 251–53, 110 Stat. 868, 868–74 (codified as amended at 5 U.S.C. § 801–08 (2012) (enacting procedures for fast-tracked congressional review of agency rules before they take effect).

²²³ MULGAN, *supra* note 24, at 43; see *supra* notes 32–34 and accompanying text.

terms²²⁴—it is worth noting that the prospect of narrowly-drawn legislation is greater in the civil context than in the realm of criminal law. Criminal-law scholars despair of constraining prosecutorial discretion through legislation, for the simple reason that the politics of crime control are so one-sided.²²⁵ While various influential constituencies (including but not limited to prosecutors themselves) benefit from broad criminal law, there is rarely anyone to make the counter-argument.²²⁶ Convicted or would-be criminals have no lobby. On the civil side, by contrast, regulated entities *do* have lobbies—powerful ones. It is at least possible, then, to imagine Congress constraining enforcement by limiting the range of offenses that can trigger an enforcement action. But those limits would apply with equal force to both public and private enforcement; they do nothing to support the argument that public enforcement is uniquely accountable, or responsive to the public, by virtue of the relationship between the executive and legislative branches.

A more promising source of accountability can be found in the congressional power of the purse.²²⁷ Unlike their private counterparts, public enforcers operate within budgets that are controlled by legislative appropriations. The budgeting process is an opportunity for both “calling to account”—extracting information about enforcement—and “holding to account”—sanctioning enforcement that is ineffective or misguided, or rewarding enforcement that effectively promotes the public interest. Theoretically, at least, Congress could use the budgeting process to push enforcement in desired directions, devoting funds to certain enforcement initiatives while withholding funds from others.²²⁸ In reality, this happens rarely: the norm

²²⁴ E.g., David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135–36 (2000) (“There are two obvious reasons [why Congress does not currently enact highly specific legislation], one involving transaction costs and the other involving political expediency.”).

²²⁵ See Bibas, *supra* note 20, at 964 (critiquing proposals for “legislation to rein in prosecutors” on the ground that “[l]egislators collude to maximize prosecutorial bargaining freedom and are not about to rein it in”).

²²⁶ See Stuntz, *supra* note 99, at 529–46.

²²⁷ See Barkow, *supra* note 104, at 43 (“[T]he power of the purse is one of the key ways in which democratic accountability is served.”).

²²⁸ See CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATION RESTRICTIONS 12–13 (2008) (noting two examples in the Consolidated Appropriations Act of 2008 that prohibited the use of appropriated funds for the enforcement of particular regulations); Andrias, *supra* note 12, at 1044–45 & n.43 (discussing limitations riders and noting that the Fiscal Year 2012 budget “included a rider preventing the government from enforcing new light bulb efficiency standards”).

is a lump-sum appropriation that covers enforcement of diverse provisions.²²⁹ Thus, while legislators can use the budget process to signal their approval or disapproval for particular enforcement agencies—and to facilitate more or less enforcement—the tool is a relatively blunt one.

When legislators do use budgeting to control enforcement, moreover, their directives are often obscured from public view and from the usual processes of legislative and public debate. “Limitations riders”—provisions forbidding the use of appropriated funds for particular uses—are, at best, buried in lengthy appropriations bills.²³⁰ More commonly, directives about how the funds are to be spent appear in appropriations committee reports, not in the actual text of the bill.²³¹

Budget controls are made weaker still by the trend toward self-funded enforcement—a phenomenon that exists at both levels of government, though it is more prevalent in the states.²³² Enforcement agencies often are permitted to retain a portion of the proceeds of enforcement to fund future enforcement efforts.²³³ Such arrangements do not allow agencies to avoid the appropriations process entirely, but they provide a significant buffer between agencies’ enforcement policies and year-to-year fluctuations in legislative favor.²³⁴

Finally, and perhaps most significantly, to the extent that budgeting concerns shape agency behavior, the effects may be largely perverse. Federal agencies must submit annual budget requests to Congress, and most agencies use the occasion as an opportunity to trumpet their enforcement efforts.²³⁵ Like anyone facing an assessment, agencies have strong incentives

²²⁹ See Richard B. Stewart & Cass R. Sunstein, *Public Programs, Private Rights*, 95 HARV. L. REV. 1193, 1290–91 (1982) (“Occasionally . . . the legislature acts decisively to control enforcement politics. But such control is infrequent and episodic.”).

²³⁰ Jason A. MacDonald, *Limitations Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 766 (2010) (“Limitation riders are provisions in appropriations bills that forbid agencies from spending money for specific purposes during the next fiscal year.”).

²³¹ ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 102, 271 (3d ed. 2007).

²³² Cf. Barkow, *supra* note 104, at 44 (discussing self-funding (through fee collection and the like) as weakening legislative control over agencies’ regulatory functions).

²³³ Lemos & Minzner, *supra* note 108, at 864–75.

²³⁴ See *id.* at 873–75 (discussing the relationship to annual appropriations).

²³⁵ See Urska Velikonja, *Reporting Agency Performance: Behind the SEC’s Enforcement Statistics*, 101 CORNELL L. REV. 901, 912–19 (2016) (discussing why and how agencies report).

to emphasize easily measurable indicia of effectiveness.²³⁶ Congress has reinforced those incentives by requiring agencies to submit annual performance plans expressing “goals in an objective, quantifiable, and measurable form.”²³⁷

The consequences of this system are both predictable and pernicious. The information in agencies’ annual reports is overwhelmingly quantitative—the number of investigations opened, cases closed, dollars recovered.²³⁸ Recent scholarship has shown that the numbers themselves are often misleading or unreliable.²³⁹ But the deeper problem lies in the nature of the analysis. Agencies rarely offer a deep account of the *why* of their approach to enforcement.²⁴⁰ Yet such a qualitative explanation is essential to meaningful debate over enforcement policy. Transparency about agencies’ policy choices would also enable Congress (and the public) to assess agency performance for consistency with the agency’s own articulated goals. Instead, performance typically is assessed in quantitative terms. Not only does that focus discourage meaningful disclosure, but it also affects enforcement itself: Knowing that they will have to sing for their supper at the end of the fiscal year, agencies may shape enforcement policy in ways designed to produce good numbers.²⁴¹

B. State Enforcement: Elections

Compared to the federal model, enforcement at the state level has a more direct link to the people: enforcer elections. Forty-three state attorneys general are elected, typically serving four-year terms.²⁴² In seven states, AGs are appointed (either by the governor, the legislature, or—in one state—the supreme court).²⁴³

²³⁶ Lemos & Minzner, *supra* note 108, at 876–77.

²³⁷ Government Performance and Results Act of 1993, Pub. L. No. 103–62, § 1115, 107 Stat. 285, 287 (1993).

²³⁸ See Lemos & Minzner, *supra* note 108, at 881–83 (discussing emphasis on financial recoveries).

²³⁹ See generally Velikonja, *supra* note 235 at 932–57 (analyzing the SEC’s reported statistics).

²⁴⁰ Cf. Kim, *supra* note 12, at 40 (noting that substantive shifts in OCR enforcement policy were not revealed in the agency’s annual reports).

²⁴¹ See, e.g., John C. Coffee, Jr., *SEC Enforcement: What Has Gone Wrong?*, NAT’L L.J., Dec. 3, 2012, at 23, 23 (“By bringing many actions and settling them cheaply, [the SEC] can point to an increase in the aggregate penalties collected This may impress Congress, but from a deterrence perspective, it is similar to issuing modest parking tickets for major frauds.”).

²⁴² NAAG, *supra* note 96, at 20–23 tbl.2-1.

²⁴³ *Id.*

Elections have not always been the norm for enforcers in the states. In the post-Revolutionary period, most state AGs were appointed rather than elected.²⁴⁴ The trend toward AG elections has its roots in the same forces that produced judicial elections in many states: an initial impulse to render certain officials independent from other parts of government, followed by a more populist emphasis on popular election as a means of accountability.²⁴⁵ Yet, while judicial elections are the subject of near-constant debate and concern, elections for the states' chief law-enforcement officers have drawn far less attention.²⁴⁶

Although AG elections create the potential for meaningful accountability for state enforcement policy, there are reasons to fear that the effect is more theoretical than real.²⁴⁷ Media coverage of AG races is patchy at best, and candidates themselves rarely offer anything more than a superficial glimpse of their plans for enforcement.²⁴⁸ Instead, campaigns tend to fo-

²⁴⁴ See JEWELL C. PHILLIPS, *STATE AND LOCAL GOVERNMENT IN AMERICA* 205 (1954) (describing the shift from appointment to election).

²⁴⁵ See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2451 (2006) (“[T]he states’ purpose [in moving to AG elections] was to weaken the power of a central chief executive and further an intrabranched system of checks and balances.”).

²⁴⁶ Cf. Richman, *supra* note 20, at 961 n.73 (noting that “we are far less ambivalent about the election of prosecutors than we are about the election of judges” (internal quotation marks omitted)). For discussions of AG elections, see, for example, Talis Colberg, *Election of an Attorney General*, 36 *ALASKA BAR RAG* 3 (2012) (defending AG elections as a means of promoting stability in the states’ departments of law); see also Marshall, *supra* note 245, at 2448 (arguing that “the divided executive model can foster an intrabranched system of checks and balances without undercutting the ability of the executive branch to function effectively”).

²⁴⁷ Criminal-law scholars have raised similar complaints about prosecutor elections. See Bibas, *supra* note 20, at 961 (“District attorneys’ electoral contests are rarely measured assessments of a prosecutor’s overall performance. At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal.”); Wright, *supra* note 20, at 582–83 (“Incumbents and challengers have little to say about the overall pattern of outcomes that attorneys in the office produce or the priorities of the office. The debates do not pick up genuine ideological differences among candidates; they are misguided attempts to measure non-ideological competence.”).

²⁴⁸ To take just a few examples: California AG Kamala Harris’s 2014 reelection campaign website listed top issues as follows: “Fighting for the Environment,” “Fighting Human Trafficking,” “Fighting for Equality,” “Fighting for California Homeowners,” “Fighting Transnational Gangs.” *Issues*, KAMALA HARRIS 2014, <https://web.archive.org/web/20140528111539/http://kalaharris.org/issues/> [<https://perma.cc/5HD7-F3X3>]. Candidate for Connecticut AG Martha Dean stated that, if elected, her first line of attack would be to “work with the state agencies to ensure that the laws are being followed.” Dirk Perrefort, *Differences Stand Out in AG Debate*, *GREENWICH TIME* (Oct. 11, 2010) <http://www.greenwichtime.com/news/article/Differences-stand-out-in-AG-debate-699318.php> [<https://perma.cc/L3WK-8U23>]. Dean’s opponent (and the ultimate winner) George Jepsen announced that he would focus on “an assault weapons ban,

cus on candidates' personal characteristics, including their partisan bona fides.²⁴⁹

Part of the problem is that AGs are responsible for much more beyond civil enforcement. They also offer opinions on proposed legislation, represent state entities and officers in a defensive capacity, handle criminal prosecutions, supervise charitable trusts—and more.²⁵⁰ Given those diverse responsibilities, it is understandable that most substantive policy discussions in AG elections are cast at a high level of generality rather than outlining what, precisely, the candidates propose to do with enforcement.

Enforcement, moreover, is likely to be a relatively low-salience issue for most voters.²⁵¹ That is perhaps particularly true

protecting a woman's right to choose, open space protection, energy issues, consumer protection issues, health care - for instance, reining in HMOs." Macklin Reid, *Jepsen Seeks AG's Job*, RIDGEFIELD PRESS, Jan. 14, 2010, at 1A, 24A. When first campaigning for the job, North Carolina AG Roy Cooper stated that his "No. 1 priority" was fighting crime. Dennis Patterson, *Attorney General Hopefuls Would Switch Roles - Democratic Senator Wants to Enforce Laws He Helped Write, and GOP Lawyer Who Helped Sue State Wants to Defend It*, HERALD-SUN, Oct. 5., 2000, at C9. When Cooper ran for reelection four years later, his opponent described his own "top priority" as "[t]ruth and justice. I want to tell the truth to the people and seek justice." Matthew Easley, *Candidates Differ on Top-Lawyer Role*, NEWS & OBSERVER, Aug. 14, 2004, at B1. Sam Houston, a 2014 candidate for the Texas AG's Office, promised voters that he would "move away from large lawsuits that garner political headlines and instead focus on school funding, consumer protection and transparency." Bianca Montes, *Democratic Attorney General Candidate Wants to Take Politics Out of the Office*, VICTORIA ADVOC. (May 27, 2014), https://www.victoriadvocate.com/news/2014/may/27/sam_houston_bm_052814_240712/ [<https://perma.cc/HTK6-2VZA>].

²⁴⁹ See, e.g., John Cahill, *John Cahill - "Tough,"* YOUTUBE (Aug. 20, 2014), <https://www.youtube.com/watch?v=IA13o8XCyBs> [<https://perma.cc/7ZWW-P57N>] ("A lot of people call me tough. I served as Governor Pataki's right hand in rebuilding Ground Zero. I helped lead the battle to preserve over a million acres of open space. And we won."); Maura Healey, *Maura Healey for Attorney General*, YOUTUBE (June 13, 2014), <https://www.youtube.com/watch?v=SXVtsQJpb68> [<https://perma.cc/6L98-54ZM>] ("This successful underdog works hard and fights with passion."); Maura Healey, *Maura Healey's First Television Ad: "Hoops,"* YOUTUBE (Aug. 25, 2015), <https://www.youtube.com/watch?v=ovcTjDnLORo> [<https://perma.cc/6L98-54ZM>] ("When you're a 5'4" pro basketball player you learn to take on the big guys."); John Miller, *John Miller for Attorney General*, YouTube (May 2, 2014), <https://www.youtube.com/watch?v=w9fqqw6YcG> [<https://perma.cc/8J3J-RHRB>] ("My wife and I moved to Winchester in 1981 and have raised three fabulous kids, all of whom went to Winchester High School and Massachusetts University.").

²⁵⁰ See generally NAAG, *supra* note 96.

²⁵¹ See Editorial, *Attorneys General For Sale*, N.Y. TIMES (Nov. 20, 2014) (<http://nyti.ms/1F5BaR1>) [<https://perma.cc/KST7-2KK7>] (describing the AG's position as "relatively low-profile"); cf. Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, The Media, and Litigation Retrenchment* (on file with author) (showing that the public pays far more attention to changes in substantive law than to changes in private enforcement regimes, and

of civil enforcement, and even more particularly true of general enforcement policy. If the average citizen pays attention to civil enforcement matters, it is likely to be in the context of a few big-ticket cases rather than abstract theories about how best to optimize deterrence.²⁵² Yet the cases that capture voters' attention are unlikely to reflect the reality of what enforcers actually do on a day-to-day basis.

These challenges are compounded by the structure of states' plural executives. Perhaps the oldest justification for a unitary executive is to enhance accountability by consolidating authority in a single representative.²⁵³ That view suggests that the multiplicity of elected state officers may make it difficult for citizens to identify, and hold accountable, the responsible officials. This is a general point about plural executives, not limited to enforcement. But the problem may be especially stark in the enforcement context, which combines a low-salience issue with an especially confusing set of institutional structures.

AGs' enforcement powers derive from a complicated mix of constitutional, statutory, and common law authority. The prevailing rule under the common law was that the AG had both "the duty and the exclusive right to represent [state] governments and their agencies and officers."²⁵⁴ Some state constitutions and statutes codify that rule, investing the AG with presumptive authority to control litigation on behalf of the state.²⁵⁵ Other states made a conscious break from the common law approach in the period after the American revolution, moving toward a more fragmented system in which state agencies are permitted to hire their own attorneys, or the Governor

more attention to legislative politics than to the consequences of case-by-case decision making).

²⁵² Cf. Bibas, *supra* note 20, at 983–84 (arguing that the "political check [of prosecutor elections] is not working" because "[v]oters, swayed by the availability heuristic, are focusing on memorable but unrepresentative stories. Many news stories and campaign ads emphasize a head prosecutor's success or failure in a few high-profile criminal cases.").

²⁵³ See THE FEDERALIST NO. 70, at 476–77 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²⁵⁴ Robert Morgan, *The Office of the Attorney General*, 2 N.C. CENT. L.J. 165, 167 (1970).

²⁵⁵ See NAAG, *supra* note 96, at 83 ("The Attorney General is typically charged, by Constitution or statute, with representing the state in all cases in which the state has an interest, in all courts of the state and in federal courts.").

is empowered to appoint them.²⁵⁶ And in some states, control over litigation resides in the Governor, not the AG.²⁵⁷

Even in states that follow the common law tradition of centralizing litigation authority in the AG's office, the AG's role varies by subject matter. In some areas—consumer protection is a common example—the AG is the primary enforcement authority, the first mover.²⁵⁸ In other areas, the AG handles the legal work of enforcement on behalf of “client” agencies.²⁵⁹ The AG's control over enforcement policy is necessarily diminished in such circumstances, and it is subject to statutory limitations and exceptions. In Arkansas, for example, the AG represents state agencies only if the agencies so request.²⁶⁰ Several states vest authority for environmental enforcement in a specialized agency rather than the AG.²⁶¹ Other states exempt civil rights litigation from the AGs' general purview, while still others have carve-outs for antitrust.²⁶² And AGs' control of in-court litigation may be significantly more robust than their control of purely administrative enforcement.

States also differ on the question of whose judgment prevails in cases of conflict between the AG and client agencies (some of which may themselves be headed by elected officials). Some states give the AG the final word; others reason that the AG-agency relationship is one of attorney and client, meaning

²⁵⁶ See National Ass'n of Attorneys General Committee on the Office of the Attorney General, REPORT ON THE OFFICE OF THE ATTORNEY GENERAL 272 (1971) [hereafter NAAG Report]; see Morgan, *supra* note 254, at 167 (“Today the states are split into several groups with some states continuing to give the Attorneys General exclusive power to represent State agencies and others allowing these agencies to hire their own attorneys.”).

²⁵⁷ See, e.g., State ex rel. Cartwright v. Ga.-Pac. Corp., 663 P.2d 718 (Okla. 1982) (noting that the AG must seek the Governor's permission to initiate a suit); see also Marshall, *supra* note 245 at 2461 (“[I]n a few states, not only is the Attorney General prohibited from initiating actions without the Governor's approval, but the Governor can also compel the Attorney General to prosecute an action even when the Attorney General does not want to proceed.”).

²⁵⁸ NAAG, *supra* note 96, at 233.

²⁵⁹ *Id.* at 83.

²⁶⁰ Ark. Code Ann. § 25-16-702(a) (2016); see NAAG Report, *supra* note 256, at 285 (“In Arkansas, a department head may request the Attorney General's assistance in litigation, or may use the agency's own attorneys. A similar situation exists in Kentucky, where the Attorney General handles all litigation for some agencies and some litigation for others.”).

²⁶¹ NAAG, *supra* note 96, at tbl.6-1; see also NAAG Report, *supra* note 256, at 276 (noting that agencies concerned with natural resources or conservation often are authorized to hire their own attorneys rather than relying on the AG's legal services).

²⁶² NAAG, *supra* note 96, at tbl.6-1.

that the agency is the principal.²⁶³ Complicating matters further, some courts distinguish between different kinds of actions, holding that the AG assumes the role of a conventional attorney when representing a state entity on certain kinds of claims but not others, or when the AG represents an officer or entity in a defensive capacity but not when she initiates suit on behalf of the state.²⁶⁴

All of this complexity would make it difficult for citizens to assign responsibility for enforcement policy even if, contrary to fact, candidates were trying to convey clear messages about enforcement and the media were picking up and disseminating those messages to voters. When multiple officials share (or appear to share) responsibility for a common goal, they have incentives to shift blame when things go poorly, or grab credit when things go well. Those incentives are amplified by partisan conflicts. Independent AG elections create scenarios in which an AG from one party must represent an agency that is controlled by a governor from the opposing party.²⁶⁵ Even relatively engaged and informed citizens may find it challenging—to put it mildly—to identify which elected officials are responsible for the resulting enforcement policies.²⁶⁶

These obstacles are not going away. But states need not abandon the model of the plural executive in order to improve the prospects for meaningful accountability in the context of

²⁶³ See, e.g., *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981) (holding that the AG is bound by the principles of the attorney-client relationship to represent the interests of the state agency “client”).

²⁶⁴ Compare, e.g., *Tice v. Dep’t of Transp.*, 312 S.E.2d 241, 246 (N.C. 1984) (holding, in the context of a suit against a state entity for money damages, that the AG “is bound by the traditional rule governing the attorney-client relationship, and cannot enter a consent judgment without the consent of the entity represented,” but distinguishing “situations in which the Attorney General is prosecuting an appeal or in which he brings an action on behalf of the State,” in which cases the AG “has control of the action and may settle it when he determines that it is in the best interest of the State to do so”), *with Hendon v. N.C. State Bd. of Elections*, 633 F. Supp. 454, 459 (W.D.N.C. 1986) (“*Tice* and the cases it relies on involve settlements of money matters, property rights and other quasi-private rights of state agencies, which the legislature has no doubt entrusted to the authority and discretion of an agency. The instant case, however, involves the constitutionality of a state statute and this can hardly be said to be a matter which the legislature has entrusted to the authority and discretion of appointed officials to the exclusion of its chief constitutional legal authority.”).

²⁶⁵ See, e.g., Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 722–23 (1997) (describing political struggles between the West Virginia AG and other elected officials).

²⁶⁶ See MANIN, *supra* note 24, at 180 (emphasizing the need for voters to “be able clearly to assign responsibility” as a prerequisite to effective electoral accountability).

enforcement. There is far more that AGs themselves can do to inform the public about their enforcement policies—not just at election time, but throughout their terms in office. For example, North Carolina AG (and gubernatorial candidate) Roy Cooper’s website describes his “top priorities” as follows:

His priorities are fighting crime and fraud and providing the right information for people to make smart decisions about their safety and their money.

The crime fight includes tougher laws, like stricter punishment for drug dealers who make meth. It means better resources for investigators, like more use of DNA evidence.

Protecting consumers means going after scam artists who trick people into bad deals like risky loans or telemarketing swindles.

Public protection also means taking care of the state’s most vulnerable residents, such as seniors in long-term care and children at school.²⁶⁷

Cooper is to be commended for providing any information about his priorities; many AGs do not. But Cooper’s list is articulated at a level of abstraction that provides virtually no concrete guidance about how he proposes to allocate his office’s scarce resources, or manage tradeoffs between competing enforcement opportunities.

Citizens who want to find out more about Cooper’s enforcement initiatives will find little joy on the AG’s website. Under the heading of “news and events,” Cooper’s website contains a link to “publications and documents,” which proves to be a list of 356 documents listed in no apparent order, and including consent decrees, affidavits, exhibits, and complaints.²⁶⁸

The people are entitled to expect more from their lawyers. As we have seen, information about public policy is essential to any meaningful system of accountability. At the very least, such information is necessary to effective elections. But transparency about what enforcers are doing in the people’s name is important in its own right, not only “as a preliminary to the

²⁶⁷ *Top Issues*, N.C. DEPT OF JUST., <http://www.ncdoj.gov/Top-Issues.aspx> [<https://perma.cc/BQU4-AKXR>].

²⁶⁸ *Related Information*, NORTH CAROLINA DEPARTMENT OF JUSTICE, <http://www.ncdoj.gov/getdoc/a74eba54-b9bf-45e9-9991-7468c59c9fc3/Related-Information.aspx> [<https://perma.cc/64JT-7B7Z>]. Again, Cooper is hardly an outlier in this respect. For example, Texas AG Ken Paxton’s website provides a list of major antitrust and consumer protection lawsuits and settlements, but specifies that the list represents “just a small portion” of all enforcement actions; no information is available about the rest. *Major Lawsuits & Settlements*, ATT’Y GEN. TEXAS, <https://www.texasattorneygeneral.gov/consumer/lawsuits.php> [<https://perma.cc/UG4W-LKPR>].

sanctioning of an agent.”²⁶⁹ As Jeremy Waldron has observed, “[i]n a democracy, the accountable agents of the people owe the people an account of what they have been doing, and a refusal to provide this is simple insolence.”²⁷⁰

C. Public Participation

The discussion thus far has focused on formal accountability mechanisms: direct oversight of enforcement via elections, and indirect oversight by elected officials. Yet democratic theory long has stressed the importance of additional, more informal, opportunities for exchange between government and the governed.²⁷¹ These informal mechanisms reinforce, and fill the gaps between, elections and indirect political controls.²⁷²

Consistent with this view, concerns about accountability have led to an increasing emphasis on public participation in agencies’ regulatory processes.²⁷³ Opportunities for public engagement range from petitioning for new rules, to participating in rule-formation (whether through negotiated rulemaking, advisory committees, or notice-and-comment processes), to challenging rules once they are promulgated.²⁷⁴ In theory, at least, public participation generates useful information for regulators, facilitates public deliberation over administrative policy, and helps ensure that regulation is responsive to the needs of diverse stakeholders.²⁷⁵

The public’s role in enforcement is significantly more limited. Some agencies are required by statute to publish proposed settlements or consent decrees and to provide an opportunity for public comment. For example, the Tunney

²⁶⁹ Waldron, *supra* note 27, at 17–18.

²⁷⁰ *Id.* at 27.

²⁷¹ See, e.g., Urbinati & Warren, *supra* note 26, at 392 (noting “the many ways in which citizens of contemporary democracies can push their interests onto the political agenda in addition to voting, owing to the porous design of liberal democracies”).

²⁷² See MULGAN, *supra* note 24, at 63 (“Beyond the major public arenas of election campaigns and legislative debates and hearings, governments are engaged in constant political debate with members of the public over the conduct of policy.”); Urbinati & Warren, *supra* note 26, at 402 (“[R]epresentation . . . enables citizens to survey and discipline power holders, not only through the direct mechanisms of voting but also through the gathering and exposure of information . . .”).

²⁷³ See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174–75 (1997).

²⁷⁴ E.g., David Markell, “Slack” in the Administrative State and its Implications for Governance: The Issue of Accountability, 84 OR. L. REV. 1, 11 (2005).

²⁷⁵ See Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1318–31 (2016) (describing the purposes of public participation).

Act—enacted in response to widespread consternation over a seeming “sweetheart settlement” between DOJ and the International Telephone and Telegraph Corporation²⁷⁶—requires that proposed settlements of antitrust actions be published and held open for 60 days to facilitate public comment.²⁷⁷ The federal Solid Waste Disposal Act mandates public notice and comment on the settlement of cases brought by the EPA to address imminent threats to health or the environment caused by mishandling of solid or hazardous waste.²⁷⁸ Certain enforcement actions under the Clean Air Act are subject to similar notice-and-comment requirements regarding settlement.²⁷⁹

While noteworthy, these scattered provisions for enforcement-related notice and comment are exceptions to the general rule. The overwhelming majority of enforcement actions—whether administrative or in-court civil actions—have no such requirements for public participation. And, in the absence of statutory provisions requiring public access, interested members of the public have scant opportunities to learn about, much less participate in, the government’s ongoing enforcement efforts. Many enforcement actions are disclosed to the public only as done deals: They are kept confidential until a complaint is filed in court or an administrative proceeding is initiated, by which point the parties often have reached a settlement.²⁸⁰ Some statutes (particularly in the environmental realm) permit interested citizens to intervene as of right in public enforcement actions.²⁸¹ Typically, however, intervention in government litigation is difficult indeed.²⁸²

²⁷⁶ See Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 *BUFF. L. REV.* 937, 960 (2003) (“This legislation was a 1974 congressional response to charges that the Justice Department, yielding to political pressure from the White House, had granted ITT a sweetheart settlement to a suit challenging ITT’s acquisition of three companies.”).

²⁷⁷ 15 U.S.C. 16(b), (c) (mandating publication in the Federal Register and in local newspapers).

²⁷⁸ See 42 U.S.C. § 6973(d).

²⁷⁹ See 42 U.S.C. § 7413(g); see also 33 U.S.C. § 1319(g)(4)(A) (2012) (“Before issuing an order assessing a civil penalty [under the Clean Water Act] . . . the Administrator . . . shall provide public notice and a reasonable opportunity to comment on the proposed issuance of such order.”).

²⁸⁰ See, e.g., *Fast Answers*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/answers/investg.htm> (explaining the need for secrecy in SEC investigations) [<https://perma.cc/KUB6-FMVK>].

²⁸¹ E.g., Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (2012); Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) (2012).

²⁸² See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 *HARV. L. REV.* 486, 508–10 (2012) (discussing caselaw establishing heightened barriers to intervention in government litigation). Intervention will sometimes be easier in administrative proceedings, though

Even where notice-and-comment requirements apply, they engage the public only on matters actually addressed in proposed settlements. The upshot is that the public can play a role in shaping the path the agency has chosen to take, but has no opportunity for input on paths not taken—investigations, or legal arguments, that the agency has opted not to pursue.²⁸³ Because the details of investigations and settlement negotiations are typically shielded from public view and debate, the resulting disclosure omits a wealth of information about agency decision making.²⁸⁴

This point suggests an additional problem with existing provisions for public engagement: they concern the resolution of individual cases rather than the formation of enforcement policy generally. Some agencies—the EPA is again an example—solicit public input on annual enforcement priorities.²⁸⁵ The resulting guidance is often quite thorough and informative.²⁸⁶ The EPA's new Clean Water Act Action Plan, for example, is a 15-page document outlining the challenges facing Clean Water Act enforcement, the steps EPA has taken to solicit input from various stakeholders, and the agency's plans for reforming enforcement going forward.²⁸⁷

Other agencies release detailed enforcement guidelines, but do not seek public input.²⁸⁸ OSHA, for example, recently

the details will depend on the particular agency. See A GUIDE TO AGENCY ADJUDICATION 59–61 (MICHAEL ASIMOW, ED.) (2003).

²⁸³ See Grimes, *supra* note 276, at 962–63.

²⁸⁴ See *id.* at 940 (“This leaves the public in the dark as to conduct deemed unlawful but not addressed in the remedy or conduct considered borderline but not challenged by the agency.”).

²⁸⁵ See Markell, *supra* note 274, at 15–16.

²⁸⁶ *But cf.* Env'tl. Law Inst. et al., BEYOND ENFORCEMENT?: ENFORCEMENT, COMPLIANCE ASSISTANCE, AND CORPORATE LEADERSHIP PROGRAMS IN FIVE MIDWEST STATES 17 (2003) (arguing that the EPA and state agencies “have . . . largely failed to solicit the views of the environmental community on high-level issues of compliance strategy”).

²⁸⁷ U.S. ENVTL. PROT. AGENCY OFFICE OF ENF'T AND COMPLIANCE ASSURANCE, CLEAN WATER ACT ACTION PLAN (Oct. 15, 2009).

²⁸⁸ Still other agencies make public announcements about enforcement policy without issuing detailed guidelines or seeking public input before the fact. SEC's new “broken windows” enforcement policy is an example. As Chair Mary Jo White has explained, the policy reflects a theory that “minor violations that are overlooked or ignored can feed bigger ones, and . . . can foster a culture where laws are increasingly treated as toothless guidelines” and thus calls for enforcement of “even the smallest infractions.” Mary Jo White, *Remarks at the Securities Enforcement Forum*, Oct. 9, 2013, <https://www.sec.gov/News/Speech/Detail/Speech/1370539872100> [<https://perma.cc/YTX5-5LWH>]. True to its word, the SEC has ramped up enforcement of strict liability offenses. See Suzanne McGee, *SEC's “Broken Windows” Policing of Wall Street: “Deeply Flawed” or Necessary?*, THE GUARDIAN (Oct. 4, 2015) <https://www.theguardian.com/business/2015/oct/04/>

issued a press release announcing a new “Severe Violator Enforcement Program” (SVEP), explaining that the program “is intended to focus OSHA enforcement resources on recalcitrant employers who endanger workers by demonstrating indifference to their responsibilities under the law,” and signaling that the agency also is working on plans to change its penalty policies.²⁸⁹ The press release contains a link to OSHA’s website, which includes a detailed description of the SVEP, outlines how the new program differs from the agency’s prior Enhanced Enforcement Program, defines “high emphasis hazards,” and offers criteria for a Severe Violator enforcement case.²⁹⁰

As these examples demonstrate, it is possible for enforcers to provide concrete information about how they propose to use their limited resources, and to involve the public in the priority-setting process. But these examples are hardly representative of the full universe of enforcement. Many agencies provide little, if any, information about their enforcement policies, or how those policies differ from what has come before. And even those agencies that do provide public information are under no obligation to do so. As Richard Mulgan has argued, “[o]nly if the people receiving the information have the right to demand it . . . is the relationship one of accountability. Purely voluntary or grace-and-favor transparency does not amount to accountability.”²⁹¹

It is worth recalling here that the benefits of public engagement run in two directions. Notice-and-comment procedures, after all, not only provide *notice* to the public of prospective policy changes but also invite public *input*. Both sides of the information exchange are critical to accountability. All too often, though, in the enforcement context we have neither.

IV

POLICING PRIVATE INFLUENCE

Accountability has both an affirmative and a negative aspect: To say that enforcement (or any other government action) should be accountable to the public is also to say that enforce-

sec-broken-windows-wall-street-crackdown-flawed-effective [https://perma.cc/9ZUZ-WCKE].

²⁸⁹ OSHA NEWS RELEASE, US DEPARTMENT OF LABOR’S OSHA TAKES ACTION TO PROTECT AMERICA’S WORKERS WITH SEVERE VIOLATOR PROGRAM AND INCREASED PENALTIES (Apr. 22, 2010).

²⁹⁰ *Severe Violator Enforcement Program*, U.S. DEPT. LABOR (June 18, 2010) https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=4503#XI [https://perma.cc/9XT9-QCYK].

²⁹¹ MULGAN, *supra* note 24, at 11.

ment should *not* be accountable solely, or primarily, to narrow private interests. The previous Part focused on accountability in the affirmative sense, canvassing opportunities for the public to call to account, and hold to account, their representatives in government. As we have seen, political controls at the federal level and elections in the states create opportunities for holding enforcers accountable for their decisions. But, in large part because of the dearth of information available about enforcement—the difficulty of *calling* enforcement to account—those mechanisms do not appear to be terribly effective.

This Part takes up what may be an even deeper problem with our existing treatment of enforcement, concerning the negative side of accountability. The deficiency of formal and informal opportunities for public engagement and debate does not mean that private citizens lack the capacity to influence enforcement decisions. It means that such influence is likely to be unbalanced and undisclosed. Part II discussed several features that make enforcement particularly susceptible to private influence or capture. Yet, despite the manifest need for protection, the tools that policymakers have developed to combat capture in other contexts are, for the most part, inapplicable to enforcement.²⁹²

To begin with, judicial review has often been described as a key mechanism for preventing regulatory capture.²⁹³ Judicial review forces agencies to articulate public-regarding reasons for their actions; it then tests regulations against the proffered reasons and the principles embodied in the relevant statute. And, “[b]ecause judicial review is open to all affected parties, it can operate as a counterweight to the influence of organized special-interest groups in political and regulatory processes.”²⁹⁴

When it comes to enforcement, judicial review is significantly curtailed. Courts play an important role in deciding the merits of litigated cases, of course, but the overwhelming majority of public enforcement actions settle, often before reach-

²⁹² We have already encountered several of those tools in the previous Part. That is, mechanisms designed to foster accountability to the public—including centralized executive and legislative oversight and provisions for public participation—also can be understood as anti-capture devices. See Barkow, *supra* note 104, at 58–64 (describing “political tools” and “public advocates” as guards against capture); Livermore & Revesz, *supra* note 112, at 1361–62 (describing OIRA review as an anti-capture device).

²⁹³ See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (explaining how expanded judicial review of agency action was designed to minimize industry capture).

²⁹⁴ Livermore & Revesz, *supra* note 112, at 1360.

ing any court.²⁹⁵ Some courts treat enforcement settlements as wholly unreviewable;²⁹⁶ others “give only a quick glance.”²⁹⁷ Even in areas where courts are required by statute to determine whether agency settlements are in the public interest,²⁹⁸ review tends to be cursory and decidedly deferential.²⁹⁹ Decisions rejecting agency settlements—such as Judge Jed Rakoff’s 2011 decision refusing to approve a \$285 million settlement between the SEC and Citigroup—make national news precisely because they are so unusual.³⁰⁰ (Judge Rakoff’s decision was later reversed on appeal as an abuse of discretion.)³⁰¹

Nor will courts second-guess the government’s decisions to enforce or not to enforce. In *Heckler v. Chaney*, the Supreme Court reasoned that judicial review of enforcement decisions would be inappropriate because such decisions “often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” including “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and . . . whether the agency has enough resources to undertake the action at all.”³⁰² The Court left open the possibility of review in certain narrow circumstances—such as where an agency has “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”³⁰³ Nevertheless,

²⁹⁵ See *supra* note 16 and accompanying text.

²⁹⁶ See, e.g., *Ass’n of Irrigated Residents v. Env’tl Prot. Agency*, 494 F.3d 1027, 1032 (D.C. Cir. 2007) (reasoning that settlement decisions—“arising from considerations of resource allocation, agency priorities, and costs of alternatives—are well within the agency’s expertise and discretion”).

²⁹⁷ Farber & O’Connell, *supra* note 52, at 1173.

²⁹⁸ See, e.g., 15 U.S.C. § 16(e) (2012) (mandating review of antitrust settlements).

²⁹⁹ See, e.g., *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995) (explaining that the court should interfere with a consent decree only if it “appears to make a mockery of judicial power”).

³⁰⁰ *S.E.C. v. Citigroup Global Mkts., Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

³⁰¹ *S.E.C. v. CitiGroup Global Mkts., Inc.*, 752 F.3d 285 (2d Cir. 2014).

³⁰² 470 U.S. 821, 831–32 (1985) (invoking § 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (2012), which withholds judicial review of “agency action [that] is committed to agency discretion by law”).

³⁰³ *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)).

after *Heckler*, judicial review of enforcement decisions is vanishingly rare.³⁰⁴

Various scholars have argued for more robust judicial review of enforcement decisions, especially decisions not to enforce.³⁰⁵ Yet it is difficult to envision the Court abandoning *Heckler*, in part because enforcement decisions are unavoidably discretionary, and in part because the logistics of reviewing decisions not to enforce are so thorny. The key point for present purposes is that the Court's unwillingness to police enforcement decisions *ex post* makes it all the more important to structure the processes by which those decisions are made *ex ante*. This Part considers three ways of policing against the risk of lopsided private influence over enforcement: transparency, election reforms, and lobbying regulations.

A. Enforcement in the "Sunshine"

The previous Part discussed transparency as a means of calling public enforcement to account, but transparency also serves a protective role. The underlying intuition is captured by the famous adage that sunlight is the best disinfectant:³⁰⁶ Transparency promotes accountability by informing the people about the business of government, while "limit[ing] the opportunities for agency capture and self-dealing."³⁰⁷ To those ends, the federal Government in the Sunshine and Freedom of Information Acts and their state-level analogues require, in broad strokes, that the work of government take place in full view of the public. Meetings must be open to interested parties and

³⁰⁴ Tara Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 801 (2009) ("Federal courts rarely review individual nonenforcement decisions . . .").

³⁰⁵ For a sampling of scholarship critical of *Heckler*, see Bressman, *supra* note 176, at 1686 (advocating arbitrariness review); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Cheney*, 52 U. CHI. L. REV. 653, 675–83 (1985) (arguing that courts should entertain certain challenges to nonenforcement decisions).

³⁰⁶ See Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY (Dec. 20, 1913) <http://www.law.louisville.edu/library/collections/brandeis/node/196> [<https://perma.cc/MHL6-F3DS>].

³⁰⁷ Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 59 (1998); see Livermore & Revesz, *supra* note 112, at 1356 ("Because efforts at agency capture are thought to be most effective when they take place outside the public eye, transparency is often considered to be an important ward against undue special-interest influence.").

the press;³⁰⁸ documents related to official government business must be publicly accessible.³⁰⁹

“Sunshine” statutes typically include broad exemptions for matters relating to enforcement and litigation.³¹⁰ The reason is not hard to understand: Transparency can undermine the efficacy of enforcement by disclosing sensitive information about government strategy, or weaknesses in the government’s case, to the adversary or to other would-be violators.³¹¹ Similar reasons support the attorney-client privilege, on which many of the exceptions are based.³¹² As one court explained, “[i]f the public’s ‘right to know’ compelled admission of an audience [to discussions concerning settlement and avoidance of litigation], the ringside seats would be occupied by the government’s adversary, delighted to capitalize on every revelation of weakness.”³¹³

Although these concerns help explain why information about *specific proceedings* is exempted from “sunshine” requirements, they do not justify secrecy about enforcement policy and priorities more generally.³¹⁴ Nor do concerns about the

³⁰⁸ 5 U.S.C. § 552(b) (2012) (requiring that meetings of multi-member agencies be held publicly). For an overview of state-level Sunshine Acts, see Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165 (1993).

³⁰⁹ 5 U.S.C. § 552 (requiring government agencies to provide access to agency documents upon public request).

³¹⁰ See, e.g., *id.* § 552(c)(10) (exempting from open-meeting requirement any meetings that “specifically concern the agency’s issuance of a subpoena, or the agency’s participation in a civil action or proceeding, . . . or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication . . . involving a determination on the record after opportunity for a hearing”); § 552(b)(7)(E) (exempting from disclosure requirements documents whose production “would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law”).

³¹¹ See *Mayer Brown LLP v. I.R.S.*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (“[T]he importance of deterrence explains why the [FOIA exemption for enforcement guidelines] is written in broad and general terms.”); see also *infra* notes 310–26 and accompanying text (discussing concerns that transparency in enforcement policy would undermine deterrence by signaling to regulated entities that certain offenses will not be pursued).

³¹² See *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 798 F.2d 499, 503 (D.C. Cir. 1986) (“Exemption 10, like the attorney-client privilege in civil litigation, . . . which it quite clearly reflects, serves to facilitate the candid exchange of views between client and counsel necessary for effective participation in adversary proceedings.”).

³¹³ *Sacramento Newspaper Guild v. Sacramento Cty. Bd. of Sup’r*, 263 Cal. App. 2d 41, 56 (Ct. App. 1968).

³¹⁴ Cf. MANIN, *supra* note 24, at 168 (“[A]lthough a certain amount of openness in political acts is required to keep citizens informed, it is not necessary at each stage of the decision process.”)

political consequences of improved transparency. In a world of limited budgets and staffs, a full account of enforcement priorities inevitably would entail a discussion of issues the enforcers are not pursuing. Yet such announcements may be politically risky. Bromides about “protecting consumers” provide less ammunition for political opponents than detailed explanations of the types of offenses enforcers plan to prioritize and those they expect to ignore. Perhaps this, too, helps explain the status quo; it does not excuse it.

A more promising argument against transparency is that exposing enforcement priorities could encourage violations by reducing the perceived likelihood of sanctions.³¹⁵ Law-evasion may well be a cost of transparency, but the problem should not be overstated. As Kate Andrias has pointed out, “sophisticated regulated parties are typically aware of informal, undisclosed policies of nonenforcement or prioritization.”³¹⁶ In areas where private enforcement is a possibility, moreover, would-be violators would be foolish to rely on agency guidelines while ignoring the potential for a private civil suit. And even where private enforcement is unavailable, many offenses are subject to multiple layers of public enforcement by different agencies, or by different states, or by states as well as the federal government.³¹⁷ This “distinctively American” approach to enforcement³¹⁸ often reflects self-conscious efforts by the legislature to avoid placing exclusive enforcement authority in the hands of one executive institution—particularly in times of divided government.³¹⁹ The upshot is that one agency’s policy of non-enforcement may offer only weak assurance that violations will not be pursued. It will be the rare case, moreover, in which an agency promises *never* to pursue a particular class of violation, as opposed to downplaying certain offenses in favor of others.³²⁰

³¹⁵ See Price, *Politics of Nonenforcement*, *supra* note 12, at 1136–43.

³¹⁶ Andrias, *supra* note 12, at 1098.

³¹⁷ See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 707–17 (2012) (describing federal statutes that authorize concurrent state and federal enforcement); Minzner, *supra* note 84, at 2142–43 (describing overlapping enforcement authority among federal agencies).

³¹⁸ Engstrom, *supra* note 55, at 629.

³¹⁹ See Sean Farhang & Miranda Yaver, *Divided Government and the Fragmentation of American Law*, 60 AM. J. POL. SCI. 401, 403–05 (2015).

³²⁰ See Andrias, *supra* note 12, at 1097–98 (noting that “a policy of statutory abdication would exceed presidential power even under existing doctrine and would also subject the Executive to greater, unwelcome judicial review under *Heckler v. Chaney*”).

The risk of law-evasion may be higher in areas where a single agency controls the relevant universe of enforcement, and where the criteria for enforcement (or non-enforcement) are particularly concrete. The IRS's audit procedures are one example. The IRS is notoriously close-lipped about how it determines which tax returns to audit, but available evidence suggests that the agency uses a complicated and top secret formula.³²¹ Disclosure of that formula could well encourage tax-evasion by providing a detailed blueprint for avoiding IRS scrutiny. The risk of scrutiny by state tax authorities would remain, so long as the states' audit procedures did not map perfectly onto the IRS's. But let us imagine, for the sake of argument, that the IRS is the only game in town. The important point for present purposes is that a decrease in deterrence—even if substantial—is only one side of the relevant equation, and must be balanced against the gains in transparency and accountability. Although secrecy may be the best approach in some circumstances, it should not be the unconsidered default. Decisions to keep enforcement policy confidential should at the very least be carefully weighed, and the decisions themselves (along with their justifications) should be as transparent as possible.

B. Regulating Enforcer Elections

Although the average citizen will find it difficult to learn about enforcement policy, there is one segment of the public that tends to know very well what enforcers are up to: the targets, and potential targets, of enforcement. Regulated entities have every incentive to try to influence enforcement, and AG elections—or, more precisely, the need for candidates to fund their election campaigns—pose particular risks of lopsided influence. Improving the information available about enforcement is one way to combat those risks. Another approach is to focus more directly on how enforcer elections are regulated.

Consider again the commonalities between enforcement and adjudication—particularly when it comes to discrete enforcement decisions. If we take seriously the Court's analysis of judicial elections, we can find support for more robust regulation of enforcer elections than would be permitted for legislators or other executive offices. One possibility might be to limit

³²¹ See Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017, 1068–69 (2009) (describing the audit process and its secrecy).

AGs' ability to solicit campaign contributions from the targets of imminent or pending enforcement actions, including investigations. Many states restrict personal solicitations from judicial candidates, and the Court recently sustained such restrictions against a First Amendment challenge.³²² Several states also require contributions to judicial candidates to be funneled through a committee rather than going to the candidate personally, and kept anonymous from the candidate so that judges will not know who supported them and who did not.³²³ Similar protections are at the very least worthy of consideration in the context of enforcer elections. Alternatively, elected AGs might voluntarily adopt policies against soliciting or accepting contributions from enforcement targets, as at least one has done.³²⁴

Rather than regulating contributions at the front end, states might instead consider limiting AGs' involvement in cases involving substantial campaign contributors.³²⁵ For example, some states have adopted regulations seeking to limit "pay to play" arrangements between AGs and private attorneys who perform work for the state in exchange for a fee, often a percentage of the recovery.³²⁶ News reports had revealed that the attorneys who won lucrative state contracts often happened to be campaign supporters.³²⁷ In response, states imposed new requirements for the hiring of outside counsel,

³²² *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015); Brief of *Amicus Curiae* The American Bar Association in Support of Respondent, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. (No. 13-1499) (appendix listing state laws barring judicial solicitations).

³²³ See, e.g., Colo. Code of Judicial Conduct, Rule 4.3(A) (permitting nonpartisan citizens' committees to raise funds for a judge's campaign, but specifying that "the judge should not be advised of the source of funds raised by the committee or committees"); Idaho Code of Judicial Conduct 5(C)(2) ("[A] candidate's judicial election committee should not disclose the names of contributors to judicial campaigns and judicial candidates and judges should avoid obtaining the names of contributors . . .").

³²⁴ See Eric Lipton, *Bipartisan Push to Limit Lobbyists' Sway Over Attorneys General*, N.Y. TIMES, Dec. 26, 2014, at A10 (describing policy adopted by Missouri AG Chris Koster).

³²⁵ Cf. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012) (advocating, in light of the Court's campaign-finance doctrine, a turn to ex post regulation of money once it is within the political system, rather than ex ante regulation of money to limit its entry in the first place).

³²⁶ See Lemos, *supra* note 16, 543-44.

³²⁷ See, e.g., Carolyn Lochhead, *The Growing Power of Trial Lawyers*, WEEKLY STANDARD, Sept. 23, 1996, at 21, 22-23; David Hammer, *Attorney General Called Out for Giving Contracts to Top Campaign Donors*, WWLTV EYEWITNESS NEWS (Oct. 30, 2013, 7:25 AM), <https://vimeo.com/142410300> [<http://perma.cc/YD39-US3U>]. For a more recent report suggesting that the problems have not gone away, see Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General*

including open bidding procedures and limits on contingent fees.³²⁸

These reforms are important, but they do nothing to address the risks associated with cases in which campaign contributors are parties or *opposing* attorneys. In the context of judicial elections, several states require judges to recuse themselves from cases concerning their financial supporters. In *Caperton v. Massey*, the Supreme Court held that recusal was required as a matter of due process when the contributor in question had “a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”³²⁹ The Court emphasized that due process sets the floor for recusal, and that states are free to adopt more stringent requirements via statutes.³³⁰ In California, for example, judges who received a contribution of more than \$1,500 from a party or attorney for an election within the last six years or for an upcoming election are disqualified from participating in the case.³³¹ New York bars judges from hearing cases when the lawyers or any of the participants involved donated \$2,500 or more in the preceding two years.³³²

Recusal rules for enforcers look very different. To the extent that states regulate recusal for civil enforcers at all, the existing regulations are relatively weak and do not distinguish

to *Sue*, N.Y. TIMES, Dec. 18, 2014, at A1 (discussing campaign contributions by attorneys hoping to secure contracts for state legal work).

³²⁸ See Fla. Stat. Ann. § 16.0155 (West 2015) (mandating open and transparent bidding systems and capping contingent fees); Ariz. Rev. Stat. Ann. § 41-4803 (2012) (same); Ind. Code § 4-6-3-2.5(b) (2012) (same); Iowa Code §§ 13.7, 23B.3 (2015) (same); Miss. Code Ann. §§ 7-5-8, 7-5-21, 7-5-39 (2015) (same); Mo. Rev. Stat. §§ 34.376, 34.378, 34.380 (2015) (same); see also Kan. Stat. Ann. § 75-37,135(a)(1) (2014) (establishing elaborate procedures for contracts that might result in the payment of more than \$1,000,000 in fees to private attorneys); Tex. Gov’t Code Ann. § 2254.103(e) (2013) (requiring legislative approval for most contingent-fee arrangements); Va. Code Ann. § 2.2-510.1 (2015) (requiring open and competitive bidding for contingent-fee contracts).

³²⁹ 556 U.S. 868, 884 (2009).

³³⁰ *Id.* at 889.

³³¹ See *Judicial Campaigns and Elections*, NAT’L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state.

³³² *Id.* Until recently, Alabama judges were required to recuse themselves from cases involving parties who contributed more than \$4,000 (for appellate judges) or \$2,000 (for trial judges). Ala. Code § 12-24-1 (repealed by Act 2014-455, p.1688, § 2 (July 1, 2014)). Alabama’s law was amended in 2014 and now establishes a rebuttable presumption that the judge will recuse herself from a case involving a party whose contributions exceeded ten percent of the total contributions in a statewide appellate race, fifteen percent in a circuit court race, and twenty-five percent in a district court race. Ala. Code § 12-24-3 (2012).

between elected enforcers and career civil servants.³³³ State-level recusal rules tend to focus on scenarios in which a government attorney's prior practice might conflict with current cases.³³⁴ No state addresses the possibility of concurrent influence in the form of campaign contributions and the like.

C. Lobbying

Finally, it is critical to attend to the role of lobbying in the enforcement context. Lobbying regulations typically require lobbyists to register with the government and to submit periodic reports of their activities and their expenditures. Some states restrict lobbyists' ability to make campaign contributions.³³⁵ The goal of such laws is to facilitate public knowledge of a key lever of influence over public policy, and to ensure that any influence is a product of advocacy and not more personal enticements.

Federal law defines "lobbying contact" broadly, to include any communication "to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to"—among other things—"the administration or execution of a Federal program or policy."³³⁶ But the relevant statute then carves out any communication "made to an official in an agency with regard to . . . a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding."³³⁷ Thus, efforts to influence general enforcement policy would likely be covered by federal lobbying regulations,

³³³ Perhaps not surprisingly, many recusal rules focus on criminal prosecutors, not civil enforcers. And the test for recusal is often fairly demanding, requiring the requesting party to show that "a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." West's Ann. Cal. Penal Code § 1424 (motion to disqualify a district attorney); see Colo. Rev. Stat. § 20-1-107(2) (similar); *People v. Loper*, 241 P.3d 353, 546 (Colo. 2010) (holding that it is not enough that "the facts raise concerns of impropriety but do not have any bearing on whether the defendant would be likely to receive a fair trial").

³³⁴ See, e.g., Ala. Rules of Prof. Conduct 1.11(c)(1) (prohibiting a government attorney from "participat[ing] in a matter in which the lawyer participated personally and substantially while in private practice or in nongovernmental employment"); Ariz. Rules of Prof. Conduct 1.11 (same); Ark. Rules of Prof. Conduct 1.11(d)(2) (same); Del. Code of Prof. Conduct 1.11(d)(2)(i) (same); Fla. Rule of Prof. Conduct 4-1.11(d)(2)(A) (same).

³³⁵ Under Alaska law, for example, lobbyists cannot host fundraising events, directly or indirectly collect money for a candidate, or make contributions to legislative candidates except in the district where the lobbyist actually votes. See ALASKA STAT. § 11.56.130, § 15.13.074(g), § 24.45.121(a), §§ 24.45.041(b)(8), (9), § 24.60.030(a)(1), § 24.60.031(a)(2), and § 24.60.085.

³³⁶ 2 U.S.C. § 1602(8)(A).

³³⁷ *Id.* § 1602(8)(B) (2012).

but efforts to influence particular enforcement actions would not be.

Lobbying rules are more limited at the state level. Some apply only to efforts to influence legislative action. To the extent they govern contacts with executive actors, the states' rules focus overwhelmingly on efforts to influence administrative rulemaking.³³⁸ Enforcement decisions, for the most part, are exempt.

The consequence is that, at a time when more and more money is flowing into AG races,³³⁹ contacts with AGs and their staffs are almost entirely unregulated. The extent of lobbying at the state level was exposed in a recent series of articles in the *New York Times*, which described elaborate efforts by firms that saw themselves as potential targets of AG enforcement.³⁴⁰ The influence took various forms, ranging from large corporate donations to the Republican and Democratic Attorneys General Associations (RAGA and DAGA, respectively), which in turn bought access to AGs at exclusive retreats; to direct campaign contributions to individual AGs' election and reelection funds; to draft letters and legal filings prepared by lobbyists and then used (sometimes verbatim) by AGs.³⁴¹ At least in some cases, the influence appears to have paid off. For example, the *Times* reported that Missouri AG Chris Koster instructed his staff to drop their investigation of the 5-Hour Energy drink after talking with an attorney for the company—a campaign contributor—at a fund-raising event at a beach hotel in California.³⁴² In a different case, Koster's office wrapped up settlement negotiations in a consumer fraud action against Pfizer shortly after Koster received an invitation to speak at an event hosted by

³³⁸ See, e.g., ALA. CODE § 36-25-1(20) (2016) (defining lobbying by reference to legislation and regulation); ARIZ. REV. STAT. § 41-1231(10) (same); see also ALASKA STAT. § 24.45.171 (2015) (defining lobbying to include communications “for the purpose of influencing legislative or administrative action” and defining “administrative action” in terms of rulemaking or adjudication); CAL. GOV'T. CODE § 82039 (2016) (same).

³³⁹ E.g., Ben Wieder, *Big Money Comes to State Attorney-General Races*, The Atlantic (May 8, 2014) <https://www.theatlantic.com/politics/archive/2014/05/us-chamber-targets-dems-in-state-attorney-general-races/361874/> [https://perma.cc/36EP-WA96].

³⁴⁰ See Lipton, *supra* note 85; Eric Lipton, *Link Shows How Lobby Firm Cultivates Influence*, N.Y. TIMES, Nov. 9, 2014, at A15; Eric Lipton, *Missouri Attorney General May Face Inquiry Over Money From Lobbyists*, N.Y. TIMES, Oct. 29, 2014, at A14 [hereinafter Lipton, *Missouri Attorney General*]; Eric Lipton, *Rhode Island Investigating Former State Attorney General*, N.Y. TIMES, Nov. 21, 2014, at A11.

³⁴¹ See generally Lipton, *supra* note 85 (exposing lobbying practices directed at attorneys general).

³⁴² *Id.*

Pfizer's PAC, another campaign contributor. Missouri's settlement with Pfizer was \$350,000 smaller than those of other states that brought similar claims and settled separately.³⁴³

Lobbying efforts do not only run against enforcement; firms also try to persuade AGs to pursue particular enforcement actions, often against their competitors. For example, lobbyists for the Las Vegas Sands, which donated \$500,000 to RAGA in 2014, have been pushing AGs to support efforts to outlaw online poker.³⁴⁴ And it is becoming increasingly common for AGs and other government enforcers to work directly with private lawyers on enforcement initiatives. As noted above, often those private lawyers work on a contingency basis, giving them a direct share in any winnings.³⁴⁵

The *Times* exposé inspired a fluttering of reform, but so far the effect has been minimal. To the extent that differential treatment of enforcement for lobbying purposes reflects something other than inattention on the part of law-makers, it seems to rest on a distinction between policy advocacy on the one hand and direct client representation, or traditional *legal* advocacy, on the other. We would not call a lawyer representing a client before an administrative judge, or negotiating a settlement with a government attorney, a lobbyist. We would just call her a lawyer. This complication suggests the need for care in crafting lobbying regulations in the enforcement context, but it does not justify the near-complete absence of regulation for enforcement-related lobbying. At the very least, lobbying rules could cover efforts to influence enforcement policy by non-parties and their attorneys.

CONCLUSION

There is a gap at the center of the vast literature on accountability in democratic government. Existing commentary focuses overwhelmingly on the contrast between legislation and regulation, on the one hand, and adjudication on the other. Enforcement lies at the intersection of law-making and law-application, both in terms of how it operates—bringing cases to adjudicators so that generally applicable laws may be

³⁴³ Koster told the *Times* that the smaller settlement from Pfizer was caused by “a mistake made by a staff lawyer that prevented Missouri from joining the so-called multistate investigation of the company.” Lipton, *Missouri Attorney General*, *supra* note 340. However, Oregon, which also negotiated a separate settlement rather than participating in the multistate action, secured four times as much as Missouri. Lipton, *supra* note 85.

³⁴⁴ See Lipton, *supra* note 85.

³⁴⁵ See *supra* text accompanying notes 322–323.

interpreted and applied to particular individuals and firms—and in terms of the features it shares with those more familiar government functions. Yet enforcement has largely been ignored in the literature on accountability.

This Article has sought to fill that gap. I have argued that public enforcement is a form of discretionary policymaking that should be understood as a form of political representation. Casting enforcement in this light helps reveal the importance of accountability in the enforcement context, while also making clear that enforcers can “represent” the public without slavishly following popular will. To say that public enforcement should be accountable is not to deny the need for autonomous professional judgment, but to insist that it is the responsibility of government to inform its citizens of what it is doing in their name, and listen to their views in return. A call for accountability is also a call for mechanisms by which citizens can attempt to influence enforcement prospectively, or “hold it accountable” retrospectively. And accountability *to the public* entails some measure of insulation from narrow, private interests.

Our current treatment of enforcement falls far short of this vision. Under existing law, we have few tools to secure meaningful political accountability for enforcers’ policy decisions—but neither do we have the means to shield enforcement from improper influence. We can do better.

I have suggested various avenues for reform, many of them focused on improving the information available about enforcement. Nevertheless, the primary goal here has been diagnostic rather than prescriptive. As a first cut, the theory I have advanced is necessarily cast at a relatively high level of abstraction. To move from theory to concrete reform, context will be critical. This Article has focused on the civil side of the civil/criminal divide, but it has explored enforcement across many jurisdictions, including the states as well as the federal government. Different jurisdictions may rely on public enforcement for different reasons, and to different degrees. As a result, the optimal relationship between enforcement and the public will may not be the same at both levels of government, or from one state to the next. For example, the role of the state AG as “the people’s lawyer”³⁴⁶ might suggest that the scales should tip farther in the direction of responsiveness in the states than in the federal government. Or, perhaps, policymakers might cali-

³⁴⁶ MATTOX, *supra* note 64, at 88.

brate accountability measures to account for the availability (or not) of private rights to enforce the relevant laws. I leave those questions for future work. Whatever one's view of the precise functions of public enforcement, however, it seems clear that the status quo is far from optimal.