OF CASES AND CONTROVERSIES ONCE MORE

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What, Judge George Nicholson asked the prospective contributors to this volume several months ago, can judges do by way of ameliorating the bitter contentions and partisan polarization that afflict our politics? My co-contributors have ably discussed the many ways in which judges might promote that urgent endeavor as prominent members of the bar and of professional associations, as civic leaders, as members of their communities, and in other roles. My own self-imposed assignment is to explore what judges might be able to do *as judges*—that is, in their capacity as public officials who serve on courts of various descriptions and who exercise judicial power.

My answer proceeds from two points of departure. One, judicial doctrine *matters* in real political life—always beneath the surface and, on occasion, quite dramatically. For example, nary a citizen outside a Federal Courts seminar cared about the finer points of Section 1983 jurisprudence and official immunities—until, in the wake of George Floyd's tragic and violent death, those seeming details did come engage the interest of a broader public and, startlingly, the United States Congress.[1] Two, I urge a bold reframing of near-sacrosanct judicial doctrines that govern what federal

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1. See the proposed Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1470/text.

courts can and cannot do. Yet that call for judicial innovation is grounded in a plea for judicial caution and modesty. The remainder of this Introduction explicates that seemingly paradoxical thought.

Now more than in less contentious times, I propose, courts—judges *qua* judges—should strive to remain an institutional haven from a turbulent, divisive politics. To that end, courts must supply impartiality and fairness to litigants, respect for law (not as an instrument of social control but as the foundation of a liberal order), reasoned decision-making, and professional integrity. By and large, the public appears to have confidence that the judiciary, federal and state, will in fact exercise those virtues.[2] However, the virtues require careful cultivation—especially under conditions of intense social conflict, high partisan polarization, and relentless public agitation over a supposedly partisan (federal) judiciary.

Part of that cultivation, in my view, is a common law-ish, constitutionally grounded approach to adjudication: we judges decide *this* dispute among *these* litigants under *this* statute (regulation, precedent, etc.); and we afford *these* remedies to *these* parties (and no one else). Put differently: the judiciary might be able to enhance public confidence—to increase its "sociological legitimacy," as Professor Richard H. Fallon, Jr. has put it[3]—if the judges were to maintain a sharper focus on the independent judiciary's core constitutional power of deciding cases and controversies over private rights among adverse parties.

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2. While public opinion polls provide a somewhat mixed picture, the overall evidence suggests a high degree of public confidence in the judiciary's competence, fairness, and impartiality. *See, e.g.*, Justin McCarthy, *Approval of the Supreme Court is Highest Since 2009*, GALLUP (Aug. 5, 2020), https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx (clear majorities of Republicans, Democrats, and Independents approve of Supreme Court's performance); *State of the State Courts: 2019 Poll*, NAT'L CTR. FOR ST. CTS. (Feb. 20, 2020), https://www.ncsc.org/__data/assets/pdf_file/0018/16443/ncsc_sosc_2019_presentation.pdf (National Center for State Courts survey indicating that 75 percent of respondents perceive state courts as generally fair).

3. RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21–24 (2018).

Who could possibly disagree with that proposition? Lots of folks, it turns out; lots of legal scholars; and armies of litigants who would have the courts issue bold proclamations and afford sweeping relief in disputes over congressional subpoenas, executive funding decisions, immigration, same-sex marriages, the Affordable Care Act, presidential emoluments, religious monuments, and other matters of public concern—often in proceedings where no actual plaintiff with a reasonably cognizable right is remotely in sight.

Federal Courts scholars have captured the different visions just sketched by contrasting a modest, party-focused "dispute resolution model" of adjudication with a "law declaration model," which would have the federal courts and especially the Supreme Court play the far more ambitious role of declaring broad principles of law prospectively and authoritatively for all concerned, including the rival branches of government.[4] There may be a place and time for such a law-declarative jurisprudence. However, this is not that place, and this is not that time. The country, and the judiciary itself, would benefit from a closer re-approximation of a dispute-centered judicial role. That objective is not just a matter of judicial style or disposition, although those factors do matter. It would require a substantial adjustment of often arcane judicial doctrines, foremost having to do with the federal courts' jurisdiction.

The underlying intuition is captured quite well in Chief Justice John G. Roberts's insistence that the judiciary must serve as an impartial "umpire," calling balls and strikes.[5] Beyond the elementary notion that the umpire should not take sides, no one wants an

4. RICHARD H. FALLON JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73 (7th ed. 2015). For a brief sketch of those models and their implications, *see infra* nn. 31–41 and accompanying text.

5. *Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules . . . .").

umpire who dominates the game or decides it with technically correct but pedantic calls. Referees in high-stakes basketball games, such as the "Sweet Sixteen" and NBA play-offs, are instructed to "let them play." Perhaps, a comparable prescription ought to apply when courts superintend acute conflicts among contending political parties: cram political disputes back into the institutional venues whence they came. Likewise, no umpire will let some agitated fan group take the field and a turn at bat. In that same spirit, the federal courts may want to guard the legal playing field against interlopers who seek to grind their axes in a judicial forum.[6]

Chief Justice Roberts's frequent invocations of the "umpire" metaphor have drawn dismissive, often sneering and uncomprehending commentary. A more respectful and perceptive response has come from Yale Law School Professor Jack M. Balkin. The "umpire" ideal, Balkin has written, is wedded to a jurisprudential model that had great plausibility to many of the law professors who taught the future Chief Justice at Harvard Law School in the 1970s.[7] Those scholars believed in the institutional settlement of the New Deal, which envisioned the Court as a gentle traffic cop for an orderly, broadly consensual politics.[8] That vision, Balkin contends, is unsustainable in a period of high polarization, gridlocked politics, and deep dissension as to what constitutes a fair, legitimate, republican form of government in the first place.[9]

There is something to this criticism.[10] In our venomous public debate, every judicial decision of

6. For illustrations, *see infra* nn. 42–71 and accompanying text.

7. JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 113–15 (2020) [hereinafter BALKIN, CYCLES].

8. *Id.*

9. *Id.* at 113–15, 123–25.

10. In my view it is a convincing response to Professor Ernest A. Young's suggestion that compared to the al ternatives, it might not be so bad under polarized conditions to fight out institutional, partisan conflicts in court: after all, the judiciary is "the least insane branch" of government. Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1921 (2019). Professor Young's characteristically cheeky and funny suggestion is

consequence will be viewed through ideological lenses and be denounced as a betrayal or a travesty by one-half of the country. Then again, it is hard to see a plausible alternative. Historically, the Supreme Court has tended to play out the program of the dominant political elites and coalitions.[11] That is not an option for *this* Court because there is no dominant coalition—only a badly and evenly divided country. An even worse option under current conditions—firmly rejected by Balkin—is the notion of a "vanguard" Court that attempts to act as an engine of social progress.[12] The country and its elites disagree vehemently as to what constitutes progress and what is rot, and no sentient Court will want to take sides in that combat.

Thus, the "umpire" ideal is the only realistic option. But the metaphor *is* somewhat problematic. It requires careful thought both about the institutional context in which the judiciary now operates, and about constitutional underpinnings and doctrines. Paradoxically perhaps, it may also require more judicial fortitude on some margins—in particular, a more confident and consistent articulation of durable, constitutionally grounded doctrines that govern the role of the courts. In a sentence, the judiciary must do more, by way of doctrine, to teach itself to do less, by way of attempting to pacify our politics.

I. AGAINST JUDICIAL HEROICS

By institutional design, courts cannot do much about pervasive social ills—about economic inequality, family breakdown, out-of-control public debt, waning public

tempting. However, for reasons stated in the text below, "let them play" is the better part of wisdom.

11. *See generally* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT (2019).

12. BALKIN CYCLES, *supra* note 7, at 139–40 (under polarized conditions, a "vanguard" Court will increase constitutional rot).

confidence in our political institutions, a culture of despair in wide swaths of the country, or for that matter partisan polarization. Courts see pieces of social conflict, never the larger picture. They are too decentralized to be capable of concerted action. Their interventions are episodic, and the legal questions are framed by opportunistic litigants. And, famously, courts possess neither the power of the purse not the power of the sword.[13] In that sense, the judiciary really is the least dangerous branch[14]—and the most impotent.

Those commonplace observations bear repeating on account of the lingering notion that courts can and should play a much more active role. That conviction of course rests on *Brown v. Board of Education*[15] and the Warren Court's prominent role in the civil rights revolution. Courts, it appears, *can* do something meaningful about deep-rooted social injustices. And the Supreme Court did something similar about sexual equality, abortion, school prayer, and gay rights and same-sex marriage—did it not?

This heroic story is open to considerable doubt. On what I take to be the most convincing account (Professor Alexander M. Bickel's), the courts succeeded in the civil rights revolution—to whatever extent they did—because the Supreme Court successfully anticipated a social consensus on a principle of racial non-discrimination.[16] The arc of history did bend that way, and the idea that the Supreme Court bent it took hold. However, in Bickel's view, the Supreme Court made a grave mistake when it then bet that on questions of sexual morality and especially abortion, the country would again fall in line with the Court's edicts—that the courts would be able to marginalize opposing constituencies in the same way in which they had succeeded in marginalizing

13. *See* THE FEDERALIST NO. 78 (Alexander Hamilton)

14. *Id.*

15. 347 U.S. 483 (1954).

16. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (2009).

segregationists.[17] That never happened. Instead, the Court's decisions on intensely controverted questions of sexual morality and religion became enmeshed in something resembling a culture war and by some measures fueled it.[18]

One need not take a position on those incendiary questions to acknowledge that the heroic story is wholly mismatched to the judiciary's current predicament, and the country's. The idea of a judicial vanguard that acts as an intellectual and institutional agenda setter may make some sense if you can be reasonably confident of knowing which way the wind is blowing and which way the public is moving, or can be moved; if you can reasonably anticipate that the political elites will move that way; and if you can build on a tolerably clear and common public understanding of what constitutes fair play and social progress.

None of those conditions hold now. Notions of fair play have eroded, and rival political camps champion very different visions of what constitutes a liberal political process.[19] Does it demand limits on campaign contributions, the better to prevent oligarchic government—or would such limitations serve as an undercover means of incumbency protection?[20] Does a fair electoral process under COVID-19 conditions permit or perhaps even compel courts to extend vote counts and to loosen other restrictions—or do such last-minute adjustments produce uncertainty and distrust among

17. *Id.* The Court itself articulated that hope—nay, demand—in rather stark terms. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (sternly urging the "contending sides of a national controversy to end their national division").

18. That, at any rate, was the late Justice Antonin Scalia's view. *See*, *e.g.*, Romer v. Evans, 517 U.S. 620, 651–53 (1996) (Scalia, J., dissenting); United States v. Windsor, 570 U.S. 744, 808–10 (2013) (Scalia, J., dissenting).

19. BALKIN, CYCLES, *supra* note 7, at 123–125.

20. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 365 (2010) (majority opinion); *see also id.* at 460–62 (Stevens, J., concurring in part and dissenting in part).

voters?[21] Can we, should we exclude deportable aliens from the Census?[22] The electorate and the political elites are badly divided on these and numerous other questions of republican government, and will remain so for the foreseeable future. Moreover, there is no righteous social movement to guide us along on some historical arc; instead, there are riled-up constituencies on two sides of a bitter partisan-ideological divide. And judicial appeals to the Constitution's "higher values" and the better angels of our nature fall flat when those values and the identity of those angels have themselves become central points of contention.

Those conditions leave no room for a federal judiciary that seeks to articulate a latent social consensus or to anticipate an emerging one. Instead, the judiciary is in danger of becoming just one more arena for partisan, ideological combat. That threat is acute, and the institutional realities of our politics exacerbate and accelerate it. The courts operate in an environment of punditry that overwhelmingly, albeit misguidedly, zeroes in on the partisan dimension of judicial decisions in highly contested cases.[23] Partisan litigants relentlessly push political controversies into state and federal courts. Judicial appointment battles are charitably described as intensely partisan, and increasingly ugly. *No* political or institutional actor in American politics has any incentive to treat courts as anything other than another arena for partisan combat—other than the judiciary itself.

In that environment, one will want to ramp the judiciary's aspirations down, not up. One will want to re-

21. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020), *cert. denied, rev'd sub nom.* Republican Party of Pa. v. Boockvar, 208 L. Ed. 2d 266 (Oct. 28, 2020) (Mem.).

22. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2563–64 (2019); *see also* Trump v. New York, 208 L. Ed. 2d 365, 367 (2020) (per curiam) (dismissing census case for lack of standing and ripenesss).

23. For a forceful rebuttal of this viewpoint, see NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 54–57 (2019) (showing that critics wildly overstate the role of politics and legal indeterminacy in federal adjudication).

orient public expectations of what the judiciary can and should do in the same direction. And to a considerable extent, that is a job for the judiciary itself.

II. JUDICIAL LEGITIMACY

The question of what the federal judiciary, and the Supreme Court in particular, could or should do to preserve its independence and legitimacy in a polarized polity has become a cottage industry among legal scholars. They have variously urged the Court to pursue some form of judicial "minimalism," meaning adherence to precedent and decisions on narrow legal grounds;[24] proportionalism, meaning a balance between individual rights and overriding social concerns;[25] and greater judicial candor about judges' theoretical commitments and greater judicial restraint with respect to legislative judgments, except perhaps in cases of great moral urgency.[26] In a particularly intriguing article, Professor Zachary S. Price has urged the Court to strive for constitutional "symmetry," meaning decisions on grounds that could redound to the benefit of constituencies on either side of the political, cultural, and ideological divide.[27]

These and similar proposals have many things in common. None of the authors propose that the judiciary should bend the law, depart from established legal canons, or play games with the Constitution. All of them acknowledge that the Supreme Court can do only so

24. *E.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001); Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L. J. 661, 717–18 (2013); Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 327 (2002).

25. Jamal Greene, *The Supreme Court 2017 Term Foreword: Rights as Trumps?*, 32 HARV. L. REV. 28, 59 (2018).

26. RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 159–165 (2018).

27. Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1278 (2019).

much to protect its institutional integrity in a poisonous political environment. At the same time, the authors insist that the Supreme Court may be able to do *something* to that end. All of them urge a more modest judicial role, albeit in somewhat different ways. And for the most part, the authors' suggestions focus not strictly on judicial doctrine but more on considerations of prudence—of judicial style or disposition, or what Professor Bickel long ago called the Court's "passive virtues."[28]

All that is directionally right. However, a purely prudential judicial posture—which, in fairness, none of the cited authors advocate—smacks of opportunistic maneuvering and situational reasoning, and there can be something quite aggressive about the exercise of nominally "passive" virtues. (Constitutional avoidance canons are a notorious example.)[29] Excess prudence thus risks endangering core judicial virtues—impartiality, candor, transparency—and judicial legitimacy in the same way in which excessive judicial ambition poses that threat.

In that light, it is worth exploring the possibility that the courts, and the Supreme Court in particular, might be able to buttress judicial legitimacy and just perhaps countermand some of the baleful tendencies of our politics by means of adjusting judicial *doctrines*, not just the style of adjudication and the exercise of prudence. That proposition presupposes that something

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28. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111 (2d ed. 1986); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

29. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) and JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE 105 (1997) (both arguing that aggressively deployed avoidance canons may intrude more severely into legislative prerogatives than outright findings of unconstitutionality); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2114 (2015) (characterizing recent uses of avoidance doctrine as "constitutional adventurism of a uniquely pernicious sort"). For an example of a plain statutory re-write based on "avoidance," see Bond v. United States, 572 U.S. 844 (2014).

is amiss in the doctrinal universe; and that is indeed my decided view. Over wide swaths of public law, I believe, the federal courts' doctrines are institutionally unrealistic; lack adequate constitutional grounding; violate norms of political neutrality; and exacerbate the difficulties of exercising core judicial commitments to impartiality, regularity, and reason-giving. In earlier writings I have sought to demonstrate the point and to suggest the contours of more tenable doctrines in the domains of federalism and the separation of powers.[30] Here, I extend the inquiry to recondite but equally central questions of public law: the jurisdiction of federal courts and their remedial powers.

The dispute resolution model and the law declaration model sketched in the Introduction both trace their origin to *Marbury v. Madison*—respectively, Chief Justice Marshall's statement that "the province of the court is, solely, to decide on the rights of individuals," and his seemingly broader pronouncement that "it is emphatically the province and the duty of the judicial department to say what the law is."[31]

Under the dispute resolution model, the judicial power of the United States extends to "cases" and "controversies" under nine constitutional heads of jurisdiction.[32] The cases and controversies must be grounded in private right, and the judicial power extends no further. There is no judicial power to decide legal questions in the abstract or to "strike down" acts of Congress—only an incidental power to decide conflicts questions that may arise in the course of ordinary, rights-centered litigation.

The law declaration model, in contrast, posits that the federal courts "have a special function of enforcing the rule of law, independent of the task of resolving

30. Michael S. Greve, *Bloc Party Federalism*, 42 HARV. J. L. & PUB. POL'Y 279 (2019); Michael S. Greve, *Is the Roberts Court Legitimate*? 45 NAT'L AFF., Winter 2020, at 42.

31. 5 U.S. 137, 170, 177 (1803).

32. U.S. CONST. art. III, § 2.

concrete disputes over individual rights."[33] Defenders of that model urge the federal courts to "declare and explicate norms that transcend individual controversies."[34] While neither model has ever existed in a pure form, the differences matter greatly. They play out in somewhat arcane but crucial doctrines of jurisdiction and remedies.

Dispute resolution will sharply circumscribe the universe of plaintiffs who may invoke the power of federal courts, the nature of their claims, and the nature and the scope of the available remedies. The claims must be claims of right; they must be the plaintiffs', not some third parties'; and the remedies must be limited to the plaintiffs and their particularized claims.

In contrast, a court committed to law declaration will be far less scrupulous in all those respects. It may entertain claims on behalf of sprawling classes of plaintiffs, claims on behalf of third parties, and disputes without adverse parties. It may reach to decide questions outside the parties' pleadings and submissions. It may award comprehensive "structural" relief, or relief that vindicates the rights of absent parties and compromises the rights of others.

Meticulous adherence to the dispute resolution model may still draw the courts into ideologically fraught controversies. Numerous famous cases in our history, from *Marbury* on forward, illustrate the point. Even so, a sharp focus on rights—and nothing beyond that—provides courts with a credible line of defense. We cannot "sport away the vested rights of others" for reasons of political convenience or institutional harmony.[35] That is why we have independent courts. That is why their judgments have binding and conclusive effects vis-à-vis the political branches. But the courts' power ends there.

All that tends to get lost in the migration toward law declaration. That move vastly expands the kinds of

33. FALLON, JR. ET AL., *supra* note 4, at 74.

34. *Id.*

35. *Cf.* Marbury v. Madison, 5 U.S. at 166.

plaintiffs who may show up, the nature of their complaints, the scope of the courts' reasoning, and the scope and the nature of whatever relief they may award. That dynamic in turn poses a dual risk: a risk of judicial overreach, and a corollary risk of political contamination of the judiciary. A judicial decision that is not really about the rights of particular plaintiffs in a genuine case cannot truly be about *law*. It must be about something else, and that "something" is politics. Any attempt to control these dual risks by means of judicially improvised, "prudential" doctrines for the convenience of the courts will look every bit as manipulative as in fact it is.

Over the past several decades, the federal courts have moved quite far in the law-declaring direction, for reasons that range from respectable to awful. Some law-declaring doctrines, such as broad institutional reform injunctions, are products of the civil rights era.[36] Others, such as citizen suits and near-routine pre-enforcement challenges to administrative rules, are part of the dramatic reformation of administrative law in the 1970s.[37] Still others, such as universal or "nationwide" injunctions, we owe to the partisan combat of the past decade.[38]

In some venues, the conservative majority on the Supreme Court has sought to reverse ambitious forms of law declaration.[39] However, the picture is starkly

36. *Cf.* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–94 (1976); OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 18–23 (1978).

37. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1716 (1975).

38. Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 254, 256, 275 (2017); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437–44, 460–61 (2017).

39. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (constitutional standing); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) (statutory standing); Raines v. Byrd, 521 U.S. 811 (1997) (institutional legislative standing); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (limited remedies for separation of powers violation); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2210–11 (2020) (same).

asymmetric. Bold advances toward law declaration have tended to stick, while reversals have been halting, sporadic, and piecemeal.[40] Almost exclusively, moreover, those reversals have principally aimed at limiting jurisdiction, rights claims, and remedies in cases brought by *private* plaintiffs. All the while, the courts have thrown the door wide open to *institutional* players: states, congressional committees, and political parties. Under conditions of acute partisan polarization, those instruments and doctrines tend to exacerbate partisan strife and to carry those contentions into the federal courts.[41] The following section provides illustrations.

III. RIGHTS, JURISDICTION, AND REMEDIES: LAW DECLARATION AND ITS CONSEQUENCES

The differences between law declaration and dispute resolution models of adjudication appear at all stages of litigation: rights, or the substantive rule of decision; before that, the courts' jurisdiction; and then the scope of the available remedies. For present purposes, a few examples of law declaration's upward march must suffice.

A. Rights

Then-Justice Kennedy's opinion for the Court in *United States v. Windsor*[42] is one of the most pristine examples of law declaration in the Court's history. The

40. *Cf.* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863 (2014) (noting the Roberts Court's tendency to narrow rather than overrule controversial precedent).

41. Numerous scholars have noted the danger. *See, e.g.*, Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 660–663 (2019) (arguing that denial of "institutional" standing will help to protect the judiciary in an era of polarization); Young, *supra* note 10, at 1924; Margaret H. Lemos & Ernest A. Young, *State Public Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 92, 122 (2018); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 406–07 (1995).

42. 570 U.S. 744 (2013).

original plaintiff and nominal appellee, Edith Windsor, had been lawfully married in Ontario to another woman. Upon the death of her spouse, Ms. Windsor, long since a resident of New York, claimed a federal estate tax exemption for surviving spouses. The exemption was denied on the grounds that the federal Defense of Marriage Act (DOMA) forbade the recognition of same-sex unions as marriages for purposes of federal law. Ms. Windsor paid the tax but challenged DOMA as constitutionally invalid and demanded a refund. A U.S. District Court agreed and entered judgment accordingly. The Obama administration agreed that DOMA was unconstitutional but nonetheless declined to pay the refund and instead appealed the judgment *in its favor* to an appellate court and, having prevailed in that forum as well, successfully sought certiorari in the U.S. Supreme Court.[43]

There were no adverse parties in the Supreme Court (or for that matter the appellate court). Nonetheless, the Court's majority decided the substantive constitutional question. Because none of the parties argued the obvious lack of jurisdiction, the Court appointed an *amicus* for that purpose.[44] In a bit of judicial alchemy, the majority transformed the conventional "adverse parties" requirement into a standing inquiry; then designated that problem as a "prudential" matter; and finally concluded that the participation of the U.S. House of Representatives' Bipartisan Legislative Affairs Group (BLAG), which had been admitted to the proceedings for the purpose of defending a statute the Executive deemed unconstitutional, sufficed to overcome prudential concerns. "BLAG's sharp adversarial presentation of the issues," Justice Kennedy wrote, "satisfies the prudential concerns that otherwise might counsel against hearing

43. *Id.* at 754–55.
44. *Id.* at 755.

an appeal from a decision with which the principal parties agree."[45]

Several points emerge from this jurisprudential train wreck. The first is the wholesale dissolution—in the opinion for the Court—of the core constitutional requirement of adverse parties into the functional need for an "adversarial presentation of the issues." That "prudential" requirement appears to be satisfied so long as some lawyer in the courtroom takes the opposite side, for the convenience of a Court that presides over a debating society. A second point is the majority's imperial view of its role—not the role of the federal judiciary, mind you, but of *the Supreme Court*. The case posed no danger that the Executive might "sport away" Ms. Windsor's rights without a judicial check. Quite the opposite: the government *had* a judgment against it—final, but for the frivolous appeals. Third, *Windsor* is one of a sequence of decisions in which a majority of justices sought to replay the *Brown* scenario of a vanguard Court. It provided a forum for a "discrete and insular" minority and articulated broad rights and novel legal propositions, in confidence that the country would eventually fall in line.

That did in fact happen in remarkably short order. Still, one wonders about the longer-term consequences. The hallmark of declarative rights jurisprudence, exemplified by the same-sex marriage line of cases, has been the expansion of rights we hold *against each other*—the demand for wedding cakes from someone who would rather not sell them; and, sure enough, the equally insistent demand that there must be a religious or free-speech exemption from that demand.[46] Having transformed rights jurisprudence into a zero-sum game, the Court is now superintending compromises among the

45. *Id.* at 761. Justice Alito, alone among the Justices, would have granted BLAG independent standing. The majority saw no need to resolve that question. *Id.* at 804–06. Justice Scalia firmly rejected Justice Alito's position. *Id.* at 789–90.

46. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

constituencies it has inflamed. That is not a good place to be.[47]

B. Jurisdiction

At bottom, federal jurisdiction governs the question of who can invoke the judicial power of the United States over what. That question—central to our politics throughout our history, and sufficiently involved for an entire, very difficult law school class on Federal Courts[48]—looms front and center in the debate over the judiciary's role in a divided polity. For the sake of brevity, a single illustration must suffice: constitutional standing to sue.

The Warren–Brennan Court's standing jurisprudence is fairly described as law-declarative.[49] For example, the Court permitted favored classes of litigants (especially in sex discrimination and First Amendment cases) to assert the rights of third parties not before the Court,[50] and it allowed challenges to religious establishments by taxpayers and "offended observers."[51] The Supreme Court has since cut back on many of those doctrines. Standing to sue requires an "injury in fact" *to the plaintiff*, which must be imminent and particularized and which must be pled with

47. Arguably, the Court would have had to confront the constitutional questions surrounding same-sex marriage eventually, even within the strictures of dispute resolution. But the eagerness with which the Court embraced its agenda-setting role has produced lingering doubts about its commitment to judicial impartiality and the protection of the ordinary operation of our institutions, including the judicial process itself.

48. *See generally* FALLON JR. ET AL., *supra* note 4.

49. *Id.* at 73.

50. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); June Med. Servs. LLC v. Russo, 140 S. Ct 2103 (2020) (upholding broad third-party standing for abortion doctors) (plurality opinion, joined in relevant part by Chief Justice Roberts).

51. Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (taxpayers). "Offended observer" cases usually make no mention of standing. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (rejecting challenge to display of a cross as a war memorial without discussing standing). *But see id.* at 2101–03 (Gorsuch, J., concurring) (rejecting "offended observer" standing in this and previous cases).

specificity and supported by competent evidence.[52] The injury must be traceable to the defendant's conduct, and it must be redressable by a judgment in the plaintiff's favor. And standing "is not dispensed" wholesale: it must be shown with respect to each claim for relief and challenged statutory provision.[53] However, the Court's standing jurisprudence has been widely described as incoherent and perhaps strategic.[54]

The salient point for present purposes is this: parallel to its meandering, more restrictive jurisprudence governing private standing, the courts have actually *broadened* standing to sue for institutional litigants—foremost, states and legislators. *Massachusetts v. EPA* held that states had standing to sue the agency for its rejection of a petition for rulemaking, asking that the EPA make an "endangerment finding" with respect to greenhouse gas emissions from automobiles.[55] The grounds on which the Court reached that conclusion are hardly pellucid. The majority remarked that Massachusetts had satisfied "the most traditional" standing requirements; in addition, it referenced a (wholly inapposite) statutory provision to buttress its ruling.[56] Then again, the injuries claimed by the state plaintiffs—such as loss of coastal property due to climate change—would *not* have sufficed to give standing to any private plaintiff, such as a landowner.[57] And in a fateful sentence, the Court

52. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63 (1992).

53. City of L.A. v. Lyons, 461 U.S. 95 (1983); Lewis v. Casey, 518 U.S. 343, 358 n. 6 (1996).

54. *See, e.g.*, Richard J. Pierce Jr., *Is Standing Law or Politics*?, 77 N.C.L. REV. 1741, 1741, 1742–43 (1999); William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 290 (1988) (arguing that broad standing principles are "too often evaded by subterfuge").

55. 549 U.S. 497, 534–35 (2007). On the merits, the Court rejected EPA's contention that greenhouse gases were not "pollutants" within the meaning of the Clean Air Act.)

56. *Id.* at 528–30.

57. In addition, the states' claims with respect to causation and redressability fell far short of the requirements that apply to all private plaintiffs.

proclaimed that states deserve "special solicitude in the standing analysis."[58]

In the early years after the decision, lower courts applied the standing holding sparingly, as a kind of climate change exception to general principles of American law. Then, the exception sprung its bounds, and "*Mass v. EPA* standing"—so called because nothing of the kind had existed before and because it is not readily reconciled with ordinary rules of jurisdiction—provided the basis for numerous state lawsuits over the administration of immigration laws, the Affordable Care Act, the border wall, and other contentious questions of public policy.[59] While the precise contours of *Mass v. EPA* standing have remained notoriously uncertain,[60] the adjudication of state-led lawsuits where *no* private party would have standing to sue has dragged the federal courts into controversies that would otherwise have remained in the political domain.

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58. Massachusetts v. EPA, 549 U.S. at 520.

59. *See, e.g.*, Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (challenge to Obama administration's DAPA program); Texas v. United States, 945 F.3d 355 (5th Cir. 2019), *cert granted and argued sub nom.* California, v. Texas, No. 19-840 (2020) (pending ACA case); Pennsylvania v. President United States, 930 F.3d 543, 562–64 (3rd Cir. 2019) (Affordable Care Act); Sierra Club v. Trump, 977 F.3d 853, 866–869 (9th Cir. 2020) (state standing in dispute over border wall funding); California v. Trump, 963 F.3d 926, 936 (9th Cir. 2020) (same); Clean Wis. v. EPA, 964 F.3d 1145, 1158–59 (D.C. Cir. 2020) (state standing to challenge EPA area designations for NAAQS purposes); Brackeen v. Bernhardt, 937 F.3d 406, 424 (5th Cir. 2019) (state standing in challenge arising over Indian Child Welfare Act); Wyo. ex rel. Crank v. United States, 539 F.3d 1236, 1241–42 (10th Cir. 2008) ("special solicitude" standing for state in a challenge against a determination of the Bureau of Alcohol, Tobacco, Firearms and Explosives); Sierra Forest Legacy v. Rey, 526 F.3d 1228, 1234 (9th Cir. 2008) ("special solicitude" in natural resource dispute).

60. *See, e.g.*, Wyoming v. U.S. Dep't of Interior, 674 F.3d 1220, 1238 (10th Cir. 2012) (lamenting the "lack of guidance on how lower courts are to apply the special solicitude doctrine to standing questions"); New Mexico v. McAleenan, 450 F. Supp. 3d 1130, 1182, 1184 (D.N.M. 2020) (declining to grant "special solicitude" standing in the absence of a state procedural right and predicting, *id.* at 1184 n. 12, that "were this issue to again come before the Supreme Court, the Supreme Court would shy away from *Massachusetts v. Environmental Protection Agency*'s special solicitude analysis").

A similar pattern has prevailed in cases brought by legislative actors to vindicate alleged institutional rights against the executive. In a 1997 decision, *Raines v. Byrd*,[61] the Supreme Court denied standing to six members of Congress challenging the constitutionality of the Line Item Veto Act, a statute that authorized suit by "[a]ny Member of Congress or any individual adversely affected." Parts of the opinion for the Court strongly suggested (albeit in dicta) that lawsuits alleging legislators' institutional interests fall outside the bounds of Article III. However, the Court has since muddied those waters in several cases involving *state* legislators' standing,[62] and the U.S. Court of Appeals for the D.C. Circuit, operating under old-ish but never-reversed precedents, has taken a far more lenient approach.[63] These tensions have recently played out in a series of cases, usually launched by party-dominated congressional committees, over executive funding decisions and congressional subpoenas to members of the executive branch.[64]

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61. 521 U.S. 811 (1997).

62. Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1955–56 (2019); Ariz. State Legislature v. Ariz. Indep.t Redistricting Comm'n, 576 U.S. 787, 803–04 (2015).

63. *See, e.g.*, Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974) (granting Senator Kennedy standing to challenge presidential pocket veto); *id.* at 434 (recognizing the plaintiff's "injury . . . as a member of the legislative branch of the government, and interest among those protected by article I, section 7"); Synar v. United States, 626 F. Supp 1374, 1381–82 (D.D.C. 1986) (stating that the law of the D.C. Circuit "recognizes a personal interest by Members of Congress in the exercise of their governmental powers;" "specific injury to a legislator in his official capacity may constitute cognizable harm sufficient to confer standing upon him"). However, *Raines v. Byrd* substantially undermined the Circuit's congressional standing jurisprudence. *See* Chenoweth v. Clinton, 181 F.3d 112, 115–117 (D.C. Cir. 1999) (acknowledging the fact).

64. *See* Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc) (holding that single House has standing to allege institutional injuries—in this case, subpoena powers). On remand, a panel held that the Committee lacked a cause of action and dismissed the case: Comm. on Judiciary of U.S. House of Representatives v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020). *See also* U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 4 (D.C. Cir. 2020) (sustaining single-House standing to allege violation of the Appropriations Clause but not of the APA); *see id.* at 13 ("When the injury alleged is to the Congress as a whole, one chamber does not

C. Remedies

Over the past several years, U.S. district courts have freely awarded universal, nationwide injunctions against the federal government, often on a preliminary basis. Such injunctions bar federal agencies from enforcing the law or regulation at issue against anyone, anywhere. (Not all of those cases were brought by states, but many of them were—in large measure, I suspect, because the "special solicitude" extended to states in the standing analysis has spilled over into the remedies analysis.)[65] That form of relief was unknown to American law, at least as a matter of acknowledged doctrine, until perhaps a decade or two ago.[66] It has since become ubiquitous. By one count, federal courts issued roughly three times the number of universal injunctions against the single-term Trump administration as they issued over the eight years of the Obama administration.[67]

Universal injunctions have attracted intense controversy. Advocates argue that the instrument serves as a valuable means of resisting an overbearing executive and as a way of obtaining prompt, conclusive relief.[68] When obtained by states, across-the-board injunctions can serve as a vehicle for "contestation" and

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have standing to litigate. When the injury is to the distinct prerogatives of a single chamber, that chamber does have standing to assert the injury.")

65. For insightful discussions of this point, see Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955 (2019), and Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985 (2019).

66. Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 254, 256, 275 (2017); Bray, *supra* note 38, at 437–44, 460–61.

67. Scott A. Keller, *Nationwide Injunctions will be a Vital Check if Biden Overreaches*, WALL STREET JOURNAL (Nov. 22, 2020 4:40 PM), https://www.wsj.com/articles/nationwide-injunctions-will-be-a-vital-check-if-biden-overreaches-11606081224.

68. Alan M. Trammel, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 105–06 (2020); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924, 1007 (2020); David Hausman & Spencer E. Amdur, *Response, Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. 49, 50 (2017).

"uncooperative federalism" in action.[69] On the other side, critics have argued that such injunctions encourage partisan forum shopping; effectively deprive the executive of a fair opportunity to defend its policies; preclude the "percolation" of issues on which the Supreme Court relies in deciding certiorari questions; and have prompted a stream of emergency petitions to the Supreme Court, asking for a stay of lower courts' preliminary injunctions.[70] And inasmuch as many of those cases are brought by partisan state attorneys general, the courts—including the Supreme Court—will be viewed as taking sides.

The problem is intimately tied to the question of jurisdiction—that is, the question of whether states can allege sufficient harm (and to what) in the first place. And it reflects the same judicial disorientation. In a much-noted immigration case, the U.S. Court of Appeals for the Ninth Circuit first upheld a broad injunction against the administration—and then granted the government a stay of the injunction to the extent that it covered states outside the Ninth Circuit.[71] One would have thought, or in any event a dispute-resolution court would have thought, that remedies in the first instance have to do with *parties*, and only secondarily with territorial jurisdiction. What the appellate court did instead was to declare law for its territory, for any and all. When even a supposed act of judicial self-restraint becomes an act of aggression, something has gone wrong with the doctrines.

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69. *Cf.* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1271–76 (2009); Young, *supra* note 10, at 1915.

70. Nash, *supra* note 65, at 2000–2001 (discussing and referencing those criticism); *cf.* Wolf v. Cook Cty., 140 S. Ct. 681, 681–83 (Sotomayor, J., dissenting) (2020).

71. Innovation Law Lab v. Wolf, 951 F.3d 1073, 1094–95 (9th Cir. 2020) (sustaining injunction); 951 F.3d 986, 990 (9th Cir. 2020) (granting stay with respect to states outside the Ninth Circuit). Subsequently, the U.S. Supreme Court granted an emergency stay of the injunction in its entirety, *sub nom. Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (Mem.) (2020), and eventually granted certiorari, No. 19-1212, 2020 WL 6121563 (Oct. 19, 2020).

IV. WHAT'S WRONG WITH THE DOCTRINES

The doctrines just sketched have several features in common.

First, all are recent innovations. Until very recently, there was no history of "institutional standing."[72] State lawsuits against the federal government were strongly disfavored, principally on the grounds that the federal government is in full privity with its citizens and that states may not interpose themselves in that relation.[73] And as noted, there were no universal injunctions—*none*—until very recently.

Second, all the doctrines just referenced are models of law declaration.[74] All break with the basic demands of dispute resolution: adverse parties; traditionally cognizable rights; remedies that are limited to the parties.

Third, no one *forced* the courts into those escapades. One can argue that the contested issues would have ended up on the Supreme Court's docket eventually even under a dispute resolution model.[75] For reasons discussed above, however, I have my doubts. And in any event, there is a real difference between a Court that eventually must decide a politically charged question and a Court that volunteers for the job and in that way short-circuits the ordinary political process.

Fourth, the litigation has had a sharp partisan valence. *Windsor* did feature adverse parties, in a manner of speaking: not the litigants, mind you, but the *political* parties. Without Republican control of the

72. Grove, *supra* n. 41, at 644 ("there is no history of government standing to sue another government entity over an alleged 'institutional injury'.").

73. *See* Massachusetts v. Mellon, 262 U.S. 447, 484–85 (1923) (denying state standing on those grounds); *see also* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 88 (1966); Woolhandler & Collins, *supra* note 41, at 406–07.

74. Bray, *supra* note 38, 462–64 (2017) (universal injunctions); Young, *supra* note 10, at 1924; (state standing); *cf.* Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting) (noting the "complete novelty" of "litigation directly between Congress and the President").

75. Young, *supra* note 10, at 1915, 1919.

House of Representatives, there would have been no BLAG brief to "sharpen the issues": there would have been a brief in further support of the colluding litigants. Similarly, the tidal flood of congressionally sponsored lawsuits pits the branches of government against one another only incidentally: at heart, those cases pit the political parties against each other. So, too, with state-sponsored litigation. *Massachusetts v. EPA*, contrary to the tenor of the majority opinion, was not a confrontation between "the states," collectively, and the federal government. It was a confrontation between the "blue" plaintiff states and their allies on one side and the Bush administration and a coalition of "red" states on the other.[76] The numerous cases in which state coalitions have obtained universal injunctions first against the Obama administration and then the Trump administration has likewise been driven by partisan calculations.[77]

Fifth, the judicial interventions, and the initiatives that produced them, look lamentably short-sighted. They all seem to presume that partisan litigants will not learn how to play the game, or that they will refrain from playing it in an act of unilateral disarmament. Predictably, however, that has not happened: in an intensely competitive political environment, neither side will leave anything on the table for very long. For example, the generous standing rules of *Massachusetts v. EPA* served the State of Texas very well in its challenges to the Obama administration's immigration policies and the Affordable Care Act.[78] Institutional

76. Caroline Cecot, Note, *Blowing Hot Air: An Analysis of State Involvement in Greenhouse Gas Litigation*, 65 VAND. L. REV. 189, 216–17 (2012). *See also* David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 75 (2012) (describing how climate change litigation frequently involves states on both sides).

77. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1103, 1107–08 (2013).

78. Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); California v. Texas, No. 19-840 (U.S. argued Nov. 10, 2020) (pending ACA case). In the latter case, seeking

standing has been sought by legislators of both parties. And so on. In that way the new rules of the road are politically neutral, or "symmetric" in Professor Price's sense.[79] However, *in any given case* arising under those symmetric rules, the litigants' partisan motivations and calculations will be dominant and plain for all to see; and suspicions that the courts are simply "taking sides" will harden.

Sixth, the effects of the judiciary's law-declarative excursions are not easily contained *post hoc*. The Supreme Court's decisions on same-sex marriage effectively canceled a longstanding social compromise on religious toleration and unleashed a torrent cases in which the federal courts declare uneasy compromises among vociferous constituencies. The standing theory of *Massachusetts v. EPA*, coupled with the substantive holding that greenhouse gases are "pollutants" for purposes of the Clean Air Act, unleashed EPA to create the most expansive regulatory program in its history, under a poorly fitting statute. That ambitious endeavor in turn produced judicial efforts to rein in the agency, including an extraordinary "stay" order in a pending EPA rulemaking proceeding.[80] So, too, with the deluge of universal injunctions and emergency stay orders. On the whole and with few exceptions, judicial efforts to arrest the logic of law-declarative innovations have had an improvised, one-offish quality.[81]

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declaratory relief in a challenge to the constitutionality of the Affordable Care Act, the states' and the individual plaintiffs' standing is highly doubtful, as is their extravagant demand to have the entire ACA declared unconstitutional. For that matter, the federal courts quite probably lacked subject-matter jurisdiction. *See* Brief of Amici Curiae Samuel L. Bray, Michael W. McConnell and Kevin C. Walsh in Support of Petitioners in No. 19-840, California v. Texas, No. 19-840, at 2–3 (U.S. filed May 13, 2020).

79. Price, *supra* note 27, at 1278.

80. Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014); Murray Energy v. EPA, 136 U.S. 999 (2016) (mem).

81. The list of examples could be extended. Causes of action—a problem closely tied to standing issues—afford an easy illustration. Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (implied private rights of action under federal statutes); Maine v. Thibotout, 448 U.S. 1 (1980) (enforceability of federal statutory entitlements under 42 U.S.C. § 1983); and Bivens v. Six Unknown

V. BETTER DOCTRINES: IN PRINCIPLE . . .

Jurisdictional doctrines are among the most convoluted and contested in all of constitutional law. This short essay cannot discuss the nuances or do justice to the sophisticated, controversial, and animated scholarly and judicial debate that has accompanied the case law. My limited purpose is to argue that current political and institutional conditions provide a potent reason for the judiciary to retreat from law-declarative jurisdictional doctrines.

Suppose you are prepared to entertain that argument. And suppose you further agree that that program cannot be merely a matter of prudence but must be a matter of doctrine: What might those doctrines look like? The abstract characteristics are easily summarized. The doctrines must be politically neutral, constitutionally grounded, and institutionally realistic.

Political Neutrality—to explain the blazingly obvious—does not mean "splitting the baby" in an individual case or strategically across a sequence of cases in accordance with partisan allegiances or assessments of the immediate public responses. It rather means the forceful articulation of doctrines that the deciding judge would enforce even if the political fronts were reversed in some future case. Paradoxically perhaps, in cases involving institutional litigants, the close and sharp partisan divide in our politics gives courts every incentive to adhere to the neutrality requirement. Judges can ill afford to ignore the near certainty that partisan alignments and constellations will in fact

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Named Agents, 403 U.S. 388 (1971) (causes of action against federal officers directly under the Constitution): those foundational cases were all monuments to law declaration. All of them have been severely curtailed, in an unrelenting stream of piecemeal decisions. *See, e.g.*, Richard H. Fallon, *Bidding Farewell to Constitutional Torts*, 107 CAL. L. REV. 933 (2019); Karen Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913 (2015). They are still technically good law, but one is hard pressed to explain why.

continue to flip, as they have of late, with great regularity.

Constitutional Grounding needs no comment except perhaps this: "doctrine" is the vast universe of abstract-concrete norms and rules of decision that make the Constitution operational.[82] The rules are sufficiently concrete to allow courts to decide individual cases; they are sufficiently abstract to prescribe, well, a *rule* of decision for similar and future cases. The doctrines may be interpretive, as with "clear statement" federalism rules; they may be jurisdictional, as with standing doctrine; or they may be substantive, as with the contested but still operative "dormant" Commerce Clause doctrine, prohibiting states from discriminating against interstate commerce. Importantly, the doctrines may change even as the Constitution remains the same.[83] But they must at all times be derived from and traceable to the Constitution, in a reasoned fashion.

Institutional Realism means a clear-eyed appraisal of the institutional framework within which the Court operates as a co-equal branch of government. Changes within that framework have often prompted—*legitimately* prompted—profound changes in constitutional doctrine. The precipitous emergence of political parties in the 1790s, under a Constitution written against parties, changed the game. So did the emergence of Progressive-Era administrative agencies. Under present conditions, "institutional realism" means a sound appraisal of partisan-ideological polarization and its concomitants. Chief among the features that have become hard-wired into our politics is executive dominance and, correspondingly, the limited institutional capacity of the U.S. Congress. A second, related feature is the replacement of a separation of

82. Robert R. Gasaway & Ashley C. Parrish, *Administrative Law in Flux*, 24 GEO. MASON L. REV. 361, 367–70 (2017).

83. See the very good discussion by Kermit Roosevelt, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1692 (2005).

powers—as conceptualized by *The Federalist*—with a separation of parties.[84] A third feature is sectional, partisan bloc politics at the state level.[85] A fourth feature is the partisans' enormous incentive to drive their agenda into the judiciary, and the judiciary's precarious position in that environment.

Admittedly, institutional realism poses considerable challenges. One difficulty for the judiciary is to tell transient political conflicts from enduring institutional dilemmas. A second difficulty is to identify and develop, in an intensely partisan climate and amid the vagaries of litigation, judicial doctrines that might provide a durable, coherent response to present-day institutional pressures and conditions.[86] A third difficulty is that the institutional realism problem—as it currently presents itself—has both a demand side and a supply side.[87] The demand side is institutional actors' relentless pressure to mobilize the courts for partisan gain and the attendant danger to the judiciary. The supply side is the set of expected institutional responses to doctrinal innovations—not the predictable cheers or howls in the immediate aftermath of this or that individual decision,

84. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329–30 (2006).

85. *See* Michael S. Greve, *Federalism in a Polarized Age, in* PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER 119 (Zachary Courser et al., eds.) (2018).

86. Conversely, perhaps, it is often difficult for consumers of Supreme Court opinions to distinguish ad-hoc judicial improvisation from harbingers that might portend lasting adjustments of administrative or constitutional common law. For example, the Supreme Court has responded to some of the Trump Administration's initiatives with novel holdings. *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573 (2020) (declaring rationale for administering national census to be "pretextual"); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (invalidating reversal of administrative non-enforcement policy without notice-and-comment rulemaking for failure to take DACA recipients' reliance interests into account). It remains to be seen whether those innovations are anti-Trump one-offs or enduring revisions of administrative law doctrine.

87. Thanks to Ashley Parrish for urging me to clear and clean this up.

mind you, but unanticipated and often undesired strategic adjustments over time.[88]

In short, the doctrinal ground I have sought to identify is not a chessboard; it is a minefield. Still, I believe that the general precepts—political neutrality, constitutional grounding, institutional realism—should command broad assent in principle, even if their real-world translation will invariably be a matter of disagreement. Moreover, those precepts find solid ground in Chief Justice John Marshall's jurisprudence and, in particular, in *McCulloch v. Maryland*.[89] Congress may create a Bank of the United States, as it deems necessary and proper—or let its charter lapse. The Constitution is supreme and unchanging, but it is designed to be adapted to "the various crises of human affairs"[90] and so demands judicial doctrines that will make it work as well as it will. Considerations of institutional incentives and capacity play a prominent role: if states can tax the Bank, they can and probably will tax anything.[91] Congress *could* preclude states from taxing the Bank any day of the week; but given the overall situation, the judicial default rule is the opposite: if Congress wants its own operations taxed or otherwise impeded by states, it may but also must say so.

The intended point of this lofty comparison is this: the present crisis of human affairs commands a re-appraisal of cherished but now institutionally unrealistic doctrines. A persistent pattern of executive dominance

88. By way of near-at-hand illustration, the Court that decided *Massachusetts v. EPA* quite probably had the commendable objective of forcing climate change policy into Congress. (No one at the time seriously believed that EPA could regulate greenhouse gases under the Clean Air Act.) That scenario did not pan out. Instead, the decision opened the floodgates for state attorney general litigation, up to and including the truly remarkable attempt by Republican attorneys general to invoke the Supreme Court's original jurisdiction to overturn the 2020 presidential election results in four other states. Texas v. Pennsylvania, No. 22-155, 2020 WL 7296814 (U.S. Dec. 11, 2020) (dismissing the case in a one-sentence order for lack of standing).

89. 17 U.S. 316 (1819).

90. *Id.* at 415.

91. *Id.* at 432.

and legislative abdication leaves no room for doctrines that rest on Madisonian premises about a legislature that threatens to draw all power into its "impetuous vortex."[92] Doctrines that envision rivalry among competing branches of government have little traction, and may distort judicial reasoning, when the actual separation and competition is among parties, not powers.[93] Federalism doctrines that hinge on an ill-defined federal–state "balance" make no sense when partisan blocs of states oppose one another in every institutional arena, including the judiciary.[94] By that same token, doctrines governing jurisdiction, rights, and remedies would benefit from a politically neutral, constitutionally grounded, institutionally realistic re-think. For reasons explained, that enterprise should aim to re-approximate the dispute resolution model of adjudication. And for all the difficulties, that task may not be quite as forbidding as it may seem.

VI. . . . AND AS APPLIED TO JURISDICTION, RIGHTS, AND REMEDIES

The place to begin is standing. As noted, extant doctrine is widely viewed as an unprincipled mess. (It may not be a single doctrine at all.)[95] The principal source of difficulty, I strongly suspect, is the "injury in fact" test that supposedly guides the analysis. To some judicial and scholarly minds, the test is constitutionally grounded in the "case or controversy" language of Article III and seeks to protect a dispute resolution model of jurisprudence.[96] To other minds, it is a prudential means

92. *See* THE FEDERALIST NO. 48 (James Madison).

93. *See* Levinson & Pildes, *supra* n. 84, at 2347, 2358–59 (urging that point and proposing modest doctrinal adjustments).

94. Greve, *Bloc Party Federalism*, *supra* note 30, at 300–02.

95. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1068–70 (2015).

96. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 574 (1992).

of judicial docket control and case management.[97] Even on the most explicitly constitutionalist theories, however, a purely speculative and therefore insufficient injury to the option of observing crocodiles in Egypt may be remedied by the purchase of an airline ticket to that country.[98] In that deployment and formulation, "injury *in fact*" cannot safeguard the boundaries of dispute resolution; it is little more than a pleading game.[99]

The crux is not the "in fact" piece of the inquiry but rather the *kind* of injury that counts for purposes of jurisdiction. As a matter of doctrinal coherence and constitutional grounding, it should not be hard to explain that third-party rights do not count, or that taxpayer or "offended observer" complaints do not count, either—not as a matter of "fact," but of legal categorization. To date, however, the Supreme Court has resisted that move and instead cut back on those expansive doctrines in an incremental, often fact-based fashion.[100] The source of that reticence is not hard to discern. Those law-declarative standing doctrines were introduced for the purpose of permitting favored constituencies to articulate their grievances in a judicial forum. The doctrines, in Professor Price's language, were "asymmetric" from the get-go.[101] Reversing them now

97. *Id.* at 580–81 (Kennedy, J., concurring).

98. *Id.* at 592 (Blackmun, J., dissenting).

99. For a clear-eyed judicial recognition of this predicament—and a courageous plea to re-think standing analysis from the constitutional ground up—see Judge Newsom's concurring opinion in Sierra v. City of Hallandale Beach, No. 19-13694, slip op. at 11 (11th Cir. May 6, 2021), https://media.ca11.uscourts.gov/opinions/pub/files/201913694.pdf.

100. *See, e.g.*, Hein v. Freedom From Religion Found., 551 U.S. 587 (2007); O'Shea v. Littleton, 414 U.S. 488 (1974); Allen v. Wright, 468 U.S. 737, 750–51 (1984); FEC v. Akins, 524 U.S. 11, 20 (1998); Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013); Spokeo v. Robins, 136 S. Ct. 1540 (2016); Dep't of Commerce v. New York, 139 S. Ct. 2551 (2020).

101. Price, *supra* note 27. "Asymmetry" here depends on one's time horizon. Pre-1930 standing cases were politically neutral and often unanimous. The New Deal Court mobilized the doctrine to insulate administrative agencies against judicial oversight. In later decades, a conservative Court used the doctrine to limit civil rights litigation and to protect agencies against "public interest" litigation. Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing*

would look, and be, equally asymmetric, and the move would have a sharply partisan valence. Thus, the Court has temporized on tenuous ground.

No such difficulty, however, attends cases of institutional, state, or legislative standing. In this universe, it is perfectly possible to articulate principled, constitutionally grounded, politically neutral, and institutionally realistic doctrines.

With respect to states' standing to sue in cases against the federal government, the conventional analysis practically invites the political parties to fight matters in court. Given the pervasive entanglement of federal programs with state operations, just about any state can plausibly allege an "injury in fact" in consequence of any change in any federal program. Especially when larded up with "special solicitude," even the most farfetched allegations will have sufficient plausibility for some hand-picked federal court. The Supreme Court cannot hope to police this universe with periodic interventions. It would be far better to clarify the *legal* content of "quasi-sovereign interests" that states are permitted to protect in federal court. Of course, states have standing to enforce their own laws in state and federal court. By extension, they may protect the continued *enforceability* of their own regulatory laws in a federal judicial forum, as in preemption cases.[102] And a limited set of non-sovereign proprietary state interests may be judicially cognizable, as in certain

Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006, 62 STAN. L. REV. 591, 595–96 (2010). Over a sufficiently extended time frame, *any* doctrine in this field may prove "symmetric" because what goes around eventually comes around. However, Professor Price is quite plainly, and wisely, seeking to articulate doctrines that will prove symmetric in the here and now, or in cases that the courts are likely to see in the near future. The point in the text is that limits on "institutional" state or legislative standing would be symmetric in *that* sense and in a way that principled standing barriers against third-party and "offended observer" litigation would not.

102. Tara Leigh Grove, *When Can a State Sue the United States*, 101 CORNELL L. REV. 851, 855, 887–88 (2016). Even that proposition is not entirely free from doubt. Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 86–87 (1966); Woolhandler & Collins, *supra* note 41, at 390–91.

federal common law actions. However, at least barring some form of congressional authorization, states have *no other* legally cognizable rights or interests that would confer standing—for example, no "interest" to participate in a federal grant program that requires no change in domestic regulatory law; and no "right" to demand a better, more aggressive, more lawful administration of federal laws. If all this is right, *Massachusetts v. Mellon* was right, and *Massachusetts v. EPA* was wrong and should be overruled.[103]

The case against legislators' institutional standing is yet more straightforward: there is no such thing. Institutions, and officials seeking standing as temporary members of those institutions, have no rights, only powers and a public trust. As noted earlier, *Raines v. Byrd* suggested—but did not hold *in haec verba*—that institutional "interests" are simply not judicially cognizable.[104] That principled position is only strengthened by a hard-nosed recognition that the ostensible "institutional" interests are typically a thin disguise for a partisan campaign. A direct holding to that effect would be salutary. Any attempt to control institutional litigation by means of hand-crafted, pragmatic doctrines—how many legislators are required? Do they have to be a committee? Must they be authorized by their respective House?[105]—will look profoundly suspect. As well it should.

And so, finally, with universal injunctions. The elementary, constitutionally grounded realization that those instruments are incompatible with two centuries

103. Grove, *supra* note 102, at 863, 870–72.

104. Raines v. Byrd, 521 U.S. 811, 820, 829 (1997). The hardest questions in this theater arise over the judicial enforcement of congressional subpoenas to members of the executive branch. *Compare* Grove, *supra* note 41, at 641–43 *with* Amandeep S. Grewal, *Congressional Subpoenas in Court*, 98 N.C.L. REV. 1043, 1055–60 (2020).

105. Questions of this kind have routinely arisen in litigation and received varying answers. For a manful effort to synthesize the case law and the relevant considerations, see United States House of Representatives v. Mnuchin, 976 F.3d 1, 9–12 (D.C. Cir. 2020).

of party-focused equity jurisprudence is reinforced by considerations of federalism, political neutrality, and institutional realism. An injunction for one partisan bloc of states that works to the detriment of the rival bloc is not much of a federalism advance.[106] Political neutrality says that neither side gains any systematic advantage, over time, from being able to engage in this form of advocacy. Institutional realism invites, on what I have called the demand side, the recognition that such injunctions are often a form of partisan combat. On the supply side, realism suggests that but for the officeholders' exceedingly short time horizon, both sides might (nay, should) welcome a cessation of hostilities at this front. The federal judiciary alone has a longer time horizon, and a means of calling a truce. It might as well play to that advantage, for its own good and that of the rest of us.

VII. CONCLUSION

I end where I began: under present and enduring conditions of partisan-ideological polarization, there is no alternative to a jurisprudence that retreats from law declaration to an "umpire" model of dispute resolution. That, in turn, cannot be a minimalist enterprise; it would have to be explicitly, (self-)consciously doctrinal.

I realize the obstacles and objections. Partisans who have become used to fighting it out in court—and who have designed their political and advocacy strategies in anticipation of a judicial endgame—will be none too pleased if that option disappeared. Any judicial holding to the effect that the courts will no longer be available as a forum will itself be viewed through partisan lenses.[107]

106. Mank & Solimine, *supra* note 65, at 1971, 1976–77, urge courts to take those dangers into consideration in shaping relief. I appreciate the underlying impulse. However, I despair of the judiciary's capacity to implement that calculus in any coherent fashion.

107. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 271–275 (2018)

And perhaps, a minimalist judicial strategy in bitterly contested partisan cases might better serve the Court and, conceivably, satisfy a latent public demand for a more regularized, orderly, less polarized politics.

None of those cavils, however, strike me as persuasive. Much would be gained, to my mind, if we were to deprive state attorneys general and congressional committees of their now-favored-forum. Sure: "no go" jurisdictional rulings will be viewed, in any given case, as partisan; but that risk pales against the danger of having the courts adjudicate political, partisan disputes on an on-going basis. And "minimalism" at this front is no answer. It just invites legitimacy doubts and inflames everyone, left and right.

We cannot sport away the vested rights of individuals; that is for us courts to protect. But everything else is politics, so you go fight. So wrote John Marshall in 1803, for an embattled Court in a deeply polarized country and in the aftermath of one of our many brutal presidential elections. If that is not the courts' program now, then what is?