AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURE OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Constitutional Litigation

**Thole v. U.S. Bank N.A., 140 S. Ct. 1615** (2020)

*James Thole received $2,198.38 as a vested participate in U.S. Bank’s defined benefit retirement plan. He and other similar situated persons filed a class action lawsuit claim that U.S. Bank from 2007 and 2010 and beyond engaged in management practices that violated federal law and cost the trust from which his retirement was paid appropriate three-quarters of a billion dollars. U.S. Bank claimed that Thole lacked standing under Article III of the Constitution of the United States because his monthly payment did not depend on the precise amount of money in the trust as a whole and he presented no evidence that he would not receive that monthly payment in the future. The local district court agreed that Thole lacked standing and that decision was affirmed by the Court of Appeals for the Eighth Circuit. Thole appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 5-4 vote sustained the lower federal court. Justice Brett Kavanaugh’s majority opinion held that Thole lacked standing because he could not demonstrate the required injury. Why does Kavanaugh think Thole was not injured by U.S. Bank’s alleged mismanagement? Why does the dissent disagree? Who has the better of the argument? Thole based his class action in part of a federal law that permitted beneficiaries of retirement plans to sue trustees for mismanagement, even if the mismanagement did not immediately affect their payout. Why did Congress mandate standing? Did the judicial decision declaring that statute unconstitutional respect the constitutional separation of powers or unduly interfere with a congressional judgment as to the best ways to prevent private retirement programs from being mismanaged?*

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iae49586ca3a311ea8939c1d72268a30f) delivered the opinion of the Court.

To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief. See *Lujan v. Defenders of Wildlife* (1992).

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We affirm the judgment of the U. S. Court of Appeals for the Eighth Circuit on the ground that the plaintiffs lack [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing. Thole and Smith have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments. If Thole and Smith were to *lose*this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less. If Thole and Smith were to *win* this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit. . . .

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The basic flaw in the plaintiffs’ trust-based theory of standing is that the participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to the participants in a defined-contribution plan. In the private trust context, the value of the trust property and the ultimate amount of money received by the beneficiaries will typically depend on how well the trust is managed, so every penny of gain or loss is at the beneficiaries’ risk.  By contrast, a defined-benefit plan is more in the nature of a contract. The plan participants’ benefits are fixed and will not change, regardless of how well or poorly the plan is managed. . . . Moreover, the employer, not plan participants, receives any surplus left over after all of the benefits are paid; the employer, not plan participants, is on the hook for plan shortfalls. The trust-law analogy therefore does not fit this case and does not support [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing for plaintiffs who allege mismanagement of a defined-benefit plan.

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The plaintiffs point to the Court's decisions upholding the [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing of assignees—that is, where a party's right to sue has been legally or contractually assigned to another party. But here, the plan's claims have not been legally or contractually assigned to Thole or Smith. . . .

. . . . ERISA affords the Secretary of Labor, fiduciaries, beneficiaries, and participants—including participants in a defined-benefit plan—a general cause of action to sue for restoration of plan losses and other equitable relief. But the cause of action does not affect the [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing analysis. This Court has rejected the argument that “a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” *Spokeo*, *Inc.* v. *Robins* (2016). The Court has emphasized that “[Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing requires a concrete injury even in the context of a statutory violation.” . . .

Thole and Smith contend that if defined-benefit plan participants may not sue to target perceived fiduciary misconduct, no one will meaningfully regulate plan fiduciaries. For that reason, the plaintiffs suggest that defined-benefit plan participants must have standing to sue. But this Court has long rejected that kind of argument for [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing. In any event, the argument rests on a faulty premise in this case because defined-benefit plans are regulated and monitored in multiple ways. . . . .

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[T]he plaintiffs’ complaint did not plausibly and clearly claim that the alleged mismanagement of the plan substantially increased the risk that the plan and the employer would fail and be unable to pay the plaintiffs’ future pension benefits. It is true that the plaintiffs’ complaint alleged that the plan was underfunded for a period of time. But a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail. . . .

Courts sometimes make standing law more complicated than it needs to be. There is no ERISA exception to [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). And under ordinary [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing analysis, the plaintiffs lack [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing for a simple, commonsense reason: They have received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives. Winning or losing this suit would not change the plaintiffs’ monthly pension benefits. The plaintiffs have no concrete stake in this dispute and therefore lack [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iae49586ca3a311ea8939c1d72268a30f), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iae49586ca3a311ea8939c1d72268a30f) joins, concurring.

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The historical restrictions on standing provide a simpler framework. [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) vests “[t]he judicial Power of the United States” in the federal courts and specifies that it shall extend to enumerated categories of “Cases” and “Controversies.” “To understand the limits that standing imposes on ‘the judicial Power,’ ... we must ‘refer directly to the traditional, fundamental limitations upon the powers of common-law courts.’ ”

“Common-law courts imposed different limitations on a plaintiff ’s right to bring suit depending on the type of right the plaintiff sought to vindicate.”  Rights were typically divided into private rights and public rights. Private rights are those “ ‘belonging to individuals, considered as individuals.’ ” Public rights are “owed ‘to the whole community, considered as a community, in its social aggregate capacity.’ ”

Petitioners claim violations of private rights under the Employee Retirement Income Security Act of 1974 (ERISA). “In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury [if] his personal, legal rights [were] invaded.”  In this case, however, none of the rights identified by petitioners belong to them. The fiduciary duties created by ERISA are owed to the plan, not petitioners. As participants in a defined benefit plan, petitioners have no legal or equitable ownership interest in the plan assets. . . .

There is thus no need to analogize petitioners’ complaint to trust law actions, derivative actions, *qui tam* actions, or anything else. We need only recognize that the private rights that were allegedly violated do not belong to petitioners under ERISA or any contract.

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Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iae49586ca3a311ea8939c1d72268a30f), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iae49586ca3a311ea8939c1d72268a30f), Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iae49586ca3a311ea8939c1d72268a30f), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iae49586ca3a311ea8939c1d72268a30f) join, dissenting.

The Court holds that the Constitution prevents millions of pensioners from enforcing their rights to prudent and loyal management of their retirement trusts. Indeed, the Court determines that pensioners may not bring a federal lawsuit to stop or cure retirement-plan mismanagement until their pensions are on the verge of default. This conclusion conflicts with common sense and longstanding precedent.

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Because ERISA requires that retirement-plan assets be held in trust, it imposes on the trustees and other plan managers “ ‘strict standards’ ” of conduct “ ‘derived from the common law of trusts.’ ”  These “fiduciary duties” obligate the trustees and managers to act prudently and loyally, looking out solely for the best interest of the plan's participants and beneficiaries—typically, the employees who sacrifice wages today to secure their retirements tomorrow. . . .

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. . . . [P]etitioners have an interest in their retirement plan's financial integrity, exactly like private trust beneficiaries have in protecting their trust. By alleging a $750 million injury to that interest, petitioners have established their standing.

This Court typically recognizes an “injury in fact” where the alleged harm “has a close relationship to” one “that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Spokeo, Inc.* v. *Robins* (2016). Thus, the Court acknowledges that “private trust” beneficiaries have standing to protect the assets in which they have an “equitable” interest. . . . . ERISA expressly required the creation of a trust in which petitioners are the beneficiaries: “[A]ll assets” of the plan “shall be held in trust” for petitioners’ “exclusive” benefit.  These requirements exist regardless whether the employer establishes a defined-benefit or defined-contribution plan. . . . The Plan Document also gives petitioners a residual interest in the trust fund's assets: It instructs that, “[u]pon termination of the Plan, each Participant [and] Beneficiary” shall look to “the assets of the [trust f]und” to “provide the benefits otherwise apparently promised in this Plan.” This arrangement confers on the “participants [and] beneficiaries” of a defined-benefit plan an equitable stake, or a “common interest,” in “the financial integrity of the plan.”

Petitioners’ equitable interest finds ample support in traditional trust law. “The creation of a trust,” like the one here, provides beneficiaries “an equitable interest in the subject matter of the trust.” Courts have long recognized that this equitable interest gives beneficiaries a basis to “have a breach of trust enjoined and ... redress[ed].”  That is, a beneficiary's equitable interest allows her to “maintain a suit” to “compel the trustee to perform his duties,” to “enjoin the trustee from committing a breach of trust,” to “compel the trustee to redress a breach of trust,” and to “remove the trustee.”

So too here. Because respondents’ alleged mismanagement lost the pension fund hundreds of millions of dollars, petitioners have stated an injury to their equitable property interest in that trust.

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. . . . Precisely because petitioners have an interest in payments from their trust fund, they have an interest in the integrity of the assets from which those payments come. . . . The Court does not explain how the pension could satisfy its monthly obligation if, as petitioners allege, the plan fiduciaries drain the pool from which petitioners’ fixed income streams flow. . . . It does not matter that other parties besides beneficiaries may have a residual stake in trust assets; a beneficiary with a life-estate interest in payments from a trust still has an equitable interest. . . .

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[T]the Court cites inapposite case law. It asserts that “this Court has stated” that “plan participants possess no equitable or property interest in the plan.” . . . Quite the opposite: [past recedent] explained that defined-benefit-plan beneficiaries have a “common interest” in the “financial integrity” of their defined-benefit plan. [473 U.S. at 142, n. 9, 105 S.Ct. 3085](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985132616&pubNum=0000780&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RP&fi=co_pp_sp_780_142&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_142).

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Second, petitioners have standing because a breach of fiduciary duty is a cognizable injury, regardless whether that breach caused financial harm or increased a risk of nonpayment.

A beneficiary has a concrete interest in a fiduciary's loyalty and prudence. For over a century, trust law has provided that breach of “a fiduciary or trust relation” makes the trustee “suable in equity.”  That is because beneficiaries have an enforceable “right that the trustee shall perform the trust in accordance with the directions of the trust instrument and the rules of equity.”

That interest is concrete regardless whether the beneficiary suffers personal financial loss. A beneficiary may sue a trustee for restitution or disgorgement, remedies that recognize the relevant harm as the trustee's wrongful gain. Through restitution law, trustees are “subject to liability” if they are unjustly enriched by a “ ‘violation of [a beneficiary]’s legally protected rights,’ ” like a breach of fiduciary duty. . . . Nor does it matter whether the beneficiaries receive the remedy themselves. A beneficiary may require a trustee to “restore” assets directly “to the trust fund.” . . .

Congress built on this tradition by making plan fiduciaries expressly liable to restore to the plan wrongful profits and any losses their breach caused, and by providing for injunctive relief to stop the misconduct and remove the wrongdoers. In doing so, Congress rejected the Court's statement that a “trust-law analogy ... does not” apply to “plaintiffs who allege mismanagement of a defined-benefit plan.”

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. . . . [F]or the same reason petitioners could bring suit if they did not receive payments from their plan, they could bring suit if they did not receive loyalty and prudence from their fiduciaries. After all, it is well settled that breach of “a contract to act diligently and skil[l]fully” provides a “groun[d] of action” in federal court.  It is also undisputed that “[a] breach of contract always creates a right of action,” even when no financial “harm was caused.” . . .

. . . . A breach-of-fiduciary-duty claim exists regardless of the beneficiary's personal gain, loss, or recovery. In rejecting petitioners’ standing and maintaining that “this suit would not change [petitioners’] monthly pension benefits,” the Court fails to distinguish the different rights on which pension-plan beneficiaries may sue. They have a right not just to their pension benefits, but also to loyal and prudent fiduciaries. . . .

With its focus on fiscal harm, the Court seems to suggest that pecuniary injury is the *sine qua non* of standing. . . . . But injury to a plaintiff ’s wallet is not, and has never been, a prerequisite for standing. The Constitution permits federal courts to hear disputes over nonfinancial injuries like the harms alleged here. . . . Petitioners . . . assert a noneconomic injury for unlawful management of their retirement plan and petitioners do have a substantive right to a particular amount of benefits. . . .

. . . .

Even if petitioners had no suable interest in their plan's financial integrity or its competent supervision, the plan itself would. There is no disputing at this stage that respondents’ “mismanagement” caused the plan “approximately $750 million in losses” still not fully reimbursed.  And even under the concurrence's view, respondents’ fiduciary duties “are owed to the plan.”  The plan thus would have standing to sue under either theory discussed above.

The problem is that the plan is a legal fiction: Although ERISA provides that a retirement plan “may sue ... as an entity,” someone must still do so on the plan's behalf. Typically that is the fiduciary's job. But imagine a case like this one, where the fiduciaries refuse to sue because they would be the defendants. Does the Constitution compel a pension plan to let a fox guard the henhouse?

Of course not. This Court's representational standing doctrine permits petitioners to sue on their plan's behalf. This doctrine “rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption ... that litigants may not assert the rights of absent third parties.” . . . The common law has long regarded a beneficiary's representational suit as a proper “basis for a lawsuit in English or American courts.”  When “the trustee cannot or will not” sue, a beneficiary may do so “as a temporary representative of the trust.” . . . ERISA embraces this tradition. [Sections 1132(a)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=29USCAS1132&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_d86d0000be040) and [(a)(3)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=29USCAS1132&originatingDoc=Iae49586ca3a311ea8939c1d72268a30f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_28cc0000ccca6) authorize participants and beneficiaries to sue “in a representative capacity on behalf of the plan as a whole” so that any “recovery” arising from the action “inures to the benefit of the plan as a whole.” . . .

Permitting beneficiaries to enforce their plan's rights finds plenty of support in our constitutional case law. Take associational standing: An association may file suit “to redress its members’ injuries, even without a showing of injury to the association itself.” . . .

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. . . . Congress expressly and thereby legally assigned pension-plan participants and beneficiaries the right to represent their plan, including in lawsuits where the other would-be representative is the defendant. Far from “ ‘automatically’ ” conferring petitioners standing to sue or creating an injury from whole cloth, ERISA assigns the right to sue on the plan's unquestionably cognizable harm: here, fiduciary breaches causing wrongful gains and hundreds of millions of dollars in losses. So even under the Court's framing, it does not matter whether petitioners “sustained any monetary injury,” because their pension plan did.

. . . .

It is hard to overstate the harmful consequences of the Court's conclusion. With ERISA, “the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators.”  In imposing fiduciary duties and providing a private right of action, Congress “designed” the statute “to prevent these abuses in the future.” Yet today's outcome encourages the very mischief ERISA meant to end.

After today's decision, about 35 million people with defined-benefit plans[11](https://1.next.westlaw.com/Document/Iae49586ca3a311ea8939c1d72268a30f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa5000001760690335ac5622d7c%3FNav%3DCASE%26fragmentIdentifier%3DIae49586ca3a311ea8939c1d72268a30f%26parentRank%3D0%26startIndex%3D21%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=a1f2d4f0b12c4b38e02e1256195721b2&list=CASE&rank=32&sessionScopeId=c00f3322bae8485deca208eeecbedfb2f89682f4dda31aeb13e19a2bd201bcfd&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00142051159138) will be vulnerable to fiduciary misconduct. The Court's reasoning allows fiduciaries to misuse pension funds so long as the employer has a strong enough balance sheet during (or, as alleged here, because of) the misbehavior. Indeed, the Court holds that the Constitution forbids retirees to remedy or prevent fiduciary breaches in federal court until their retirement plan or employer is on the brink of financial ruin. This is a remarkable result, and not only because this case is bookended by two financial crises. There is no denying that the Great Recession contributed to the plan's massive losses and statutory underfunding, or that the present pandemic punctuates the perils of imprudent and disloyal financial management.

. . . .

The Court's proposed solutions offer nothing in a case like this one. The employer, its shareholders, and the plan's cofiduciaries here have no reason to bring suit because they either committed or profited from the misconduct. Recall the allegations: Respondents misused a pension plan's assets to invest in their own mutual funds, pay themselves excessive fees, and swell the employer's income and stock prices. . . . Neither is the Federal Government's enforcement power a palliative. “ERISA makes clear that Congress did not intend for Government enforcement powers to lessen the responsibilities of plan fiduciaries.”  The Secretary of Labor, moreover, signed a brief (in support of petitioners) verifying that the Federal Government cannot “monitor every [ERISA] plan in the country.” Brief for United States as *Amicus Curiae* 26. Even when the Government can sue (in a representational capacity, of course), it cannot seek all the relief that a participant or beneficiary could. . . .

Missing from the Court's opinion is any recognition that Congress found private enforcement suits and fiduciary duties critical to policing retirement plans; that it was after this litigation was initiated that respondents restored $311 million to the plan in compliance with statutorily required funding levels; and that counsel justified their fee request as a below-market percentage of the $311 million employer infusion that this lawsuit allegedly precipitated.

The Constitution, the common law, and the Court's cases confirm what common sense tells us: People may protect their pensions. “Courts,” the majority surmises, “sometimes make standing law more complicated than it needs to be.” Indeed. Only by overruling, ignoring, or misstating centuries of law could the Court hold that the Constitution requires beneficiaries to watch idly as their supposed fiduciaries misappropriate their pension funds. I respectfully dissent.