

INDEPENDENT JUDGES, DEPENDENT JUDICIARY: INSTITUTIONALIZING JUDICIAL RESTRAINT

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Many commentators believe that judicial independence and democratic accountability stand in irreconcilable tension with each other. Professors Ferrejohn and Kramer suggest that these competing ideals are not themselves goals, but rather are means to a more important end: a well-functioning system of adjudication. Either or both may be sacrificed in the pursuit of this overarching objective. The United States Constitution seeks to achieve this objective by giving individual judges enormous independence while placing them within an institution that is highly susceptible to political control. The resulting vulnerability creates a dynamic that makes federal courts, and especially the Supreme Court, into effective self-regulators. The Authors argue that, seen in this light, the system of institutional self-restraint encompasses a broader range of judicial doctrines than has been understood previously. The Article concludes that reconciling the judiciary's twin goals of democratic legitimacy and legal legitimacy requires a more balanced view, for maintaining the judicial branch's independence lies as much or more in the judge's own hands as in external political pressures.

Platitudes become platitudes only because they are so obviously true. Take the following: “[T]he independent federal judiciary has been a powerful tool in guarding the Constitution and the rights of individuals.”¹ Now who would disagree with that? How about: A constitutional democracy must “include provisions making the judiciary accountable to both the political branches and the electorate.”² Any objections? Statements like these, as vapid as they are axiomatic, are the sort of thing that men and women on both sides of a discussion

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¹ Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 *Mercer L. Rev.* 645, 645 (1995).

² Am. Bar Ass’n, *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence* pt. 2, at 5 (1997), <http://www.abanet.org/govaffairs/judiciary/report.html> [hereinafter ABA Report].

of judicial independence will agree upon and serve up with perfect sincerity and conviction.

Sadly, bromides like these—or maybe these together with a vague notion that independence is supposed to make it possible for judges to decide cases based on “the law” (whatever that means)—pretty much exhaust the areas of agreement. Consensus on broad values combined with discord over their application in particular cases is hardly uncommon, in law or anything else. But the range of disagreement when it comes to judicial independence seems unusually wide. We expect controversy over how to draw the line between proper and improper judicial behavior in particular cases, but there is as much uncertainty in locating the line between proper and improper external influences. Indeed, we do not have anything approaching consensus even with respect to the normative conditions necessary to have a properly independent bench. There is disagreement about whether or how to criticize judges and their decisions, and about whether or how to discipline judges. There is disagreement about how to explain or justify our institutional arrangements, and about which of these arrangements are constitutional and which are conventional. And, of course, there is pervasive disagreement about whether our judges exhibit too much or too little independence.

Sorting through the debates on and surrounding judicial independence is thus a formidable task, but the necessary first steps seem clear enough. We need a workable definition of what we want to accomplish by making the judiciary independent and an accurate description of the institutional arrangements through which these ends are supposedly accomplished. With a better understanding of how our system of judicial independence actually works, we can begin to explore what, if anything, makes these arrangements stable and to address ticklish normative questions about whether judges have too much or too little independence.

In Part I, we consider what independence is meant to accomplish, seeking to clarify some areas of confusion by recharacterizing and so refocusing the inquiry. Most discussions of judicial independence bog down in what commentators view as an irreconcilable tension between independence and democratic accountability. We are told we cannot have it both ways. We can have a bench that is independent or a bench that is accountable, but we must accept a trade-off that sacrifices one or the other of these goals to some yet to be defined extent. Maybe so, but we will argue that independence and accountability are not the ends about which we need to be concerned. They are *means* toward a more fundamental goal: the construction of a well-function-

ing judiciary. That either or both must be sacrificed to a degree simply is not a problem if done in the service of this, our true objective.

Because the process of adjudication has this dual concern for independence and accountability, it necessitates a complex institutional design. We mix and match various structural arrangements—some protecting the independence of judges, others making them accountable—in an effort to create a properly balanced judicial system, by which we mean one capable not only of deciding particular disputes in light of their facts, but also of interpreting and even creating law, including constitutional law. Given the numerous ways in which courts can be regulated and influenced, countless possibilities exist in this regard (as evidenced by the variety of systems used both within the United States and in other nations). What matters is to understand how a particular judicial system balances concerns for independence with concerns for accountability. Only then can one begin to think about whether the system does so in a way that creates a well-functioning judiciary.

As we explain in Part II, the balance between independence and accountability in the federal system is maintained through a system that protects individual judges from direct outside interference while making the institution in which they work vulnerable to control by the political branches of government. This institutional dependence, in turn, has made the judiciary into a self-regulator, the creator of self-imposed institutional and doctrinal constraints that, as we describe in Part III, keep judges from needlessly stepping on sensitive political toes. The resulting equilibrium is one in which the political branches seldom need to exercise their power or even to threaten doing so.

Without, at this point, taking a position on the normative question of whether our judiciary exercises too much or too little restraint, we believe—and will try to demonstrate below—that the mechanisms operating to cabin federal judges include a variety of judicially created doctrines not usually thought of in connection with judicial independence. The full panoply of institutionalized forms of judicial restraint is, in fact, broader than most judges and commentators realize. Despite bold rhetoric about an independent or uncontrollable judiciary actively and aggressively curtailing political decisionmaking, our federal bench is normally a prudent institution, hemmed in on every side by self-created fetters—normally, but not always, as the Supreme Court's recent actions demonstrate. Yet when the Court overreaches, the political branches have the means and the responsibility to remind the Court of its due place in the political system. Such, at least, has been the dynamic that has historically defined constitutional adjudication in the United States.

I
INDEPENDENCE AND ACCOUNTABILITY:
PROTECTING THE ADJUDICATORY PROCESS

In characteristically lighthearted fashion, Judge Alex Kozinski recently pondered what judicial independence means. Suppose, he mused, "I decided to show my independence by getting on the bench dressed like Ronald McDonald" or "took it on myself to write all my opinions in law French. That would be independent, right?"³ The very outlandishness of his illustrations served to underscore the unexpected difficulty of the inquiry, as Judge Kozinski knew they would. What *do* we mean when we talk about the need for judicial independence? What are we looking for judges to do, what are we trying to prevent or protect, and why?

Commentators have offered a bewildering assortment of answers to such questions, urging the need to protect everything from "decisional independence" to what they call "branch independence," "procedural independence," "administrative independence," and even "personal independence."⁴ Close consideration of the arguments does little to dispel confusion. Everyone agrees that we need "decisional independence," meaning judges' ability to adjudicate facts and interpret law in particular cases "free from any outside pressure: personal, economic, or political, including any fear of reprisal."⁵ Yet everyone also agrees that certain forms of popular or legislative pressure are not only permissible, but indispensable. If the legislature changes the applicable law, for example, judicial decisions obviously ought to reflect this fact. And how about "branch independence," the judiciary's freedom "to operate according to procedural rules and administrative machinery that it fashions for itself through its own governance structures"?⁶ Self-governance seems like a good thing, inasmuch as it makes the judiciary more independent of the legislative and executive powers than it would be otherwise. But does self-governance foster the right kind of independence? Does it entail too much independence? Or, conversely, is it like permitting judges to parade into court in funny costumes or write opinions in whatever language they

³ The Honorable Alex Kozinski, *The Many Faces of Judicial Independence*, 14 Ga. St. U. L. Rev. 861, 862 (1998).

⁴ A useful survey can be found in Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 Mercer L. Rev. 835, 837-38 (1995).

⁵ Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. Dayton L. Rev. 565, 566 (1996).

⁶ Bermant & Wheeler, *supra* note 4, at 845.

choose, something that certainly can be described as a form of independence, but hardly one we should feel constrained to protect?

To begin answering questions such as these, we first must return to principles and consider the nature of the threat to good government that judicial independence is meant to rectify. Generally speaking, three elementary properties of law in a democratic system give rise to the concerns that motivate separation of powers and justify an independent judiciary.⁷ First, we have the straightforward notion that laws reflect substantive commitments to a course of action: commitments to treat certain situations a certain way or to encourage or discourage specific behavior or states of mind. Second, these commitments are made, either directly or indirectly, through a process of democratic deliberation, a process that seldom reaches the ideal we might imagine would make our laws perfectly legitimate, but that nevertheless embodies the forms we depend on to award legal enactments the appellation of "law," properly so called.⁸ In the case of ordinary legislation, the commitments are made by representatives of a democratic majority; in the case of constitutional law, action is taken either by representatives reflecting a supermajority or, as we sometimes flatter ourselves, directly by "the people." In both cases, the critical point is that adopted law reflects a substantive commitment of some sort, justified by its creation through appropriate procedural forms.

A third, related characteristic of law that animates our attachment to separation of powers and judicial independence is the law's generality. Legislation may be motivated by a single case but written to apply to a class of comparable cases. This class can be more or less numerous, more or less general, but the principle that a legal regulation governs equally every case that falls within its terms is the very essence of what we mean by "the rule of law." Hence, bills of attainder are forbidden,⁹ and even the most particularistic tax transition rules are drafted in general language.¹⁰ There are, to be sure, ways in which this descriptive claim about the generality of law can be qualified, but such exceptions are beside the point being made here: Our fundamental commitment to separation of powers and judicial inde-

⁷ This is, obviously, a functional and analytical claim rather than an historical one. No one ever thought things through in precisely this manner, though we believe that the development of independence was grounded in the kind of concerns we discuss.

⁸ Courts in systems derived from England also exercise common law powers, but these are justified on grounds that are tied to democratic governance and thus do not present any inconsistency with the principles described above. See Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 *Pace L. Rev.* 263, 265-73 (1992).

⁹ U.S. Const. art. I, § 9, cl. 3.

¹⁰ Cf. Daniel Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity* 90 (2000).

pendence is motivated by the idea that laws normally reflect substantive commitments of a more or less general nature that must either be applied to analogous cases or changed through a specified lawmaking process.

These rudimentary principles make sense of the traditional definition and explanation of judicial independence, which comes from Montesquieu and still lies at the root of current doctrine. "[T]here is no liberty," he asserted,

if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.¹¹

Montesquieu's typically cryptic dictum states the orthodox understanding of judicial independence, in which independence shelters the process of adjudication from interference by the political officials responsible for writing or enforcing law. Why? Because interference from these actors threatens to undermine the substantive commitments embodied in law through partial applications—partial both in the sense of being biased and in the sense of encompassing less than the whole. A legislature required to generalize when crafting its rules will, we fear, be all too quick to abandon or distort those rules in particular cases involving favored or disfavored parties, thus subverting the law's generality for inappropriate reasons. A legislature unhappy with laws adopted by its predecessors may find it tempting to undo these laws through adjudication, thus circumventing the normal process of democratic lawmaking.

By separating the adjudicatory function and placing it in a body independent of the political branches, we promote impartiality, fairness, and regularity in the interpretation and application of law—benefits that can be viewed together as a form of public or collective good. As one of us has written previously:

[T]he collective good takes the form of creating a capacity of the political system to commit to a future course of action—that is, to commit not to interfere with judicial decisions, no matter what their content. Independent judging makes it possible that substantive rules adopted now will be reliably upheld in the future, even in the face of strong temptations to do otherwise.¹²

¹¹ 1 Baron de Montesquieu, *The Spirit of the Laws* 152 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1750).

¹² John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. Cal. L. Rev. 353, 367 (1999).

This understanding of judicial independence fits most people's intuitions about why we make judges independent. Most people assume, reasonably enough, that political actors face pressures to abandon or subvert legal rules for legally inappropriate reasons. So we create a forum for adjudication removed from politics, presided over by actors immune from overt political compulsion or inducement.

Note how, understood in these terms, there is no particular need to distinguish between enforcing the Constitution and enforcing ordinary law. Like ordinary law, constitutional rules reflect substantive commitments; and while the commitments reflected in constitutional rules are meant to be superior to ordinary law, the function of judicial independence in relation to them is the same: to hold out the possibility of a forum for adjudication in which these commitments are less likely to be sacrificed to short-term political interests. For similar reasons, there is no need to distinguish between judges' fact-finding and lawmaking roles. Whether a decisionmaker is finding facts or making law, and whether rule creation takes place through common law articulation, statutory interpretation, or constitutional review, it is critical that the decisionmaking process not be controlled by political actors in the legislative or executive branches.

One shortcoming of this conventional representation of judicial independence is that it does not fully capture the nature of the threats to the adjudicatory process. In particular, it fails to distinguish between corruption of the political process—failures of political agency that lead politicians or other powerful actors to interfere in adjudication for their own private purposes—and endemic properties of popular government that tend to undercut judicial independence. Recall that James Madison's most profound insight was that the greatest threat to justice in a republican system comes from the most democratic parts of the government:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.¹³

¹³ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *The Papers of James Madison* 295, 298 (Robert A. Rutland et al. eds., 1977). "This is a truth of great importance," Madison continued, "but not yet sufficiently attended to . . ." *Id.* Madison was baffled and frustrated by the failure of his fellow Framers and Founders to grasp this axiomatic point. See Larry D. Kramer, *Madison's Audience*, 112 *Harv. L. Rev.* 611, 678 (1999).

In thinking about judicial independence, we need to worry about more than efforts by public officials to sabotage adjudication for their own immediate profit. Efforts to overpower the judiciary are as likely to emanate from the people themselves, acting through faithful representatives, as they are from defects in political agency. This concern is, if anything, more pronounced today than it was in Madison's time given the development of political parties, organized lobbies, and the like.

Pressures from this quarter can manifest themselves in a variety of ways. Making bribery grounds for impeachment reflects concern for private as well as official efforts to influence justice, though bribes at the federal level have been somewhat rare in practice.¹⁴ Judicial elections pose a more serious threat, and anxiety about interest-group politics has caused much unhappiness over the practice of electing judges at the state level.¹⁵ Separating the judiciary from the other branches of government means little if judges are then subjected directly to the very same pressures that caused us to mistrust executive and legislative influence in the first place. At the federal level, where judges are appointed for life, majoritarian political pressures are expressed most often through Congress or the executive branch, and perhaps this explains the scholarly tendency to conflate anxieties about public officials pursuing personal ends with anxieties about public officials acting at the behest of powerful private interests or a mobilized majority. The distinction between majoritarian pressures and corruption nevertheless matters because, as Madison saw, majoritarian pressures are vastly more threatening to judicial independence,¹⁶ and because these pressures can also find expression outside

¹⁴ See Joseph Borkin, *The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts* 189-204 (1962). During the Great Depression there were eight congressional impeachment investigations, leading to the removal of one judge by impeachment, the resignation of another who was under investigation, and the criminal conviction of a third. *Id.* app. at 219-58. The only other period during which there were as many formal investigations was the 1870s, when Congress investigated six judges for financial irregularities. See *id.*

¹⁵ See Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. Cal. L. Rev. 505, 512-15 (1999); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev. 315, 331-35 (1999); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, *Law & Contemp. Probs.*, Summer 1998, at 79, 87-98. This is to say nothing about the ethical problems posed when state judges have to accept campaign contributions from lawyers and parties who are likely to appear before them. See Abrams, *supra*, at 516-17 (noting that attorneys often make contributions to judicial campaigns in effort to influence judicial decisionmaking).

¹⁶ Majorities are the most serious problem for judges, not because they are more likely to interfere than corrupt officials, but because they are incorrigible within a democratic system, whereas official corruption can be discovered and corrected.

the political branches (through the media, for example).¹⁷ The principle underlying judicial independence calls for hindering political pressures of *every* kind, from *any* source, if they would interfere with a well-functioning judiciary by distorting its decisionmaking process.

It cannot have escaped notice that, to this point, we have not explained what we mean by pressures that “distort” the decisionmaking process; nor have we said how a “well-functioning judiciary” works. Some problems are obvious. We know, for instance, that we want to protect the judicial process from efforts to extort results by bribing or threatening to harm judges. But there is more at stake in the debate over an independent judiciary than avoiding these vulgar sorts of external pressures. Independence is animated by a robust vision of adjudication, one in which judicial decisionmaking is insensitive to a wide range of influences deemed arbitrary and impertinent. The trick is to articulate a principle by which to distinguish the arbitrary, impertinent influences from those that are not; or, to turn the problem around, to articulate a principle with which to identify reasons that offer appropriate grounds for judicial decisions and adjudicatory outcomes. The object of independence then is to enhance the probability that decisions actually are reached for these sorts of reasons and on these sorts of grounds.

That task might be easy in a formalist fantasy world: a world in which law was wholly objective and the interpretive process was mechanical and perfectly predictable. We could know for certain whether judges’ decisions in such a world respected “the law” simply by observing their behavior and assessing decisions under our objective standards. Indeed, we could probably dispense with judges altogether and just submit cases to properly programmed computers.

But matters are rather more complex in our world—and not only because the realists were right about how judges in fact decide cases, but because they were also persuasive about how judges *should* decide cases, at least insofar as they urged us to embrace a more wide-ranging inquiry into policy and consequences.¹⁸ This, in turn, led to our recognition that law is not fully determinate, and it broadened the forms of argument deemed relevant in litigation and legal interpretation. Since then, successive waves of lawyers, judges, and academics have—with varying degrees of success—carried the realist agenda forward and further complicated legal analysis by introducing still new and different forms of argument into law, from economics to moral

¹⁷ See generally Symposium, Judicial Independence, 25 Hofstra L. Rev. 703 (1997), which explores the problem of media criticism of judges and their decisions.

¹⁸ See Karl N. Llewellyn, Some Realism About Realism, in *Jurisprudence* 42, 53-74 (1962).

philosophy to postmodern awareness of the subjectivity of legal actors. Part of the postrealist condition, then, is an often-unsettling dissensus about the appropriate nature and content of legal discourse.

In truth, no one ever really approached decisionmaking in quite the simple or simpleminded manner in which the realists portrayed (or rather caricatured) formalism. Still, there is little doubt that legal analysis today is considerably more open textured and unspecified than it was in the late-nineteenth or early-twentieth centuries. The domain of arguments available in interpreting and applying law is larger, the boundary between forms of argument deemed proper and forms deemed improper is fuzzier and more contested, and the standards for measuring judgments as rightly or wrongly decided are more uncertain. The debate continues over which considerations ought to be judged relevant in adjudicating cases and which should not.

This absence of consensus over the appropriate method for handling legal disputes obviously makes it difficult to specify what kind of decisionmaking process judicial independence is meant to promote. We have no pretensions to settle in this Article the ongoing feud over what arguments count as appropriately "legal," a struggle that amounts to the lawyers' version of a *Kulturkampf* and one that will not be solved by logic anyway. But while the culture of legal argument may be contested and constantly shifting, there is at any given time a relatively large and settled domain of arguments whose legitimacy is conceded. Disagreement may persist about whether one or another kind of argument *ought* to be legitimate, but there will be something approaching consensus about the social fact that such arguments *are* acceptable parts of existing legal discourse. There will, at the same time, be other arguments whose *illegitimacy* in adjudication is similarly acknowledged by actors in the system. Originalists who believe that arguments based on moral philosophy have no place in constitutional adjudication presumably would not deny that such arguments are nevertheless part of the existing legal culture; yet both the originalist and the moral philosopher would surely also agree that arguments based on, say, the physical attractiveness of a party or the amount of money that party contributed to a political campaign are unacceptable reasons for deciding a case.

We are now in a position to say something useful about how a well-functioning judiciary works and what kind of adjudicatory process judicial independence is meant to promote. The set of arguments in the category "acceptable legal discourse" may be neither perfectly clear nor permanently fixed. Some arguments once thought proper may cease to be so, while others formerly deemed impertinent or immaterial may come to be accepted, and still others hover uncertainly

in a twilight zone between legitimacy and illegitimacy. There is at any given moment, however, a recognizable domain of permissible legal arguments. The purpose of making judges independent is to increase the likelihood that cases are decided on the basis of those sorts of arguments.

The point seems obvious, yet it needs to be emphasized: Judicial independence seeks first and foremost to foster a decisionmaking process in which cases are decided on the basis of reasons that an existing legal culture recognizes as appropriate. To use a rough heuristic device, judicial independence seeks to ensure that cases are decided for reasons that can be offered publicly in a brief or oral argument, and not for reasons that, if offered publicly as a basis for decision, would be deemed unethical, improper, or irrelevant. This still leaves room for debate over what sorts of considerations ought to be acceptable in litigation, because that debate is itself part of the public discourse of law and so an appropriate aspect of adjudication.

An important caveat is in order. We have so far viewed the problem of independence primarily from the judge's perspective, as if the goal were merely to insulate judicial decisionmaking and interpretation from corrupting outside influences. Such an "external" definition of the problem may be too narrow, however, for it fails to include changes in legal discourse that reflect or embody subtle forms of corruption and that are generated by the judges themselves. A more "internal" perspective might lead us to ask whether some accepted forms of legal discourse nevertheless compromise the role of the judiciary in ways that ought to concern us. We will argue in Part III, for example, that the judiciary itself has adopted an assortment of doctrinal restraints that have the effect of forestalling political scrutiny. Under an external definition of judicial independence, such doctrines may appear wholly legitimate. Yet they remain troubling, which suggests the need for a broader definition of independence that focuses on internal as well as external aspects.¹⁹

Be that as it may, defining judicial independence by focusing on the adjudicator's decisionmaking process throws a new problem into relief: the problem of judicial accountability. Making judges indepen-

¹⁹ This broader definition raises questions that could slice very deeply into our understanding of what a "well-functioning judiciary" looks like. How, for example, should we think about structures that allocate the availability of legal services by restricting the practical domain of litigation to those who can afford it? Or about practices that ensure a professional bench unlikely ever to find itself interested in moving the law in certain directions? Advocates of expanding legal services have challenged such structures and practices on individual-rights grounds. But they have broader significance as well, for they define the boundaries of adjudication in ways that also ought to matter for separation of powers and our concept of judicial independence.

dent of politicians and other lawmakers may free them from certain foreseeable pressures to ignore the law (with "law" understood in the terms described above), but it also frees them from any pressure to follow it, and it allows them to make law in ways that could be problematic. If no one is empowered to judge the judges, what do we do about lawless courts and irresponsible judging?

The question of judicial accountability must be broken down into two further problems. The first, which would exist even in our formalist fantasy world, is simply the danger that judges will act for improper reasons. Judges are people, after all. Removing them from direct political control may eliminate one kind of pervasive threat or temptation to ignore the law, but there are others. Judges have friends and financial interests and ideologies; they have loves and hates and passions and prejudices just like the rest of us. So what do we do when our independent judges let these sorts of influences guide their actions in the courtroom? If independence means freedom from oversight by other departments of government and by voters, how do we prevent judges from ignoring or misapplying the law for their own inappropriate reasons?

This first problem of judicial accountability is less complex than the second, which springs from realist-inspired insights concerning law's indeterminacy. No one really believes that law is wholly indeterminate, but virtually everyone recognizes that modern jurisprudential tools create a range of legitimate choices in almost any given case. And even those who believe in objectively "right" answers appreciate that the process by which these answers are generated hinges on arguments and judgments of a kind about which reasonable people can (and will) subjectively disagree.²⁰

Now imagine a bench staffed by judges of superhuman intelligence who are also completely free of cognitive biases that might lead them to misapply the law—free, that is, of what we have described above as the first problem of judicial accountability.²¹ Judges on this bench must still adopt a jurisprudence, and the choice of legitimate alternatives in this respect can be predictably counted upon to produce systematically different outcomes in litigated cases. Yet we have no purely *legal* grounds for preferring one set of results to another, no consensus within the legal community on "the" one true jurisprudence. Moreover, every methodology for deciding cases leaves room for reasonable people to reach more than one conclusion in many or

²⁰ Ronald Dworkin makes this classic argument in Ronald Dworkin, *Taking Rights Seriously* 126-30 (1977).

²¹ Readers will recognize this improbable character as Dworkin's fictional Judge Hercules. Ronald Dworkin, *Law's Empire* 239-40 (1986); Dworkin, *supra* note 20, at 105-06.

even most cases. Like it or not, a judge's choice of methodologies and his or her exercise of discretion are imbued with an inescapably political dimension, and the claim of politics to have a say over what courts do reasserts itself.²² To the extent that adjudication entails choices that are political in this sense, choices that cannot be determined by strictly legal considerations, how do we make judges accountable for the consequences of their decisions?

Many commentators see these concerns for judicial accountability as inescapably in conflict with the goals of judicial independence: The only way to make judges accountable for their decisions is to control them in ways that intrude on their independence.²³ But this mischaracterizes the problem, and we think that framing the issue differently dissolves any apparent contradiction. Neither judicial independence nor judicial accountability are ends in and of themselves. Both are means toward the construction of a satisfactory process for adjudication.²⁴ As we have seen, this means a process that is appropriately "legal" in its nature: one in which decisions are made for appropriately legal sorts of reasons, without regard for considerations that law considers extraneous or immaterial. As we have also seen, however, it means a process that is subject to legitimate democratic control over differences in the range of outcomes procurable within the confines of legal analysis: a process in which judges cannot deviate too far from popular political understandings for reasons unconstrained but not excluded by law.²⁵ Not surprisingly, these joint

²² This problem is most acute when it comes to constitutional interpretation, because it is so much more difficult to overturn the courts' decisions. But insofar as legislative overruling is not transaction-cost free, the same concern exists in the domain of statutory interpretation and common law adjudication.

²³ See Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. Cal. L. Rev. 1571, 1571-76 (1988); ABA Report, *supra* note 2, pt. 2.

²⁴ A similar point has been made by Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. Cal. L. Rev. 625, 628-32 (1999). See also Burbank, *supra* note 15, at 317 ("[M]isunderstanding is fostered . . . by considering judicial independence as an isolated value . . ."); Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 *Judicature* 117, 117 (1996) ("Judicial independence is a means to an end rather than an end itself.").

²⁵ One technique by which such control may be exercised is changing the substantive law in response to judicial decisions, something Congress can do even to the extent of making its changes retroactive. See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (ruling that lower court must apply relevant new law, even though it was newly enacted during litigation). Congress, though, may not legislate in a way that redecides specific cases. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding unconstitutional statute that required federal courts to reopen final judgments entered before its enactment). Legislative overruling is effective only to a limited extent, however. It is formally unavailable when it comes to the Constitution and often practically so even when it comes to ordinary legislation since Congress is often too busy worrying about new laws to spend its time supervising and revising judicial (mis)interpretations of the old ones.

and several allegiances to law and democracy—with their joint and several objectives of procedural rectitude, legal impartiality, and democratic accountability—necessitate a complex institutional design. Searching for the right system, we mix and match in different ways and to different degrees various arrangements—some protecting the independence of judges, others making them accountable—in the effort to construct a properly balanced judiciary. Finding the right mix surely is not easy, but complexity is not the same as contradiction.

Seen in this light, questions like whether the Constitution demands “branch” or “decisional” independence are revealed as instrumental and pragmatic, rather than matters of principle pertaining to some freestanding concept of judicial independence. Like the larger system of checks and balances of which it is a part, the judiciary is designed to maintain a dynamic equilibrium among contending forces. To this end, the system’s designers can choose among an extraordinarily varied assortment of institutional alternatives to achieve their multiple overlapping goals. One catches a glimpse of just how broad the range of strategic possibilities is from surveying the different approaches taken in our Federal Constitution and in the fifty states.²⁶ These utilize everything from judicial elections to civil-service protections to life tenure, from impeachment to judicial self-discipline to removal for cause, from independent judicial budgetary control and rulemaking authority to administration through the executive branch to legislatively prescribed rules of procedure, from deferential review of decisions rendered by independent executive agencies to de novo appellate review to jurisdiction stripping. The number of possible arrangements is endless, though differences in actual systems surely are generated by historical accident and indigenous cultural traits as often as through deliberate constitutional engineering.

Whatever the system, one cannot understand it (much less evaluate it, though our present task is confined to understanding) without attending to its full complement of institutional checks and asking how these balance concerns for independence with concerns about accountability in seeking to optimize the caliber of adjudication. Judicial elections are not ipso facto inappropriate if their potentially debilitating effects on independence are counterbalanced by other institutional devices or cultural factors. Independent judicial rulemaking authority can be unwarranted under certain conditions and, in any event, may be unnecessary if there are checks in place that empower

²⁶ For surveys, see Anthony Champagne & Judith Haydel, Introduction, in *Judicial Reform in the States* 1, 2-15 (Anthony Champagne & Judith Haydel eds., 1993); Harry P. Stumpf & John H. Culver, *The Politics of State Courts* 14-35 (1992); Carrington, *supra* note 15, at 113-25.

the courts to fend off overly aggressive legislative interference. Everything depends on everything else, and there is no one true model of judicial independence. Each system must be examined in its own context and on its own terms. Only then can we ask whether there is too much or too little independence, and only then will we be in a position to understand the system well enough to think intelligently about how, or whether, to make adjustments. Accordingly, our task in the remainder of this Article is to offer a model that explains better how the balance between independence and accountability is maintained within the United States federal judiciary.

II

THE FEDERAL SYSTEM: INDIVIDUAL SECURITY IN A VULNERABLE INSTITUTION

The federal system's basic strategy in balancing independence and accountability is (we hope) decently conveyed by our title: "Independent Judges, Dependent Judiciary." Life tenure and salary protection—together with potent cultural norms stemming from colonial history and the Framers' outspoken determination to make national judges secure²⁷—give individual federal judges generous protection from essentially all forms of direct coercion. Judges may occasionally feel intimidated after criticism by politicians or in the press,²⁸ but members of the federal judiciary generally have unparalleled freedom to rule in their own courtrooms as they please, safe from direct outside threats.

²⁷ State constitutions adopted after 1776 generally gave judges more independence than under British rule, particularly by providing for them to hold office during good behavior. See Willi Paul Adams, *The First American Constitutions* 266-71 (Rita Kimber & Robert Kimber trans., Univ. of N.C. Press 1980) (1973); Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* 122-23 (1997). Experience during the Confederation period and an emerging new conception of the courts' role in separation of powers led to greater appreciation of the need for a strong and independent judiciary, and the Framers of the Constitution made federal judges especially secure. See Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 453-56 (1998); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 *Chi.-Kent L. Rev.* 31, 35-48 (1998). According to Gerhard Casper, "by comparison with all the state constitutions, Article III represents the extreme solution: an appointed judiciary serving at a guaranteed salary for life, subject only to impeachment. Not a single state constitution had gone that far." Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, in *Separating Power* 132, 137-38 (1997).

²⁸ Cf. Interview by Roy D. Simon, Jr., Professor, Hofstra University School of Law, and Karen E. Baldwin, Managing Editor of *Articles*, *Hofstra Law Review*, with Judge Harold Baer, Jr., *New York* (Nov. 14, 1996), in Harold Baer, Jr., *Interview: A Unique Perspective on Judicial Independence*, 25 *Hofstra L. Rev.* 799, 800 (1997) (stating that public criticism has "chilling effect on judicial independence").

These independent agents are, at the same time, situated within an institution that is exposed and vulnerable to a wide array of controls by the political branches. The ability of Congress to control such things as the judiciary's budget and jurisdiction creates opportunities for a trenchant political response to objectionable judicial behavior. As a result, individual judges may be subject to *indirect* pressure through threats to deprive their court of resources or to curtail its jurisdiction. The tools available to Congress are cumbersome and blunt, and federal lawmakers can seldom pinpoint attacks at specific judges or particular decisions. Instead, political pressure from Congress or the executive (or the public, for that matter) tends to operate more on a wholesale basis—a reaction to accumulated grievances or general trends, rather than individual opinions.²⁹

The pressure nevertheless can become quite intense, its mere threat a cause for anxiety. Judges are, generally speaking, a cautious lot, which is hardly surprising for officials whose decisions deal with controversial public matters but who lack access to most normal channels for acquiring political capital. The judiciary's capital is intellectual and reputational, limited to what it can acquire through effective job performance, and the sort of thing that quickly wears thin in the face of persistent criticism.³⁰ Consequently, the mere threat of political retribution from Congress seems to have turned the judiciary into an effective self-regulator, a point we will attempt to substantiate in Part III. Federal judges have concocted an impressive body of doctrinal limitations, creating a buffer zone that minimizes their chances of stepping heedlessly into political thickets. Obviously the federal judiciary sometimes finds itself at the center of controversy, but less often than one might expect given the degree of individual autonomy offered its members. Indeed, if federal courts have sometimes managed to be effective in controlling politics, this may be attributable partly to

²⁹ There are obvious exceptions. Truly high profile cases in the Supreme Court—the occasional *Roe v. Wade*, 410 U.S. 113 (1973), or *Brown v. Board of Education*, 349 U.S. 294 (1955)—may have immediate and specific political repercussions. But the structure of judicial protection in the federal system makes this a rare event. More typical is political resistance to a course of decisions rendered over a period of years, as happened, for example, with the criminal procedure decisions of the Warren Court or the substantive due process cases of the *Lochner* era.

³⁰ All the more so inasmuch as judges cannot ethically take to the airwaves to respond publicly to criticism of their decisions. See Model Code of Judicial Conduct, Canon 3(b)(9) (1998) (prohibiting judges from commenting on pending or impending proceedings); Stephen J. Fortunato, Jr., On a Judge's Duty to Speak Extrajudicially: Rethinking the Strategy of Silence, 12 *Geo. J. Legal Ethics* 679, 685-90 (1999) (questioning widely held norm that judges must keep silent).

the fact that their interventions are so rare, the product of a politically astute, institutional self-abnegation.³¹

Before attempting to substantiate this claim by canvassing forms of self-imposed judicial restraint, we take a moment to document the political threat faced by the judiciary, surveying techniques federal lawmakers can and do use to control the courts. Because these are mostly familiar, our discussion will be brief.

As noted above, individual judges are generally well guarded from direct political punishment or pressure. The only means by which Congress can penalize a particular judge's errant behavior is through impeachment,³² a largely toothless threat used in practice to remove judges only when extreme misconduct can be proved. Whether impeachment originally was meant to be quite this inconsequential is uncertain. Some of the Framers spoke against including any power to impeach in the Constitution for fear that such power could be exploited for political purposes.³³ Once the decision to include impeachment had been made, however, the founding generation's history and experience probably led them to anticipate more frequent resort to the device than has been true in practice.³⁴ But any expectations they might have had about the role of impeachment were abruptly upended by the unanticipated emergence of political parties, which caught the Founders off guard and revealed that their fears about possible misuses of impeachment had been greatly understated.

Political parties were something entirely new in the early American republic, where the idea that there could even be a loyal opposition, much less a highly organized one, still had not taken root.³⁵ There were, as yet, no rules for party competition. Each party saw the other as treasonous and illegitimate, and set about not just to defeat but to destroy it. As party passions escalated during the 1790s, partisans on both sides, and in both state and federal governments, grasped at any and every available tool to obliterate their political

³¹ This basic idea is familiar from Alexander M. Bickel, *The Least Dangerous Branch* (1962), though Bickel's analysis was confined to the Supreme Court and consisted more of exhortation than any kind of institutional explanation of an observable phenomenon.

³² See Nat'l Comm'n on Judicial Discipline and Removal, *Hearings of the National Commission on Judicial Discipline and Removal* app. B at 20-21 (1993) (concluding that any statutory provision for removing Article III judges by means other than impeachment, or for diminishing salaries even of criminally convicted Article III judges, would be unconstitutional).

³³ *The Federalist* No. 65 (Alexander Hamilton); see Jack N. Rakove, *Original Meanings* 260-61, 264-65 (1996) (discussing debate over legislative impeachment powers).

³⁴ See generally Peter Charles Hoffer & N.E.H. Hull, *Impeachment in America, 1635-1805* (1984) (documenting historical use of impeachment prior to Founding and in early Republic).

³⁵ See Richard Hofstadter, *The Idea of a Party System*, at vii-xii (1969).

opponents. In such circumstances, impeachment was too obvious and tempting a device to ignore.³⁶

Things started slowly but quickly heated up. Early efforts to water down the notion of impeachable offenses were resisted. So, for example, in 1795 Congress refused even to investigate a charge that Kentucky Senator Humphrey Marshall had committed perjury in a civil case.³⁷ By 1796, however, officials in Georgia were being impeached because of involvement in a land scam having nothing to do with their official responsibilities,³⁸ and in 1803, judges in Pennsylvania were impeached and removed from office for “misdemeanors” amounting to dubious rulings from the bench.³⁹

Impeachment-mania peaked during Thomas Jefferson’s first term, as angry Republicans struck back at the Federalist judges who had tormented them during the crisis of 1798. After warming up by successfully removing John Pickering from the New Hampshire district court—ostensibly for misapplying the revenue laws, but really because he was mentally deranged⁴⁰—the Republicans went after Supreme Court Justice Samuel Chase for his biased handling of criminal trials under the Sedition Act. The House of Representatives impeached Chase for using his position as a platform to make political speeches and for conducting trials as explicitly partisan affairs.⁴¹ Chase’s own trial in the Senate turned into a contest among competing conceptions of the judicial role: Did independence mean the freedom of judges to behave in an openly partisan manner, or was independence contingent on judges refraining from active and aggressive politicking?⁴² Chase managed to avoid conviction, but Republicans successfully made their point, “changing expectations of what constituted proper judicial behavior, thereby excluding overt partisan political activity.”⁴³

The Chase affair marked a turning point in the history of impeachment, a precedent-setting event that affirmed and extended the Framers’ original conviction that impeachment should be reserved only for the most serious kinds of wrongdoing. After Chase, judges

³⁶ Our discussion of the early history of impeachment in this and the following two paragraphs is drawn from Richard E. Ellis, *The Jeffersonian Crisis* 69-107 (1971), and Hoffer & Hull, *supra* note 34, at 107-265.

³⁷ Hoffer & Hull, *supra* note 34, at 147-48.

³⁸ See *id.* at 149-51.

³⁹ *Id.* at 193-205.

⁴⁰ See Ellis, *supra* note 36, at 69-75.

⁴¹ See Keith E. Whittington, *Constitutional Constructions: Divided Powers and Constitutional Meaning* 20-25 (1999).

⁴² See *id.* at 25-65.

⁴³ *Id.* at 65.

ceased being active partisans on the bench, and impeachment virtually disappeared from American politics, reserved for cases of blatant misconduct. Over the course of American history only thirteen judges have been impeached and only seven removed from office; four were acquitted and two more resigned before their trials in the Senate.⁴⁴ One must be careful in assessing these numbers not to overlook the possibility that judges might be intimidated by the mere threat of impeachment proceedings, and an additional twenty or so judges may have resigned rather than face investigation.⁴⁵ Still, given the nearly 2800 men and women who have served as federal judges since 1789,⁴⁶ these are pretty small numbers.

Nothing formally prevents Congress from making more active use of its power to impeach. But the political understanding that impeachment should be reserved for the most serious cases of malfeasance is deep in the culture and unlikely to change absent extreme circumstances. Certainly nothing about the recent unpleasantness involving President Clinton seems likely to upset this arrangement. If anything, the Republicans' rabid pursuit of Clinton may have reaffirmed our commitment to keep the impeachment power carefully closeted. Impeachment seems destined to remain a device for removing judges whose wrongful acts are criminal or border on the criminal, but not a tool for controlling judges whose rulings or general deportment are merely controversial.

There is one other means by which politicians can influence individual judges, though it consists of a carrot rather than a stick and is controlled by the President rather than Congress. We mean, of course, the promise of promotion to a higher court. Presidents can—and today often do—select Supreme Court Justices and circuit court judges from the ranks of sitting circuit and district judges,⁴⁷ giving rise to concerns that potential nominees may change their behavior on the bench to please the President or his advisors.⁴⁸ We could prevent this

⁴⁴ Emily Field Van Tassel, *Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992*, at 2 (1993).

⁴⁵ *Id.* at 19-22. As Van Tassel notes, the number of judges who resigned to avoid investigation cannot be determined definitively, since no formal records are kept of the reasons a judge resigns. *Id.* at 21. A few more judges resigned while still enmeshed in investigations of one sort or another, *id.* at 23-33, and it seems hard to believe that this factor would not have contributed to their decisions to leave the bench.

⁴⁶ Vincent A. Eng, *Preface to Biographical Directory of the Federal Judiciary 1789-2000*, at x (Bernan ed., 2001).

⁴⁷ See Deborah J. Barrow et al., *The Federal Judiciary and Institutional Change* 22-23, 89-90, 94-96 (1996); Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 *S. Cal. L. Rev.* 455, 460-61 & fig.1 (1999).

⁴⁸ There is some evidence, mostly anecdotal, to justify this fear. See Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commis-*

by forbidding the elevation of lower court judges, but that would sacrifice the advantage of having appellate judges with prior experience on the federal bench. In practice, moreover, “[t]he risk that a judge would let the desire to curry a President’s favor contaminate the judicial process is deemed too low to override the assumed benefit to the judicial process that comes from picking judges with previous federal judicial experience.”⁴⁹ This weighing of costs and benefits seems reasonable, particularly as the prospect of advancement normally is limited to a small subset of judges whose prior history has already revealed their predispositions to be consistent with those of the President.⁵⁰

If relatively few devices are available to control individual judges, a great many more can be directed at the institution of the judiciary as a whole. These include the appointment power, which affords the political branches of government—and especially the President, in whose hands this power chiefly lies—considerable leverage to shape (or reshape) the bench.⁵¹ Court packing in the dramatic fashion of FDR’s notorious gambit may be off the table for now, but more subtle forms of court packing—such as adding judgeships to the lower courts or making ideologically driven appointments—have long and distinguished pedigrees in American politics.⁵² The beauty of using ap-

sion?, 7 J.L. Econ. & Org. 183, 188-89 (1991) (suggesting that some judges supported sentencing commission to increase their chances at promotion); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 Int’l Rev. L. & Econ. 13, 27 (1992) (“[P]romotion potential does explain a significant portion of the variance in corporate criminal antitrust penalties.”).

⁴⁹ Bermant & Wheeler, *supra* note 4, at 839.

⁵⁰ See Klerman, *supra* note 47, at 463.

⁵¹ See Barry Friedman, “Things Forgotten” in the Debate over Judicial Independence, 14 Ga. St. U. L. Rev. 737, 763 (1998) (“[Appointment and confirmation] is the process that generally keeps the judiciary in tune with present political concerns . . .”). In recent years, Congress has tried to limit the President’s control over appointments by refusing to approve his nominees, hoping thus to force a compromise on who is nominated. The big losers in this game, apart from the nominees (who may be put through the wringer for several years), are the other federal judges, who find themselves deprived of much-needed assistance in coping with an expanding caseload. Such are the costs of divided government.

⁵² See Barrow et al., *supra* note 47, at 23 (remarking that nearly all presidents “were able to stack the court with partisans—in some cases in very short order”). Court packing got off to an early and rocky start in the Judiciary Act of 1801, which (among other things) created numerous new positions to be filled by the already-defeated Federalist President John Adams. Ellis, *supra* note 36, at 15-16; see also Judiciary Act of 1801, ch. 4, 2 Stat. 89, 96. Jefferson later complained bitterly about Adams’s willingness to make these appointments, saying that it was “personally unkind” of Adams to appoint some of Jefferson’s “most ardent political enemies” in this fashion, and that “[i]t seemed but common justice to leave a successor free to act by instruments of his own choice.” Letter from Thomas Jefferson to Abigail Adams (June 13, 1804), in 8 *The Writings of Thomas Jefferson* 306, 307 (Paul Leicester Ford ed., G.P. Putnam’s Sons 1897). The Republican response to the Federalist scheme—which included not only the impeachment of Samuel Chase, but also a

pointments to control the bench is that it fosters democratic accountability without in any way threatening judicial independence: The political branches have a regular means to keep the bench in line with prevailing attitudes, but individual judges are immune from further pressure or obligation once they have been appointed.⁵³ The weakness of the appointment power in this regard is that turnover rates for federal judges are often low—less than three-and-a-half percent per year in the 1990s⁵⁴—which makes this an undependable method for fine tuning the judiciary's political complexion. Past practice indicates that increasing the size of the judiciary can be used to enhance the effectiveness of using appointments to change or control the federal bench, especially during periods when one of the two major parties controls both Congress and the Presidency.⁵⁵

There are other, less benign tools with which to pressure the judiciary. Congress controls most of these, though we must not overlook one important check that, like the appointment power, is an executive prerogative. It is, after all, the executive who—as Hamilton famously remarked in *The Federalist No. 78*—“holds the sword of the community.”⁵⁶ The judiciary can accomplish nothing unless the Executive Branch enforces its orders, a point that “has not been lost on the fed-

controversial law firing the newly appointed judges by abolishing their court—probably constituted the most serious assault on judicial independence in American history. See Ellis, *supra* note 36, at 3-52, 76-82; Geyh & Van Tassel, *supra* note 27, at 77-85. Interestingly, court packing survived the controversy and has thrived, while the Jeffersonian remedy of abolition soon faded into disrepute. Cf., e.g., William S. Carpenter, *Judicial Tenure in the United States 78-100* (1918) (discussing Congress's rejection of option to fire judges when abolishing short-lived Commerce Court).

⁵³ Bear in mind that gratitude and the sense of obligation most of us naturally feel toward our patrons can be a motivating force. Judge Kozinski, for example, has acknowledged candidly his continuing sense of duty to the Attorney General and Administration that appointed him:

It doesn't happen every time I write an opinion, but every so often I come to a close case and I ask myself the question: “Would Ed Meese approve?” . . .

The question, for me, isn't what the actual Ed Meese thinks. The question is: Am I living up to be the kind of judge the people who appointed me thought they were appointing? Am I the kind of judge I represented myself to be?

Kozinski, *supra* note 3, at 865. Writers of legal mythology like to focus on renegades like Justices Brennan or Blackmun (though whether and to what extent either of these Justices really were renegades is a complicated issue), but the kind of thinking divulged here by Judge Kozinski is surely far more common.

⁵⁴ See Richard A. Posner, *The Federal Courts* 31 (1996); see also Harry P. Stumpf, *American Judicial Politics* 208-10 (2d ed. 1998) (discussing judicial tenure and turnover); Van Tassel, *supra* note 44, at 9 (addressing judicial departure rates).

⁵⁵ Barrow et al., *supra* note 47, at 90-96. The appointments process as a device for controlling the judiciary also has been enhanced at times by politically astute judges who timed their retirements to ensure that they were replaced by someone who was ideologically compatible. *Id.* at 94.

⁵⁶ *The Federalist No. 78*, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

eral executive or on the states and their executives.”⁵⁷ In practice, presidents usually have backed even controversial rulings from the Court, though state governors have been more willing to stare the Court down.⁵⁸ Andrew Jackson apparently ignored judicial mandates in a case involving the Cherokee Indians (leading to an apocryphal story that has Jackson grumbling about how John Marshall should enforce his own decisions).⁵⁹ But as Barry Friedman has pointed out, Jackson’s travails with the Court took place when the struggle over judicial review was still young, and Jackson was prepared to back the Court when controversial questions threatening the Union, like nullification, were at stake.⁶⁰

With the notable exception of the Lincoln Administration, moreover, subsequent presidents have shied away from following Jackson’s example. Lincoln ignored an order by Chief Justice Taney to release a prisoner in *Ex parte Merryman*,⁶¹ and his cabinet (under Andrew Johnson) gave equally scant respect to the Supreme Court’s command in *Ex parte Milligan*⁶² that military trials cease.⁶³ But civil wars tend to strain the legal process, and none of Lincoln’s successors have been quite so brazen. President Eisenhower came closest when faced with massive resistance to the Court’s desegregation orders, for which Eisenhower seemingly had little enthusiasm.⁶⁴ Even Eisenhower,

⁵⁷ Burbank, *supra* note 15, at 323.

⁵⁸ See Dwight Wiley Jessup, *Reaction and Accommodation: The United States Supreme Court and Political Conflict, 1809-1835*, at 428-32 (1987) (arguing that state assaults on Court may have “succeeded had national executive influence been exercised in support of that cause”); Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790-1860) and the European Community (1958-1994)*, 11 *Stud. Am. Pol. Dev.* 149, 159 (1997) (noting that until Civil War, “Supreme Court authority to declare void state law was repeatedly denied and flouted by state governments”).

⁵⁹ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Barry Friedman draws even this example into question, observing sensibly that “there is some question first, whether there was anything in either case for the Executive to enforce, and second, whether Jackson felt he had the practical ability to enforce the mandate.” Barry Friedman, *The History of the Countermajoritarian Difficulty* (pt. 1): *The Road to Judicial Supremacy*, 73 *N.Y.U. L. Rev.* 333, 400 (1998). On whether Jackson made his famous remark about John Marshall, see Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 *Pol. Sci. Q.* 341, 349 (1956).

⁶⁰ Friedman, *supra* note 59, at 394-404.

⁶¹ 17 F. Cas. 144 (D. Md. 1861) (No. 9487); see Carl Brent Swisher, *Roger B. Taney 550-56* (1935).

⁶² 71 U.S. (4 Wall.) 2 (1866).

⁶³ Mark E. Neely, Jr., *The Fate of Liberty* 176 (1991) (“[T]he *Milligan* decision had little practical effect. It was written in thunderously quotable language . . . [but d]espite unmistakable condemnation, trials by military commission continued.”).

⁶⁴ See Gerald N. Rosenberg, *The Hollow Hope 75-76* (1991). Only after he had been out of office for three years, in 1963, did Eisenhower finally endorse *Brown* as “morally and legally correct.” Reed Sarratt, *The Ordeal of Desegregation* 50 (1966).

however, ultimately backed the Court and acted to ensure that its orders were obeyed.⁶⁵

While presidents may rarely be willing to ignore openly orders of the Supreme Court, executive enforcement of politically unpopular decisions is often willfully lackluster, even in the face of widespread disregard for the Court's mandate. The failure of the desegregation cases to accomplish anything until political winds changed and a new President and Congress made civil rights enforcement a priority is well known.⁶⁶ The Court's school prayer decisions still are ignored in many parts of the country,⁶⁷ and continued resistance to *Roe v. Wade* has left abortion unavailable as a practical matter in many places.⁶⁸ Additional instances can easily be documented and multiplied, particularly if we look to the treatment of lower court decisions. The federal bench is quite sensitive to the danger of half-hearted executive support—as indicated, for example, by the Supreme Court's savvy handling of the remedial issue in *Brown II*⁶⁹—and judges are conscious that they should not take executive backing for granted.

As with impeachment, moreover, the mere threat of executive nonenforcement can be a powerful deterrent. The willingness of Presidents to support the Supreme Court in cases like *Brown* undoubtedly turns partly on the fact that the Justices put the Chief Executive in such positions so rarely. And this, in turn, just as surely rests partly on the implicit threat that executive submission to judicial mandates may cease if the Court goes too far too often. The precariousness of the judges' standing in this political equilibrium is underscored each time a high executive official attacks the federal bench for acting politically or, as Attorney General Edwin Meese did in the mid-1980s, publicly muses about resurrecting Lincoln's position on the limits of judicial authority.⁷⁰

When we turn to Congress, moreover, we find a wide array of tools available to rein in a rambunctious judiciary.⁷¹ Surely the most

⁶⁵ See Richard Kluger, *Simple Justice* 754 (Vintage Books 1977) (1975).

⁶⁶ See Rosenberg, *supra* note 64, at 42-82.

⁶⁷ See Robert S. Alley, *Without a Prayer* 21-24 (1996); Frank S. Ravitch, *School Prayer and Discrimination* 3, 73 (1999).

⁶⁸ See Janet Hadley, *Abortion* 1-17 (1996); Mira Weinstein, *On 25th Anniversary of Roe v. Wade, NOW Asks "Who Still Has a Choice?"*, Nat'l NOW Times (Nat'l Org. for Women, Washington, D.C.), Jan. 1998, <http://www.now.org/nnt/01-98/roe.html>.

⁶⁹ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); see Robert B. McKay, "With All Deliberate Speed": A Study of School Desegregation, 31 N.Y.U. L. Rev. 991, 999-1000 (1956).

⁷⁰ See Edwin Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. 979, 984-85 (1987).

⁷¹ See David P. Currie, *Separating Judicial Power*, Law & Contemp. Probs., Summer 1998, at 7, 11-12; cf. Friedman, *supra* note 51, at 758 ("[A]lmost every device for disciplining judges or the judiciary has been suggested.").

important of these is Congress's control over the budget, no less effectual in subduing the third than the second branch.⁷² The gravity of this power in respect to the judiciary has grown over time, as the federal bench changed from a modest operation into today's massive bureaucracy, which oversees extensive facilities across the country and boasts a staff in excess of 30,000.⁷³ Judges must worry about funds to keep this machine running and, especially, to hire capable staff and supply them with adequate resources (which include computer and research support, courthouse security, storage facilities, press offices, and much more). With these additional needs has come increased sensitivity to how the judiciary's budget is dealt with in Congress.⁷⁴ Judicial administrators are acutely conscious of competing for resources with other agencies and departments of government,⁷⁵ and the judiciary has already witnessed how budget cuts can wreak havoc on its ability to manage the caseload.⁷⁶ Even putting aside the power of Congress to inflict *de facto* pay cuts on judges by declining to adjust their salaries for the cost of living,⁷⁷ an underfunded court is a distinctly unpleasant place to work.

Only rarely does Congress wield its budgetary authority in an openly threatening manner, as when Senator Dennis DeConcini announced that Congress would begin exercising more "vigorous oversight" of the courts because of unhappiness with things that were

⁷² See Bermant & Wheeler, *supra* note 4, at 848-50. Although the judicial budget makes its way to Congress via the executive Office of Management and Budget (OMB), the President is obliged by statute to forward the judiciary's request without change, and by long tradition executive branch officials do not even comment on the judicial proposal. See 28 U.S.C. § 605 (2002); 31 U.S.C. § 1105(b) (2002); John M. Slack, *Commentary, Funding the Federal Judiciary*, 82 W. Va. L. Rev. 1, 8 (1979). Indeed, the OMB provoked a firestorm of protest from the judiciary in 1993 when it packaged the judiciary's submission to Congress along with its own budget and budget-cutting proposals, which included an eighteen-percent cut in the judicial budget. Bermant & Wheeler, *supra* note 4, at 849.

⁷³ Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. Cal. L. Rev. 657, 663, 668 (1999).

⁷⁴ See Judicial Conference of the U.S., *Long Range Plan for the Federal Courts* 85-96 (1995) [hereinafter *Long Range Plan*] (listing recommendations for maintaining independence from "fiscal oversight" and for ensuring "adequate compensation"); Tacha, *supra* note 1, at 648; Bermant & Wheeler, *supra* note 4, at 847.

⁷⁵ See Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 St. Louis U. L.J. 19, 22-26 (1996) (describing, as former chairman of Judicial Conference's budget committee, various problems in protecting judicial budget from executive and congressional cost-cutting plans).

⁷⁶ See Tacha, *supra* note 1, at 650 ("[D]epending on the difficulties of any particular budgetary year, courts have had to suspend civil trials and civil juries, cease to pay appointed defense attorneys, and engage in a host of temporary budget-shifting mechanisms.").

⁷⁷ See ABA Report, *supra* note 2, pt. 6(B)(2)(d).

happening there.⁷⁸ This degree of bluntness is highly unusual, however, and Judge Richard Arnold (former chair of the Budget Committee of the Judicial Conference) insists that "[a] Member of Congress has never said, 'Okay, we are not going to appropriate money or we are going to cut your budget this year because we do not like certain decisions.' That does not happen, even though they may think it sometimes."⁷⁹ What does happen is subtler. The mere fact of oversight, and of Congress's unwillingness to treat the judiciary's budget as *pro forma* or to defer to the judges' requests without examination, has nourished an acute consciousness of the need to please—or, rather, of the need not to displease excessively. According to Judge Arnold, while no one tells him that funds will be cut unless such-and-such precedents are overruled, "[w]hat often transpires is a general debate over issues of substance. For example, we discuss which crimes should be prosecuted by the Federal Government or what sorts of procedures should be followed in habeas corpus cases. The Members are interested in our views on those subjects, and we oblige."⁸⁰ The fist inside even the silkiest congressional glove can hardly be missed, and it would take a very naive group of judges to ignore the potential dangers of excessive antagonism with Congress. As Judge John Walker remarked in testimony to the American Bar Association's Commission on Separation of Powers and Judicial Independence, "The necessary reliance by the judiciary on the political branches of government for its sustenance creates the potential for the weakening of the judiciary as an institution."⁸¹

Of almost equal importance to the budget is Congress's power to define the subject-matter jurisdiction of the federal courts. Scholars continue to debate the extent to which federal legislators can withhold jurisdiction conferred in Article III,⁸² but there is no need to rehearse their excruciatingly technical arguments, because even the most aggressive readings of Article III recognize that Congress has wide latitude to regulate the business of the federal courts. That allowed, most discussions of congressional regulation dwell on laws that deprive federal judges of power to hear a particular case or class of cases because

⁷⁸ See Bermant & Wheeler, *supra* note 4, at 859. DeConcini was worried less about particular substantive decisions than about the failure of the judicial branch properly to discipline its own members for unethical conduct. See *id.* at 859 n.117.

⁷⁹ Arnold, *supra* note 75, at 26.

⁸⁰ *Id.* at 26-27.

⁸¹ ABA Report, *supra* note 2, pt. 4(B)(1)(b) (quoting testimony of Judge John Walker at December 13, 1996 hearing).

⁸² For a discussion of the range of views on this question, see generally Richard H. Fallon, Jr., et al., Hart and Wechsler's *The Federal Courts and the Federal System* 358-87 (4th ed. 1996).

of its controversial nature, or what has come to be known as “jurisdiction stripping.”

Congress’s record in this domain is perplexing from a political perspective and uncertain from a legal one. Several efforts were made to curtail Supreme Court review of state court judgments during the Marshall era, but none was enacted.⁸³ Early in Reconstruction, a more aggressive Congress successfully divested the Supreme Court of appellate jurisdiction in habeas corpus cases, acting specifically to prevent the Court from deciding the then-pending case of *Ex parte McCardle*.⁸⁴ But while the Court appeared to submit to this flagrant battery by dismissing McCardle’s petition and agreeing that Congress could regulate its appellate jurisdiction, the Justices snuck in a technical loophole that left the case’s meaning equivocal.⁸⁵

Subsequent events have done little to clarify matters, mainly because further examples of similar legislation are hard to find. There is the Norris-LaGuardia Act,⁸⁶ which called a halt to federal judicial interference in labor organizing by narrowly restricting the courts’ authority to award injunctive relief in cases “involving or growing out of a labor dispute.”⁸⁷ However, every other effort to enact legislation depriving federal judges of jurisdiction for the purpose of undoing a controversial ruling has failed. According to one group of influential commentators, “[a]t least since the 1930s, no jurisdiction-stripping bill has become law.”⁸⁸ Failed bills represent a virtual (albeit incomplete) honor roll of controversial twentieth-century rulings and include proposals to deprive federal judges of power to review everything from the admissibility of confessions in state criminal cases⁸⁹ to the use of

⁸³ See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 895, 896-97 (1984).

⁸⁴ 74 U.S. (7 Wall.) 506 (1868); see 6 Charles Fairman, *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* 459-66 (1971) (describing congressional efforts to “put a stop to the *McCardle* case” that culminated in passage of bill to end appeals in habeas corpus).

⁸⁵ While dismissing the pending appeal because Congress had repealed the provisions of the Habeas Corpus Act of 1868 under which the appeal had been brought, the Court suggested that it still could review habeas cases brought before the Court under section 14 of the Judiciary Act of 1789. *Ex parte McCardle*, 74 U.S. at 515; see also Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (granting federal judges power to grant writs of habeas corpus). The Court soon acted upon this suggestion in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

⁸⁶ Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-105 (2002)).

⁸⁷ 29 U.S.C. §§ 101-105 (2002).

⁸⁸ Fallon et al., *supra* note 82, at 351.

⁸⁹ See S. 917, 90th Cong. (1968).

busing as a remedy in school desegregation cases,⁹⁰ the apportionment of state legislatures,⁹¹ laws regulating or restricting subversive activities,⁹² laws regulating abortion,⁹³ and laws permitting school prayer.⁹⁴

The chronic failure of these efforts to divest federal courts of jurisdiction easily could mislead one into believing that Congress cannot, as a practical matter, effectively control federal judges by regulating their jurisdiction. But this takes too narrow a view of jurisdiction stripping by confining it to retaliatory measures crudely aimed at specific rulings. Looked at more broadly, we see that Congress routinely dispossesses federal courts of authority to hear cases or award remedies because of concern for how the judges might rule, or in order to circumscribe their ability to interfere with congressional objectives. The discussion below canvasses a number of examples without, by any means, offering an exhaustive inventory. Yet it should suffice to convey the breadth and significance of congressional involvement in policing federal jurisdiction and its potential importance for a branch of government that hardly relishes having its authority curtailed.⁹⁵

Many familiar restrictions on federal subject-matter jurisdiction are motivated by federalism and the desire to keep federal judges from needlessly interfering with state courts. To this end we have, for example, amount-in-controversy requirements,⁹⁶ limitations on federal supplemental and removal jurisdiction,⁹⁷ and particular classes of cases that have been excluded from otherwise general statutory grants of jurisdiction.⁹⁸ These may seem like trivial restrictions, in part be-

⁹⁰ See Student Transportation Moratorium Act of 1972, H.R. 13916, 92d Cong. (1972); Equal Education Opportunities Act of 1972, H.R. 13915, 92d Cong. (1972); Student Transportation Moratorium Act of 1972, S. 3388, 92d Cong. (1972).

⁹¹ See H.R. 11926, 88th Cong. (1964).

⁹² See S. 2646, 85th Cong. (1957).

⁹³ See H.R. 867, 97th Cong. (1981).

⁹⁴ See H.R. 865, 97th Cong. (1981); H.R. 326, 97th Cong. (1981).

⁹⁵ This entirely natural posture is evident from the vociferous but predictable opposition of federal judges to any measure that threatens their stature. Indeed, the whole elaborate planning process within the Judicial Conference is mainly an effort to preserve the dignity and prominence of the federal courts from potential diminution by Congress. See Long Range Plan, *supra* note 74, at vii-viii, 1-9.

⁹⁶ See, e.g., 28 U.S.C. § 1332 (2002) (establishing \$75,000 amount-in-controversy requirement in diversity cases).

⁹⁷ See, e.g., § 1367(b) (restricting supplemental jurisdiction in diversity cases); § 1441(b) (restricting removal in diversity cases); § 1445 (making actions against railroads and shippers, workers' compensation cases, and actions under Violence Against Women Act nonremovable); § 1447(d) (making decision to remand removed case nonreviewable on appeal).

⁹⁸ In addition to the well-known limitations on federal diversity jurisdiction, § 1332, see Erwin Chemerinsky, *Federal Jurisdiction* 292-308 (3d ed. 1999) and, for example, § 1334(c) and (d), which limits jurisdiction in bankruptcy cases.

cause federal judges either support or do not mind them. But Congress also has enacted federalism-inspired regulations that bite more deeply. Examples include the Anti-Injunction Act,⁹⁹ the Tax Injunction Act,¹⁰⁰ and the Johnson Act of 1934,¹⁰¹ each of which limits the authority of federal judges to issue relief that Congress has determined would interfere unduly with the business of the states. Most obviously, concern for friction generated by federal review of state-court criminal convictions periodically has led Congress to decree statutory limitations on habeas corpus relief.¹⁰²

More striking than these familiar sorts of restrictions in the name of federalism are actions that Congress takes to limit the authority of Article III courts over purely federal questions. To this end, federal lawmakers have constituted a variety of non-Article III tribunals—so-called legislative or Article I courts—to adjudicate federal claims and interpret and apply federal law. Congress has never pursued a systematic strategy of using these courts, but it has over the years employed them in a variety of important contexts.¹⁰³ Familiar examples from the past include the old territorial courts, which heard claims in the federal territories prior to statehood, and the Court of Customs Appeals, which had a monopoly over disputes involving tariffs and trade duties.¹⁰⁴ More recent and still functioning examples of non-Article III courts include the Tax Court, the Court of Claims, the Court of International Trade, the courts of the District of Columbia,

⁹⁹ Anti-Injunction Act, ch. 646, 62 Stat. 968 (1948) (codified as amended at 28 U.S.C. § 2283) (forbidding use of injunctions to stay state-court proceedings subject to three narrow exceptions).

¹⁰⁰ Tax Injunction Act, ch. 646, 62 Stat. 932 (1948) (codified as amended at 28 U.S.C. § 1341) (limiting power of federal courts to restrain collection of state taxes where relief is available in state courts).

¹⁰¹ Johnson Act, ch. 283, 48 Stat. 775 (1934) (codified as amended at 28 U.S.C. § 1342) (limiting power of federal courts to enjoin state administrative agencies and ratemaking proceedings).

¹⁰² See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C.) (limiting successive applications for habeas corpus and periods for determining habeas corpus applications and motions). Even more than Congress, federal judges may themselves be responsible for limiting federal habeas corpus relief, particularly in recent decades. See *infra* notes 290-96 and accompanying text. Moreover, when Congress acts in this area it sometimes does little more than codify doctrines already created by the courts—though, as this most recent legislation illustrates, federal legislators typically extend these doctrines. See *infra* note 297 and accompanying text. We take this as evidence in support of our thesis in Part III that courts respond to political pressure by anticipating and avoiding potential difficulties through self-imposed constraints.

¹⁰³ For an excellent discussion of these and other specialized courts (some of which are Article III courts), see generally Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 *BYU L. Rev.* 377.

¹⁰⁴ See *id.* at 383 n.14, 389-91.

and bankruptcy courts.¹⁰⁵ Taken together, this is hardly an insignificant portion of federal business.

Creating an Article I court does not enable Congress to escape independent judicial scrutiny altogether. The Constitution requires that rulings of legislative courts be subject to at least minimal appellate review in an Article III tribunal (though the law respecting how much review has become Dickensian in its intricacy).¹⁰⁶ Still, effective review is limited, at best. Congress can, and typically does, require deference from the reviewing courts on both facts and law, leaving Article III judges with finite practical ability to control or oversee what these legislative courts do.

If Article I courts are not a more conspicuous feature of federal jurisdiction, this may be because Congress has found a simpler and more effective way to evade Article III review, one that does not require creating an entity that looks like or is called a "court," but that serves equally well to minimize the role of the third branch across a broad range of contemporary regulation. We are, of course, referring to the practice of delegating authority to executive agencies to interpret law and adjudicate disputes. There is, in truth, little or no difference between a legislative court and an executive agency with respect to the power to implement and apply law, unless it is that agencies often have even greater authority than Article I courts. For in addition to conducting formal adjudication, many agencies have substantial rulemaking and prosecutorial responsibilities, blending functions in a way that has sometimes nonplussed constitutional scholars.¹⁰⁷ We take no position on the validity or desirability of this practice. We merely note that, as a result, an immense proportion of federal law can be interpreted and applied by political bodies, subject only to the most limited sort of appellate review in an Article III tribunal.¹⁰⁸ We

¹⁰⁵ See *id.* at 383 nn.13-14, 384-88, 402-05.

¹⁰⁶ Having begun with the very reasonable, and reasonably coherent, decision in *Crowell v. Benson*, 285 U.S. 22 (1932), the Court has in recent years handed down a series of complicated and confusing opinions that are a delight for teachers of federal courts and a nightmare for everyone else. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (ruling that fraudulent conveyance actions cannot be relegated to non-Article III adjudicative bodies); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (allowing Commodity Futures Trading Commission to adjudicate some state law counterclaims); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (upholding form of binding arbitration with limited judicial review as method to resolve disputes among participants in congressional pesticide registration scheme); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (finding jurisdiction of bankruptcy court unconstitutional broad).

¹⁰⁷ For a full discussion of the problem, see Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 887-949 (5th ed. 2002).

¹⁰⁸ In some instances, such as prison reform litigation and immigration law, Congress has even found ways to impede substantially or deny reviewability. See *Illegal Immigra-*

find it noteworthy as well that, while these delegations may once have been defended on grounds of scientific or bureaucratic expertise, contemporary theory frankly acknowledges the political nature of the practice.¹⁰⁹

Finally, Congress has undertaken to manage the federal judiciary by regulating federal practice and procedure. That federal lawmakers have this power has never been in issue. Five days after passing the First Judiciary Act, Congress followed up by directing federal courts in each state to apply the same procedures in actions at law "as are now used or allowed in the supreme courts of the same [state]."¹¹⁰ Two-and-a-half years later, Congress opted for a different solution in equity. Because some states had not yet developed any substantial equity practice, Congress instructed federal judges to follow settled "rules and usages" of equity courts, subject, however, "to such regulations as the supreme court . . . shall think proper from time to time by rule to prescribe."¹¹¹

With changes unimportant for present purposes, this system remained in force for more than a century. Beginning in 1912, the American Bar Association, with vigorous support from Chief Justice Taft, launched a determined campaign to extend the Supreme Court's rulemaking authority to actions at law.¹¹² Political opposition from a variety of directions confounded these efforts until 1934, when the Rules Enabling Act was finally adopted.¹¹³ The Supreme Court approved its first set of rules (including one that merged law and equity) four years later, and for the next half century the federal judiciary was

tion Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-3546 (codified as amended in scattered sections of 8 U.S.C.) (limiting reviewability of removal of aliens); 18 U.S.C. § 3626(a)(2) (2002) (imposing special procedural requirements on injunctions regarding prison conditions).

¹⁰⁹ See, e.g., Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. Rev. 85, 91 (1988).

¹¹⁰ Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

¹¹¹ Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275.

¹¹² See Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 Mich. L. Rev. 1116, 1116-17, 1123-24 (1934). American Bar Association interest first had been stirred five years earlier by Roscoe Pound's famous speech on "The Causes of Uncertainty and Delay in the Administration of Justice." This prompted the formation of a committee to make appropriate recommendations for procedural reform. See Edgar Bronson Tolman, *Historical Beginnings of Procedural Reform Movement in This Country—Principles to Be Observed in Making Rules*, 22 A.B.A. J. 783, 784 (1936).

¹¹³ Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934). On opposition to the Act, see Charles E. Clark, *Handbook of the Law of Code Pleading* § 9, at 35 (2d ed. 1947). For a detailed recounting of the entire legislative history, see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982).

responsible for making and revising its own procedures with little congressional interference or involvement.¹¹⁴

All that changed in the early 1980s "when Congress unexpectedly began to flex its legislative muscle in the procedural rulemaking arena."¹¹⁵ Impatient with how certain problems were being handled by courts and by the Judicial Conference, Congress stepped in to impose its own solutions. Two developments in particular merit brief discussion. First, congressional dissatisfaction with criminal sentencing led to administratively formulated guidelines under the Sentencing Reform Act of 1984,¹¹⁶ together with a number of separately enacted, mandatory minimum sentences for particular offenses.¹¹⁷ The judicial reaction to these laws has been predictable: Judges almost uniformly abhor the guidelines and detest mandatory minimum sentences, viewing both as ill-conceived meddling by legislative interlopers.¹¹⁸ Recognizing the futility of urging repeal, the Judicial Conference's Long Range Plan for the Federal Courts (Long Range Plan) opted instead to make a more politic entreaty. While broadly hinting at the judiciary's dismay with congressional interference in sentencing,¹¹⁹ the Long Range Plan suggested only that federal judges "continue and strengthen efforts to express judicial concerns about sentencing policy" (though the Plan also implored Congress "not to prescribe

¹¹⁴ The Federal Rules of Evidence are an important exception, as political divisions within the bench and bar, together with other circumstances, drew Congress in, though the federal legislature ultimately made few changes of significance to the original draft approved by the Supreme Court. See 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5006 (1977).

¹¹⁵ Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 *Mercer L. Rev.* 733, 735 (1995) [hereinafter Mullenix, *Judicial Power*]; see also Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 *N.C. L. Rev.* 795, 798-800 (1991) (discussing "enhanced public participation and scrutiny . . . [in] judicial rule formation").

¹¹⁶ Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 28 U.S.C. §§ 991-998 (2002)).

¹¹⁷ See, e.g., *Anti-Drug Abuse Act of 1986*, Pub. L. No. 99-570, 100 Stat. 3207; *Federal Prison Population: Present and Future Trends*, Hearings Before the Subcomm. on Intellectual Prop. & Judicial Admin. of the House Comm. on the Judiciary, 103d Cong. 15 (1993).

¹¹⁸ See Molly Treadway Johnson & Scott A. Gilbert, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey 6* (1997) (finding that judges "strongly prefer a system in which judges are accorded more discretion than they are under the current guidelines"). According to Judge José Cabranes, that the sentencing guidelines leave trial courts with some discretion only makes matters worse, "produc[ing] a game of tug of war between the bureaucracy and the bench, as the Sentencing Commission struggles to incorporate or repudiate the exceptions articulated by individual judges or appellate courts." Judge José Cabranes, *Address at the University of Puerto Rico Law School* (Oct. 1993), in *Cabranes Rips Sentencing Rules*, *Legal Times*, Apr. 11, 1994, at 17.

¹¹⁹ See *Long Range Plan*, *supra* note 74, at 60-61.

mandatory minimum sentences” and guardedly asked for some discretion to be returned to the courts).¹²⁰

A second example of congressional interference in judicial procedure is the Civil Justice Reform Act (CJRA) of 1990,¹²¹ enacted by Congress to address “mounting public and professional concern with the federal courts’ congestion, delay, expense, and expansion.”¹²² This controversial law—in the words of one critic, “the most sweeping procedural rule reform since promulgation of the federal rules in 1938”¹²³—takes authority away from the Judicial Conference’s Civil Rules Advisory Committee and places it instead in the hands of ninety-four district-level committees acting pursuant to a statutorily prescribed case-management policy.¹²⁴ On a superficial level, this looks like just one more instance of policymaking devolution, consistent with a more general political trend that began around 1980.¹²⁵ Against the background of twentieth-century developments in procedure, however, the Act also represents a significant “redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch.”¹²⁶ On this question, then, the Long Range Plan speaks more forthrightly, noting that “[i]t is troubling . . . that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act.”¹²⁷ The judges beseeched Congress “at the conclusion of the period of experimentation and evaluation prescribed” by CJRA to allow the judiciary to resume “promoting nationally uniform rules of practice and procedure” through its own familiar processes.¹²⁸ Bowing to pressure from Congress, the Judicial Conference said it was willing to “enhance outside participation” in the process, but clearly the Conference regards its rulemaking authority as an important facet of judicial independence.¹²⁹ Articulating a sentiment

¹²⁰ *Id.*

¹²¹ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

¹²² Larry D. Kramer, Report of the Federal Courts Study Committee 3 (1990). The Civil Justice Reform Act of 1990, 23 U.S.C. §§ 471-482 (2002), grew directly out of the report issued by the Federal Courts Study Committee (FCSC), created by Congress in 1989 to investigate these problems and recommend reforms. See Kramer, *supra*, at 31.

¹²³ Mullenix, *Judicial Power*, *supra* note 115, at 737.

¹²⁴ 28 U.S.C. §§ 471-482 (2002).

¹²⁵ See Keith E. Whittington, *Dismantling the Modern State?: The Changing Structural Foundations of Federalism*, 25 *Hastings Const. L.Q.* 483, 505 (1998) (“Centralization has become a specific target for the public’s increasing skepticism about government.”).

¹²⁶ Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 *Minn. L. Rev.* 375, 379 (1992).

¹²⁷ Long Range Plan, *supra* note 74, at 58.

¹²⁸ *Id.* at 59.

¹²⁹ *Id.*; see also ABA Report, *supra* note 2, pt. 6(B)(2)(a).

widely shared among judges, Linda Mullenix explains: "A judiciary that cannot create its own procedural rules is not an independent judiciary. Moreover, a judiciary that constitutionally and statutorily is entitled to create its own procedural rules, but must perform that function under a constant cloud of congressional meddling and supercession, is truly a subservient, non-independent branch."¹³⁰

III

SIREN'S SONG: INSTITUTIONALIZED JUDICIAL SELF-RESTRAINT

Taken as a whole, the miscellaneous devices available to the political branches to obstruct the courts afford ample means to cow or even cripple the federal judiciary. Life tenure and salary protection would count for little on a bench whose mandates were ignored, whose budget had been cut to the point where daily administration was impossible, or whose jurisdiction or procedures left judges with little authority or flexibility. Of course, none of these statements even remotely describes the actual state of our federal judiciary: Presidents *can* ignore the courts' orders, but they seldom do so. Congress *can* manipulate the budget, the jurisdiction, and the procedures of the federal courts, and, as recounted above, federal legislators have occasionally done so. But legislative oversight remains sporadic and its range modest, and it would be fatuous to maintain that Congress has significantly degraded or repressed the federal judiciary. The most one can say is that the political branches have formidable means by which to humble the courts and *could* significantly debase the institution of the judiciary, not that they have done so.

Still, to say that Congress and the executive *can* stifle the federal courts is, in our view, to say quite a lot, particularly since the courts boast no comparable power to hit back.¹³¹ Politics is not a static business. The institutional match-ups devised by the Constitution pro-

¹³⁰ Mullenix, *Judicial Power*, *supra* note 115, at 734.

¹³¹ On this point, we think Alexander Hamilton had it exactly right in *The Federalist No. 78* when he observed that the Court would be "the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them." *The Federalist No. 78*, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). To quote his familiar language:

The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

mote a kind of perpetual tension in which the actions of each department or branch of the government are influenced by the actions or potential actions of other branches and departments. Any equilibrium achieved under these conditions is a dynamic one, in which slippages are possible and must be expected occasionally to occur. But if everything works properly—that is, if institutional actors respond rationally to the pressures they face—equilibrium may be restored just as quickly. If Congress and the executive have seldom exercised their power to impair the judiciary, in other words, this may be because the judiciary has acted in such a way that Congress and the executive have seldom felt the need to do so (and because, when they have felt this need, and acted upon it, the courts have responded in ways to avert a crisis).

This model for understanding judicial independence leads to a number of tentative predictions. First, especially because the federal courts were unlike any that had existed under colonial rule or the Articles of Confederation, we should expect a period of initial uncertainty in their relations with the other branches, possibly leading to some sort of crisis followed by a political settlement. Assuming the success of this initial settlement, we should then expect to observe reasonably prolonged periods of relative stability in relations between the judiciary and the other branches, interrupted from time to time by conflicts of varying degrees of duration and intensity; the source, number, and magnitude of these conflicts is itself unpredictable, turning on highly contingent matters of personnel and events. Finally, given the judiciary's political weakness relative to the other branches, we nevertheless should expect it generally to conduct its business in such a way as to minimize the number and severity of any showdowns, conserving its capital to secure a margin of safety that maintains independence in its daily affairs as a practical and political matter.

At a glance, the historical experience of the federal judiciary bears these predictions out. There was indeed considerable uncertainty about the proper role of federal judges during the early years of the Republic, and an overly politicized Federalist bench provoked a major crisis by 1800.¹³² Lawyers have tended to fix their attention on *Marbury v. Madison*,¹³³ celebrating it as some sort of triumph for judicial supremacy, when in fact *Marbury* was a relatively inconsequential

Id. at 522-23. If the Court seems more powerful than Hamilton here prophesies, this may be, as we suggest below, because of its careful husbanding of political capital and its attentiveness to signals from the political branches.

¹³² See Ellis, *supra* note 36, at 1-35; Dumas Malone, *Jefferson the President: First Term, 1801-1805*, at 110-56 (1970).

¹³³ 5 U.S. (1 Cranch) 137 (1803).

rear-guard action by a Court in full flight after a ruthless political offensive. Much more important at the time were the impeachments of Pickering and Chase and the Judiciary Act of 1802,¹³⁴ in which Congress made clear its determination to put the federal bench in its place by abolishing a number of newly created judgeships and firing the judges, by delaying a Supreme Court sitting for over a year, and by restoring the despised ordeal of circuit-riding.¹³⁵ The actual resolution of the crisis was reflected not in *Marbury*, which passed by with little fanfare,¹³⁶ but rather in the Court's meek submission to this congressional mugging in *Stuart v. Laird*¹³⁷ and in the cessation of open politicking by Federalist judges.¹³⁸ The resulting settlement, which left the Supreme Court much more deferential to Congress (though not to the states),¹³⁹ endured for many decades. And while inter-branch relations obviously have evolved since then, they have on the whole been relatively stable, subject as predicted to periodic, brief crises (of which 1857 and 1937 are the most famous, with another one possibly brewing right now).

Documenting these claims obviously requires a much more detailed, nuanced account of the history. We believe that such an account would bear out our hypotheses, but that project is beyond the scope of this Article. We would like here to focus instead on our third prediction: that the judiciary will conduct its business in ways designed to stave off political confrontations. What is especially interesting in this regard is the manner in which it is accomplished. A judiciary staffed by hundreds of judges, each with life tenure and an irreducible salary, cannot trust its individual members always to act discreetly—cannot, that is, count on them all to avoid trouble by exercising Alexander Bickel's famous "passive virtues."¹⁴⁰ Safety requires

¹³⁴ Judiciary Act of 1802, ch. 31, 2 Stat. 156.

¹³⁵ Ellis, *supra* note 36, at 36-52; 2 George Lee Haskins & Herbert A. Johnson, *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* 151-63 (Paul A. Freund ed., 1981).

¹³⁶ Ellis, *supra* note 36, at 65-67.

¹³⁷ 5 U.S. (1 Cranch) 299 (1803); see Ellis, *supra* note 36, at 53-68; Dean Alfange, Jr., *Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom, 1993 Sup. Ct. Rev. 329, 362-65 (describing Court's decision in *Laird* as "a fully justified fear of the political consequences of doing otherwise").

¹³⁸ See *supra* notes 40-43 and accompanying text.

¹³⁹ The results, we believe, speak for themselves: The Court did not strike down another federal law for more than fifty years (until *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)); rulings against state law, in the meantime, became, if not commonplace, certainly routine. See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* *passim* (1985).

¹⁴⁰ Bickel, *supra* note 31, at 111-98.

institutional and doctrinal barriers that reduce the need for judges to attend to such matters in each case.

We divide the judiciary's self-policing devices into two main categories. On the one hand are mechanisms of internal discipline that operate to correct individual judges when they ignore or misapply established rules and practices; these are discussed in Part III.A. On the other, discussed in Part III.B, are principles of jurisdiction or justiciability that operate to remove altogether whole categories of cases from federal judicial cognizance. Rather than merely ensuring that law is applied properly, these principles withdraw potentially controversial issues from direction by the federal courts, leaving them to be addressed in other fora.

A. Internal Discipline

With respect to devices pertaining to internal discipline, we have already seen how little can be done from outside the judiciary to curb or repress individual judges who misuse their authority.¹⁴¹ This is particularly true of renegade behavior that consists of controversial rulings rather than illegal or unethical conduct, though the elaborate process and limited office of impeachment makes even ethical transgressions hard to reach unless they are rather extreme. In such circumstances, a judiciary fearful of provoking a political backlash and concerned about preserving its institutional autonomy, not to mention its reputation, must find ways to control its own members.¹⁴²

Two principal devices serve this purpose for the federal judiciary. First and foremost is the process of appellate review. Appeals reduce the risk posed by wayward judges by ensuring that multiple judicial voices are heard before any particular judgment becomes final. As Barry Friedman notes, the federal system provides an appeal as of right to the court of appeals, thus ensuring that at least four judges will consider any objectionable decision.¹⁴³ But that is not all, he adds, for:

[T]here are en banc hearings in divisive or difficult cases, and, for truly important cases, the Supreme Court is always available. The fact of the matter is that many, many judges might review a case. The more controversial the decision, the likelier it is that a great amount of judicial review will follow. This collective judgment is very valuable. It may be divided at times, and those times may

¹⁴¹ See *supra* Part II.

¹⁴² See Burbank, *supra* note 15, at 342.

¹⁴³ Friedman, *supra* note 51, at 763.

cause controversy, but by the time the appellate process is complete, many judges will have spoken.¹⁴⁴

The effectiveness of appellate review is not simply a matter of giving more than one judge an opportunity to rule, though this is undoubtedly important. As Lewis Kornhauser and Lawrence Sager have convincingly argued, the development of an appellate hierarchy with collegial courts at the higher levels and stringent rules of vertical stare decisis operates structurally to ensure that no individual judge can, by his or her actions alone, inflict too much damage on the judiciary by making aberrant or overly ambitious decisions.¹⁴⁵ Beyond even this, horizontal stare decisis among the district and circuit courts is relatively weak, while the Supreme Court seldom hears an issue that has not had time to percolate in the lower courts, and it is generally reluctant to ignore what a strong majority of those courts has decided. As a result, even within this hierarchical structure, the process of establishing settled precedents remains decentralized, enhancing the amount and quality of collective deliberation underlying the judiciary's interpretations of law.¹⁴⁶

In addition to appellate review, the federal judiciary exercises control over its members through internal disciplinary procedures. Prior to mid-century, circuit judges informally exercised loose disciplinary control over the district courts.¹⁴⁷ Congress sought to regularize

¹⁴⁴ *Id.*

¹⁴⁵ Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *Yale L.J.* 82, 115-17 (1986).

¹⁴⁶ The allocation of authority between judge and jury and between trial and appellate courts also has obvious implications for our ability to police deviant outcomes. Whenever judges give deference to juries, or appellate courts give deference to trial courts, we increase the risk that controversial rulings will be left standing. At the same time, numerous other considerations must be taken into account in determining who should decide what: considerations of efficiency and economy, of relative expertise, of political commitments to a role for lay deliberation, and of making the trial the main focus of adjudication. Such questions present modern versions of the monumental battles fought between Hamiltonians and Jeffersonians in the early nineteenth century, and between Democrats and Whigs a few decades later, over such matters as whether to permit lay judges, whether to preserve the jury's role in finding law, when to allow judges to overturn a jury verdict and award a new trial, and whether even to permit the publication of written judicial opinions. See John Reid, *Controlling the Law: Jeremiah Smith, William Plumer, and the Politics of Law in the Early Republic: New Hampshire, 1791-1816* (Nov. 2001) (unpublished manuscript, on file with Professor Larry Kramer). These struggles between trained lawyers striving to professionalize the legal process and democratic leaders who fear surrendering control of law to professional elites obviously affect the question of independence. We nevertheless defer consideration of this interesting subject because its details are unimportant for our present purpose—which is simply to identify and underscore the place of appellate review in the analysis. Insofar as other decisions about how to structure litigation also bear on the relative independence or accountability of judges, these too should be kept in mind.

¹⁴⁷ *Bermant & Wheeler*, *supra* note 4, at 841.

their authority in 1939, enacting a statute that established each court of appeals as a judicial council with a mandate to ensure that "the work of the district courts shall be effectively and expeditiously transacted."¹⁴⁸ This statute accomplished little, however, partly because of continuing reservations about its constitutionality.¹⁴⁹ By the mid-1970s, mounting evidence of problems in the judiciary, together with support from the Judicial Conference that helped overcome lingering constitutional doubts, led Congress to consider revising and strengthening the disciplinary process. It took six years to hammer out a compromise, but in 1980, with the Judicial Conference's backing, Congress finally passed the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.¹⁵⁰

The Act expands and formalizes the judiciary's disciplinary process. It authorizes anyone who believes that any federal judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability" to complain in writing through the clerk of the court of appeals for the circuit in which that judge sits.¹⁵¹ The Act specifies how the chief judge and circuit judicial council should respond to complaints, and it empowers the council to impose remedies.¹⁵² These include certifying the judge as disabled, formally requesting his or her retirement, imposing a freeze on the assignment of new cases, and delivering a private or public reprimand; the council may not order the removal of a sitting district or circuit court judge.¹⁵³

Both the success and the constitutionality of the Judicial Conduct and Disability Act remain debatable. Perceptions in Congress that the courts were not taking their responsibilities under the Act seriously simmered throughout the 1980s, kept warm by the judiciary's tardiness in enacting rules to implement it.¹⁵⁴ Goaded by pressure from Congress, the Judicial Conference eventually proposed rules,

¹⁴⁸ An Act to Provide for the Administration of the United States Courts, and for Other Purposes, ch. 501, § 306, 53 Stat. 1223, 1224 (1939).

¹⁴⁹ Cf., e.g., Sam Ervin, *Separation of Powers: Judicial Independence*, Law & Contemp. Probs., Winter 1970, at 108, 121-27 (doubting constitutionality of similar 1969 bill).

¹⁵⁰ Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended in scattered sections of 28 U.S.C.). A useful account of the background and history of this legislation is found in Burbank, *supra* note 113, at 291-308.

¹⁵¹ 28 U.S.C. § 372(c)(1) (2002).

¹⁵² *Id.* § 372(c)(3)-(17). For a brief description, see Stephen B. Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, *Judicature*, June-July 1987, at 13, 15 (1987).

¹⁵³ See § 372(c)(6).

¹⁵⁴ See Burbank, *supra* note 152, at 13-14.

and courts began making more active use of their disciplinary authority.¹⁵⁵ Congress nevertheless appointed a commission in 1990 to investigate whether the Act was working and to recommend changes if needed.¹⁵⁶ The Report of the National Commission on Judicial Discipline and Removal, issued in 1993, included numerous recommendations, but it reaffirmed the basic structure for judicial discipline and strongly supported its constitutionality.¹⁵⁷ "[T]he existing federal system," said the Commission, "is working reasonably well and is capable of improvement."¹⁵⁸ Although ninety-five percent of complaints made under the Act had been dismissed,¹⁵⁹ the Commission found that "nearly all" of these dismissals were "justified and appropriate," and also that many complaints "were resolved by corrective action taken on the part of the judge complained against."¹⁶⁰ Indeed, "the very existence of the Act has facilitated informal resolutions of misconduct or disability problems by chief judges and circuit councils, without need for a formal complaint under the Act."¹⁶¹ The Supreme Court has yet to rule on the constitutional question, but several lower courts have already upheld the legislation.¹⁶²

A number of other devices that are available to the federal judiciary in disciplining its members should be mentioned, if only briefly. Appellate courts sometimes use their opinions not only to correct legal errors but also to reprimand lower court judges for controversial actions or comments.¹⁶³ They may also reassign cases to a different judge on remand.¹⁶⁴ Extraordinary writs like mandamus and prohibi-

¹⁵⁵ See *id.* at 13-23.

¹⁵⁶ See National Commission on Judicial Discipline and Removal Act, Pub. L. No. 101-650, §§ 409-410, 104 Stat. 5124, 5124-25 (1990).

¹⁵⁷ Nat'l Comm'n on Judicial Discipline and Removal, Report of the National Commission on Judicial Discipline and Removal 14-17, 147-55 (1993).

¹⁵⁸ *Id.* at 124.

¹⁵⁹ A study done by Jeffrey Barr and Thomas Willging for the Commission found that of 2405 complaints filed between 1980 and 1991, corrective action was taken in only seventy-three, including only five formal reprimands. Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 52 tbl.9 (1993).

¹⁶⁰ Executive Summary to the Report of the National Commission on Judicial Discipline and Removal 9 (1993).

¹⁶¹ *Id.*

¹⁶² See *In re Certain Complaints*, 783 F.2d 1488, 1502-15 (11th Cir. 1986); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders*, 83 F. Supp. 2d 135, 151-56 (D.D.C. 1999), *aff'd in part and vacated in part*, 264 F.3d 52 (D.C. Cir. 2001); *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371, 1378-85 (D.D.C. 1984), *aff'd in part and vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985).

¹⁶³ See *Bermant & Wheeler*, *supra* note 4, at 844 & n.40 (citing cases).

¹⁶⁴ See, e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-70 (1988) (granting new trial when original judge had fiduciary interest in litigation); *Dyas v. Lockhart*, 705 F.2d 993, 997-98 (8th Cir. 1983) (concluding that remand to another district

tion can be used to correct particularly flagrant misbehavior by lower court judges.¹⁶⁵ Finally, the chief judge in a circuit or district has authority to control the assignment of cases, though Norma Holloway Johnson's recent difficulties in the District of Columbia may put a damper on further use of this power.¹⁶⁶

B. Limitations on Jurisdiction and Justiciability

Beyond these sorts of administrative tools, the federal judiciary has also devised an assortment of doctrinal principles that reduce the likelihood of politically controversial judicial entanglement in broad categories of cases. The cases and issues excluded from federal jurisdiction by these means are, as we shall see, an eclectic lot. No one ever sat down to think comprehensively through precisely how or where to introduce doctrines of self-restraint, and rules have emerged haphazardly over time: sometimes in response to particular controversies or crises, but just as often through the exercise of ordinary prudence by judges looking out for the interests of other institutions (and in this way looking out for the interests of their own). For similar reasons, the doctrines do not all take the same form: some exclude whole cases, while others merely limit the timing or scope of judicial involvement. What they share in common is the aim and effect of curbing judicial responsibility in potentially sensitive areas of law and policy. Taken as a whole, the extent of this judicial abstinence turns out to be impressive indeed.

For ease of exposition, we have divided the relevant principles into three categories: (1) principles of justiciability, (2) principles of federalism, and (3) rules of constitutional interpretation. We do not purport to offer an exhaustive inventory; that would require a short treatise at the very least. We have instead sought simply to chart the major lines of institutionalized judicial self-restraint, which should suffice to make our point. Thus prompted, most lawyers already will be familiar with the additional details of the particular doctrines.

Before turning to these doctrines, we pause briefly to mention a class of legal rules that may reflect concern for judicial overreaching but that also serve other purposes and, in any event, can be understood without elaborate discussion. We refer to doctrines that impose

judge is appropriate); *United States v. Robin*, 553 F.2d 8, 9-10 (2d Cir. 1977) (holding that "there may be unusual circumstances where . . . assignment to a different judge" is appropriate).

¹⁶⁵ See Robert L. Stern et al., *Supreme Court Practice* 493-501 (7th ed. 1993).

¹⁶⁶ See *Inquiry Clears Chief D.C. Judge of Steering Cases of Clinton Friends*, *Com. Appeal* (Memphis), Feb. 27, 2001, at A6, 2001 WL 9428019; *Judges Scrap Rule Used in Hubbell, Trie Cases*, *Com. Appeal* (Memphis), Feb. 3, 2000, at A4, 2000 WL 4438380.

various sorts of limitations on the remedial powers of federal courts. Federal judges have created, for example, numerous devices to avoid addressing issues on procedural grounds. These include default and waiver rules, harmless error rules, the various exhaustion requirements that appear in regulatory schemes, and, in the Supreme Court, the independent-and-adequate-state-ground doctrine. In an earlier era, the Supreme Court came up with the idea of denying appeals for "want of a substantial federal question," a device the Justices used to give themselves discretion over their supposedly mandatory appellate jurisdiction.¹⁶⁷ The need for this device disappeared in 1988 when—at the behest of the Justices—Congress expanded the Court's certiorari jurisdiction to encompass virtually all review.¹⁶⁸

Federal judges also have restricted their remedial authority in more substantive ways. The availability of relief against the government, for example, is drastically limited by judicially formulated rules of official immunity: Judges, legislators, and prosecutors are absolutely immune, while other executive officials are entitled to a qualified immunity that affords them broad protection from adverse judgments in a federal court.¹⁶⁹ In addition, the Supreme Court has curtailed dramatically its power to imply remedies over the past two decades, and, in sharp contrast to prior practice, the Court now limits parties strictly to whatever remedies Congress explicitly creates by statute.¹⁷⁰ This change, in particular, significantly curtailed the federal courts' power and authority.¹⁷¹

Finally, the well-documented move toward "managerial judging" is mostly a means to encourage private settlement of disputes.¹⁷² Private settlements, in turn, make it possible for courts to avoid potentially controversial legal rulings, particularly at the appellate level.¹⁷³ Even when litigation on the merits occurs, federal courts work strenuously to encourage the parties to reach a settlement at the all-impor-

¹⁶⁷ Cf. Stern et al., *supra* note 165, at 210-11 (discussing Court's subjection of large number of mandatory appeals to discretionary considerations).

¹⁶⁸ See *id.* at 39-40, 88-91.

¹⁶⁹ See Sheldon H. Nahmod et al., *Constitutional Torts* 225-88 (1995).

¹⁷⁰ See Chemerinsky, *supra* note 98, at 376-84.

¹⁷¹ See Tamar Frankel, *Implied Rights of Action*, 67 *Va. L. Rev.* 553, 559-70 (1981); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 *Harv. L. Rev.* 1193, 1202-19 (1982).

¹⁷² See Judith Resnik, *Managerial Judging*, 96 *Harv. L. Rev.* 376 (1982).

¹⁷³ See Long Range Plan, *supra* note 74, at 67-70 ("There should be further development of appellate adjudicative programs . . . designed to dispose of appeals through settlement . . ."); Anthony Partridge & Allan Lind, *A Reevaluation of the Civil Appeals Management Plan*, in *Managing Appeals in Federal Courts* 89, 91 (Fed. Judicial Ctr. ed., 1988) (citing results of study showing that "program does result in the settlement or withdrawal" of significant number of appeals).

tant remedial stage. This can be especially important in avoiding or defusing potentially acrimonious public disputes in structural-reform and other complex litigation.

1. Principles of Justiciability

In 1798, the Federalist-controlled Congress set out to annihilate its Republican opposition by, among other things, enacting the Alien and Sedition Acts.¹⁷⁴ Republicans denounced these laws as unconstitutional in resolutions promulgated through the Virginia and Kentucky legislatures, which they controlled.¹⁷⁵ Their efforts, in turn, were promptly denounced by Federalist-dominated assemblies in ten other states.¹⁷⁶ State legislatures "are not the proper tribunals to determine the constitutionality of the laws of the general government," these legislatures replied, insisting that this duty "is properly and exclusively confided to the judicial department."¹⁷⁷ Not so, protested the Virginians, and a famous report authored by James Madison declared: We cannot depend on the judiciary because, for one reason, "there may be instances of usurped power, which the forms of the constitution would never draw within the controul of the judicial department."¹⁷⁸

Many readers today find this part of Madison's rejoinder puzzling or assume that he must have been speaking disingenuously. Yet the argument had considerable weight at the time, if for no other reason than that the procedural rules of the eighteenth century made many lawsuits hard to bring. Between the need to fit one's case into one of the forms of action, limitations on joinder of parties and claims, the

¹⁷⁴ An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798); An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798); see Manning J. Dauer, *The Adams Federalists* 198-205 (1953); Stephen G. Kurtz, *The Presidency of John Adams* 308-13 (1957).

¹⁷⁵ See Adrienne Koch, *Jefferson and Madison* 184-87 (1950).

¹⁷⁶ See Stanley Elkins & Eric McKittrick, *The Age of Federalism* 726 (1993).

¹⁷⁷ The quotes in text are from the reply approved by the state of New Hampshire on June 14, 1799. 4 Jonathan Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787. Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates's Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution* 538-39 (photo. reprint 1987) (Ayer Company, Publishers, Inc., 2d ed. 1836). For the replies of six other states, see *id.* at 532-39.

¹⁷⁸ Report on the Alien and Sedition Acts (Jan. 7, 1800), in James Madison 608, 613 (Jack N. Rakove ed., 1999) [hereinafter *Madison Report*]. This was consistent with Madison's position at the Philadelphia Convention. See Notes of James Madison (Aug. 27, 1787), in James Madison, *Notes of Debates in the Federal Convention of 1787*, at 535, 538 (indexed ed. 1984) (proposing limitation on jurisdiction of Court to cases of "Judiciary Nature," rather than "generally to cases arising under the Constitution").

division of law and equity, restrictive rules of personal jurisdiction, and a variety of other obstacles, there were indeed many disputes that never assumed a form suitable for litigation.¹⁷⁹ Over time, this changed. The forms of action were replaced by code and then notice pleading; many new causes of action were recognized; law and equity were merged and the rules of joinder were liberalized (including the expansion of class actions); the requirements for personal jurisdiction and service of process were eased; and so forth.¹⁸⁰ Suddenly, a much larger portion of real-world behavior could be fashioned into a viable lawsuit. In the meantime, the development of the regulatory state vastly expanded the amount of activity that is either an object or a subject of government regulation, again augmenting potential sources of litigation.

The federal judiciary has responded to these changed circumstances by inventing a whole series of doctrinal constraints that significantly reduce the scope of its potential authority. Taken together, these require that cases assume a certain form and achieve a degree of particularity and focus before they can become proper subjects for adjudication. Certainly the range of justiciable claims is larger today than it was in Madison's time. As a result of these doctrines, though, it is also smaller than it might otherwise be. From a technical standpoint, the Supreme Court has grounded its doctrinal innovations in the language of Article III, specifically the words "cases" and "controversies" in the provisions conferring federal jurisdiction.¹⁸¹ Hence, these limitations on justiciability are sometimes referred to as the "case or controversy requirement." But no one seriously believes that the Framers chose those words with anything like the Supreme Court's doctrinal framework in mind or that the Court's justiciability rulings are anything other than a judicially invented gloss on the Constitution.

Certain aspects of the case or controversy requirement are quite old and also quite explicit in steering the bench away from political controversy. Take the prohibition on advisory opinions, which one leading commentator calls "the oldest and most consistent thread in the federal law of justiciability."¹⁸² In July 1793, Secretary of State Thomas Jefferson wrote to the Justices of the Supreme Court on behalf of President Washington, requesting advice on a number of matters pertaining to America's obligations under the treaty of alliance

¹⁷⁹ See generally Fleming James, Jr. et al., *Civil Procedure* 12-23 (5th ed. 2001); Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 267-91 (1987).

¹⁸⁰ See generally Jack H. Friedenthal et al., *Civil Procedure* 244-49 (3d ed. 1999).

¹⁸¹ See *infra* notes 215-23 and accompanying text.

¹⁸² Charles Alan Wright, *Law of Federal Courts* 65 (5th ed. 1994).

with France and to her legal options were she to remain neutral in the war between France and England.¹⁸³ The President and his cabinet had no reason to doubt that the Court would respond. Judges had offered advice on legal matters throughout the eighteenth century, both in England and in the colonies, and courts in the United States had continued the practice after the Revolution.¹⁸⁴ Nor had judges forsaken their advisory role upon the adoption of the Constitution, performing a variety of extrajudicial tasks for and during the Washington Administration.¹⁸⁵ "The appropriateness of judicial advice," writes the leading historian of the question, "was a matter of established custom."¹⁸⁶ But the Court did refuse to answer Washington's request, explaining in a letter that separation of powers, together with text that seemed to authorize the President to call for opinions from the heads of executive departments only, "are considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to."¹⁸⁷

Against the background of contemporary practice, it is hard not to view the Jay Court's explanation for declining to opine with skepticism. Against the background of contemporary politics, however, the matter of neutrality was fraught with meaning. It symbolized how the United States would respond to the French Revolution, and few issues have matched the French Revolution as a divisive force in American politics. As Lance Banning once remarked, the bitterness of the split aroused by the revolution in France "has been exceeded only once in American history, and that resulted in a civil war."¹⁸⁸ Even George Washington's seemingly impregnable reputation could not withstand such passions, and the President's decision to steer America on a neutral course provoked the first open attacks on his previously untouchable character and judgment.¹⁸⁹

¹⁸³ See Letter from Thomas Jefferson to the Justices of the Supreme Court (July 18, 1793), in 26 *The Papers of Thomas Jefferson*, 11 May to 31 August 1793, at 520, 520 (John Catanzariti ed., 1995). The actual questions, twenty-nine in all, were sent to the Court separately the day after Jefferson's letter. 33 *The Writings of George Washington*, July 1, 1793-October 9, 1794, at 15-19 (John C. Fitzpatrick ed., 1940).

¹⁸⁴ See Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* 10-56 (1997).

¹⁸⁵ See *id.* at 77-112; Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 *Sup. Ct. Rev.* 123.

¹⁸⁶ Jay, *supra* note 184, at 76.

¹⁸⁷ Letter from John Jay and the Associate Justices of the Supreme Court to George Washington (Aug. 8, 1793), in 15 *The Papers of Alexander Hamilton: June 1793-January 1794*, at 110, 110 n.1 (Harold C. Syrett ed., 1969).

¹⁸⁸ Lance Banning, *The Jeffersonian Persuasion* 209 (1978).

¹⁸⁹ See James Roger Sharp, *American Politics in the Early Republic* 81-82 (1993).

John Jay and his brethren were not stupid, and they had no desire to be drawn into this fray. The mere announcement that their opinion had been sought touched off negative commentary in Republican newspapers, which added to the furor already generated by the willingness of a federal circuit court to try Gideon Henfield for privateering on behalf of France¹⁹⁰ (not to mention the still-recent ruling in *Chisholm v. Georgia* that private citizens could sue states in federal court).¹⁹¹ The Justices were seasoned politicians, acutely conscious of the political mood in the country. Plus, they had an agenda of their own, hoping to persuade Congress to eliminate the burdensome circuit-riding system that made life on the Supreme Court such a misery.¹⁹² Recognizing, as John Jay wrote to Rufus King in December 1793, that "[t]he federal Courts have Enemies in all who fear their Influence on State Objects,"¹⁹³ the Justices were not about to squander political capital unnecessarily. So they refused to answer. Their refusal was not purely political, of course. Legitimate arguments pertaining to separation of powers were available, and offered, for adopting a position against advisory opinions.¹⁹⁴ But there is little doubt that the charged political atmosphere had much to do with the decision of Chief Justice Jay and his brethren to steer clear of this particular controversy.

The precedent thus established has, with remarkably few exceptions,¹⁹⁵ guided federal courts ever since. For more than two centuries it has been established that federal judges will not render an opinion or decide a case unless there is an actual dispute between adverse litigants before the court.¹⁹⁶ So accustomed have we grown to this condi-

¹⁹⁰ See Jay, *supra* note 184, at 160. Henfield was acquitted by a jury, which scarcely relieved the intense anxiety of Republicans concerned by the willingness of federal judges to make common law crimes a basis for federal prosecutions. Harry Ammon, *The Genet Mission* 70-71 (1973).

¹⁹¹ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), had been decided the previous February, provoking censure and criticisms that were still reverberating in July. Jay, *supra* note 184, at 162-63.

¹⁹² There is an excellent discussion of the full political context of the Justices' decision in Jay, *supra* note 184, at 149-70.

¹⁹³ Letter from John Jay to Rufus King (Dec. 22, 1793), in 2 *The Documentary History of the Supreme Court of the United States, 1789-1800: The Justices on Circuit 1790-1794*, at 434, 434 (Maeva Marcus ed., 1988).

¹⁹⁴ Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 *Geo. L.J.* 473, 477-91 (1998) (reviewing Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (1997)).

¹⁹⁵ Examples are listed in Fallon et al., *supra* note 82, at 95-96.

¹⁹⁶ See Felix Frankfurter, *A Note on Advisory Opinions*, 37 *Harv. L. Rev.* 1002, 1005-06 (1924). The practice is otherwise in many of the states, which authorize their courts to provide opinions about the constitutionality of pending legislation or on constitutional questions referred to them. See Chemerinsky, *supra* note 98, at 48-49 & n.1.

tion that we have ceased to appreciate its profound significance. Imagine how different things might have looked had federal courts maintained the tradition of rendering advice, thus putting the judiciary's credibility and reputation at risk in every important political or constitutional controversy. Instead, the Court has restricted its involvement to a much narrower set of circumstances, avoiding many controversies altogether while addressing others in more particularized, and so less contentious, forms.

Over time, the Court has refined and extended the rule against advisory opinions in ways the Justices deemed necessary to preserve its essence. In the early years of the Republic, and even after the Jay Court had declared against advisory opinions, federal judges happily entertained lawsuits that had been contrived by the parties.¹⁹⁷ But this attitude changed, as the Supreme Court became increasingly uncomfortable with actions that were feigned for the sole purpose of obtaining a judicial opinion.¹⁹⁸ In *United States v. Johnson*,¹⁹⁹ the Court ruled explicitly that a suit brought by the plaintiff at the request of a defendant (who had also financed and directed the litigation) must be dismissed. An "honest and actual antagonistic assertion of rights," the Court held, is "a safeguard essential to the integrity of the judicial process."²⁰⁰ Some uncertainty remains as to the precise line between an illegitimate contrived case and a legitimate test one, but it generally is accepted today that feigned litigation is nonjusticiable.²⁰¹

For similar reasons, the Court has held that litigants must have genuinely adverse interests and that a judgment of the court one way or the other must have some effect on the parties. With respect to the former requirement, for example, the Court in *Muskrat v. United*

¹⁹⁷ See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (adjudicating contrived case to decide constitutionality of state law); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (hearing contrived case challenging carriage law's constitutionality); see also 1 Charles Warren, *The Supreme Court in United States History: 1789-1835*, at 146-47, 392-95 (rev. ed. 1926) (discussing contrived nature of *Hylton* and *Fletcher*); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 612 ("[C]ontrived suits were reasonably common in this period, and appear to have raised no red flags.").

¹⁹⁸ See, e.g., *Chi. & Grant Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) ("It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."); *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850) (dismissing action docketed by consent to get before Supreme Court as "in contempt of the court, and highly reprehensible").

¹⁹⁹ 319 U.S. 302 (1943).

²⁰⁰ *Id.* at 303-05 (quoting *Wellman*, 143 U.S. at 345).

²⁰¹ See *Chemerinsky*, *supra* note 98, at 50; cf. *Evers v. Dwyer*, 358 U.S. 202 (1958) (allowing suit to challenge segregation on buses although plaintiff rode bus on one occasion in order to institute litigation).

*States*²⁰² refused to entertain suits brought by Native Americans to determine the constitutionality of a statutory allotment of land. Although these actions were authorized specifically by statute, the Court found that the plaintiffs' interests were not adverse to the government's and that Congress had adopted the statute simply to enable the federal courts to issue an advisory opinion on the constitutionality of its land policy.²⁰³

The requirement that a ruling of the court have some actual effect on the parties has manifested itself in a variety of settings. Judicial rulings must be final, at least with respect to the controversy before the court, and thus not subject either to further review or to being disregarded by executive officials.²⁰⁴ Congress may revise the law, but it may not reverse a particular judgment rendered.²⁰⁵ Most important for present purposes, a controversy between adverse parties must continue to exist at every stage of the proceedings. If events subsequent to the filing of a case or an appeal resolve the dispute, the action must be dismissed as moot.²⁰⁶ Despite exceptions for special situations,²⁰⁷ the mootness doctrine operates as a significant restraint on what courts do, particularly in today's world, where settlements are common at every stage in litigation.

As suggested above, much of the law of justiciability was generated in response to other legal changes occurring in the nineteenth and twentieth centuries. In addition to liberalizing rules of procedure, the law witnessed an enormous substantive transformation during this period, particularly in the century just ended. The advent of the regulatory state brought legislation creating countless new interests that had not been protected at common law, interests that invariably were

²⁰² 219 U.S. 346 (1911).

²⁰³ *Id.* at 351, 360-62.

²⁰⁴ See *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111-13 (1948) ("Judgments within the powers vested in courts . . . may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792) (holding that legislature and executive officers are not authorized to review Court decisions).

²⁰⁵ See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding act requiring federal courts to reopen final judgments unconstitutional).

²⁰⁶ See *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (pronouncing challenge to school affirmative action policy moot since petitioner would complete school regardless of decision); cf. *Liner v. Jafco, Inc.*, 375 U.S. 301, 305-07 (1964) (ruling case was not moot because petitioners had substantial stake in outcome); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1383-86 (1973). For a discussion of whether the mootness doctrine is a matter of the courts' power under Article III or merely a question of policy, see the exchange between Chief Justice Rehnquist and Justice Scalia in *Honig v. Doe*, 484 U.S. 305, 329-42 (1988) (Rehnquist, C.J., concurring, Scalia, J. dissenting).

²⁰⁷ These are surveyed in Chemerinsky, *supra* note 98, at 129-43.

shared by large numbers of people. At the same time, the Supreme Court recognized a myriad of new constitutional rights, also widely held, that likewise did not resemble traditional forms of liberty or property. These changes forced courts to address, in the words of one leading group of commentators, "who, if anyone, should be able to sue to ensure governmental compliance with statutory and constitutional provisions intended to protect broadly shared interests of large numbers of citizens."²⁰⁸ Taken for all they were worth, the new procedural and substantive regimes might have opened the doors of the courthouse to practically anyone unhappy with almost anything the government did. Instead, the Supreme Court circumscribed access to the judiciary by fabricating the doctrines of standing and ripeness.

There was no doctrine of standing prior to the middle of the twentieth century. The word "standing" made scattered appearances, but it was unattached to any analytical framework because no such framework was needed.²⁰⁹ Litigants invariably based their claims on legal interests of a type long recognized at common law. Even in suits raising constitutional challenges, plaintiffs typically complained about official action that caused them some form of traditional physical or economic harm—a trespass or a conversion or something like that.²¹⁰

Not surprisingly, the Supreme Court tried to import this traditional private law model in its early encounters with rights conferred by the new administrative state. In *Massachusetts v. Mellon*,²¹¹ a federal taxpayer challenged the constitutionality of the Maternity Act of 1921,²¹² which provided federal funds to state programs to reduce maternal and infant mortality. Alleging that the Act exceeded Congress's Article I powers, the plaintiff argued that it harmed her by increasing her tax liability.²¹³ The Supreme Court held the action nonjusticiable, explaining that to invoke the judicial power a party must show "not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury [actionable at common law] as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."²¹⁴ To accept jurisdiction, the Court continued, "would be not to decide a judicial controversy, but to assume a position of au-

²⁰⁸ Fallon et al., *supra* note 82, at 137.

²⁰⁹ See Joseph Vining, *Legal Identity: The Coming of Age of Public Law* 55-56 (1978).

²¹⁰ See *id.* at 20-33 (discussing legal interests test).

²¹¹ 262 U.S. 447 (1923).

²¹² Ch. 135, 42 Stat. 224.

²¹³ *Mellon*, 262 U.S. at 486.

²¹⁴ *Id.* at 488.

thority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.”²¹⁵

Over time, as the amount and importance of public law surged, this private law model proved too unforgiving, and excluded too many of the government's new activities. Responding to the pressure, the Supreme Court revisited the question of standing, and—after a brief detour that momentarily promised an extravagantly expansive doctrine²¹⁶—settled on a framework that is more permissive than *Mellon*, but that still imposes limits on the reach of the federal courts.²¹⁷ Describing this doctrine concisely is difficult because the cases are such a jumbled mess. In its present guise, however, the law of standing consists of three main requirements, ostensibly grounded in Article III, together with a handful of subconstitutional “prudential” limitations that are sometimes hard to disentangle from the constitutional ones. In terms of Article III, a party must have suffered an “injury in fact” that consists of something more than an ideological opposition to what government is doing; there must be some material harm that is “distinct and palpable,”²¹⁸ rather than “‘conjectural’” or “‘hypothetical,’”²¹⁹ and this harm must be suffered personally.²²⁰ The plaintiff's harm must also be “fairly traceable” to the challenged action and it must be “likely to be redressed by the requested relief.”²²¹ A plaintiff who satisfies these constitutional requirements still may be excluded from federal court, however, if he or she runs afoul of a judicially developed prudential limitation, such as presenting a claim that is too “generalized,”²²² or seeking relief when the plaintiff is not “ar-

²¹⁵ *Id.* at 489.

²¹⁶ See *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970) (allowing competitors to challenge Comptroller decision allowing banks to provide data processing services because competitors were “arguably within the zone of interests” protected by relevant statute); *Flast v. Cohen*, 392 U.S. 83 (1968) (allowing taxpayer to challenge statute under Establishment Clause). As is discussed below, *Data Processing's* “zone-of-interests” test has been converted over the years from an extension of standing into a limitation. See *infra* note 223.

²¹⁷ See *Wright*, *supra* note 182, at 67-83; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 *Colum. L. Rev.* 1432, 1434-51 (1988).

²¹⁸ *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

²¹⁹ *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983).

²²⁰ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

²²¹ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

²²² See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (dismissing action to enjoin members of Congress from serving in military reserves based on argument that this violated constitutional prohibition against legislators holding other civil offices); *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (rejecting complaint arguing that statute authorizing CIA to keep its budget secret violated Constitution's requirement of regular accounting of expenditures).

guably within the zone of interests to be protected or regulated" by the substantive law at issue.²²³

The law of standing shields only a small number of questions from federal judicial review, mainly those that fall within the prudential limitation on generalized disputes. The primary effect of standing is to alter the form and timing by which questions are addressed, making sure they are presented in a concrete form by an individual with a real interest at stake. In some instances, the resulting delay before such an individual emerges may be enough to resolve a problem without judicial intervention. Even where this is not the case, however, the requirements of standing change the form in which courts address an issue in a way that helps to minimize political friction. Standing really does make the judiciary's intervention appear more necessary and less like a roving commission looking to scold.

Ripeness, like standing, is a creature of the administrative state, though also like standing it is now applied in many situations not involving agency action.²²⁴ Where standing addresses the propriety of allowing a particular party to litigate, ripeness asks whether the subject matter is ready for adjudication; it deals with *when* review is appropriate. The ripeness doctrine seeks to separate actions that are premature from those that are fit to be litigated. It is the obverse of mootness, defining when it is too soon rather than too late for federal court action. Courts use the ripeness doctrine to avoid ruling if an alleged injury is speculative or may never occur, thus sidestepping unnecessary judicial involvement.²²⁵ Ripeness issues often intersect with overbreadth or void-for-vagueness challenges in the First Amendment

²²³ *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). When this condition was first articulated in 1970, it was with the purpose of liberalizing the law of standing. The Court offered the zone-of-interests test in lieu of the then still-prevailing private law model, explaining that the requirement of standing was distinct from the traditional "legal interest" test and could be satisfied more easily. See *id.* When the Court subsequently erected the tripartite Article III test described above, it preserved the zone-of-interests requirement while transforming it into an additional condition that needs to be satisfied in cases challenging agency action under the Administrative Procedures Act. In *Air Courier Conference of America v. America Postal Workers Union*, 498 U.S. 517 (1991), for example, the Supreme Court held that the postal workers' union could not challenge the United States Postal Service's decision to suspend its monopoly over certain routes, because the union was not within the zone of interests protected by the Postal Express statutes. *Id.* at 524-25.

²²⁴ See, e.g., cases cited *infra* note 228.

²²⁵ Compare *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (allowing prescription drug manufacturer to challenge labeling regulation since litigation was ripe enough to avoid "entangling [courts] in abstract disagreements over public policy") with *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) (holding that cosmetics manufacturer could not yet challenge FDA regulation because only punishment imposed at this stage was suspension of sales certificates).

context,²²⁶ and they have been important in limiting the scope and timing of review in Takings Clause cases.²²⁷ Among the most significant uses of ripeness has been to avoid requests for equitable relief in cases challenging certain practices by the government, especially in the area of law enforcement.²²⁸

We move from standing and ripeness to the political question doctrine, in a sense the perfect illustration of our basic contention about how federal courts behave. For unlike standing or ripeness, which limit only when or by whom a challenge can be brought, the political question doctrine removes whole categories of constitutional law from judicial consideration because the subject matter is deemed inappropriate for resolution by judges. It is a very old doctrine, as old as *Marbury v. Madison*, where Chief Justice Marshall said:

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . Questions, in

²²⁶ See, e.g., *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 44-46 (1961) (declaring that petitioner's attack on ordinance requiring examination of motion pictures prior to exhibition was too narrow to avoid dismissal); *Adler v. Bd. of Educ.*, 342 U.S. 485, 504 (1952) (Frankfurter, J., dissenting) (arguing that Court should decline to hear case concerning constitutionality of legislation to bar members of subversive organizations from employment in schools).

²²⁷ See *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (ruling that lack of "sufficiently concrete factual setting" precludes challenge to rent-control ordinance); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (holding that Takings Clause claim was not ripe because respondent had not yet received final decision on related claims nor taken other available action); *Gene R. Nichol, Jr., Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 166-67 (1987).

²²⁸ The plaintiffs in *O'Shea v. Littleton*, 414 U.S. 488 (1974), for example, sought an injunction to combat what they claimed was a long-standing and continuing pattern of discriminatory law enforcement against blacks. The Court dismissed their claim. That some of the plaintiffs allegedly had been victims of these discriminatory practices in the past was not enough to convince the Court that their complaint presented a live case or controversy within the meaning of Article III. While "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," the requested relief still depended on finding that similar violations would occur in the future. *Id.* at 496. "But it seems to us," the Court said, "that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture." *Id.* at 497. The Court has employed this reasoning to turn back a variety of analogous challenges over the years, using justiciability to avoid becoming enmeshed in continuously monitoring another branch of the government. See, e.g., *City of L.A. v. Lyons*, 461 U.S. 95 (1983) (challenging use of chokeholds by Los Angeles police); *Rizzo v. Goode*, 423 U.S. 362 (1976) (addressing action to enjoin variety of practices by Philadelphia police); *Laird v. Tatum*, 408 U.S. 1 (1972) (concerning action to enjoin Army surveillance of civilian political activity).

their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.²²⁹

It is also a very confusing doctrine. Commentators have puzzled about how this aspect of *Marbury* fits with Marshall's *other*, more famous declaration that it is "the province and duty of the judicial department to say what the law is."²³⁰ They have wondered what the Court means by questions "in their nature political," since judges deal with political questions all the time.²³¹ They have insisted that, properly understood, the political question doctrine is not a matter of justiciability at all, but is merely a question of giving appropriate deference to the judgments of coordinate departments.²³² The Court, in the meantime, has made things worse by steering an erratic and inconsistent course in how it has used and explained the political question doctrine over time.

Now is neither the time nor the place to sort out these complexities.²³³ Given the kind of dynamic model of judicial independence we have proffered, it is not surprising and it does not matter that the Court deals with some political questions but not others. Nor does it matter whether the doctrine is formally a question of jurisdiction or simply a matter of deference to coordinate branches. What matters (and is expected) is that, over time, the Supreme Court has declared that federal courts could not, and so should not, deal with certain questions because they are too political. These are not necessarily the most controversial questions, though they are plenty controversial (or

²²⁹ 5 U.S. (1 Cranch) 137, 165-70 (1803). That the substantive question at issue in *Marbury* was of this nature still did not stop Marshall from lecturing Jefferson about what he should have done, and it was this, rather than the exercise of judicial review, that provoked what hostility the Court's decision received. See Ellis, *supra* note 36, at 66.

²³⁰ *Marbury*, 5 U.S. (1 Cranch) at 177; see, e.g., Martin H. Redish, Judicial Review and the "Political Question," 79 Nw. U. L. Rev. 1031 (1984).

²³¹ See, e.g., Chemerinsky, *supra* note 98, at 144-45.

²³² See Herbert Wechsler, Principles, Politics, and Fundamental Law 11-14 (1961) ("[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government . . ."); Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 622-23 (1976).

²³³ To the extent the confusion can be traced back to Chief Justice Marshall's enigmatic first articulation of the political question doctrine in *Marbury*, we simply may be dealing with the sort of mix up that invariably occurs when readers interpret a text anachronistically. Read in context, there was nothing confusing about Marshall's declaration, which was consistent with prevailing understandings about the nature of constitutional law and the Court's limited role in enforcing it. See Larry D. Kramer, The Supreme Court, 2000 Term: Foreword: We the Court, 115 Harv. L. Rev. 4, 16-90 (2001). Once we recapture these understandings, we see that the political question doctrine fits what Madison had in mind when he rejected reliance on judicial review because of concern that "the forms of the constitution would" leave too many problems outside "the controul of the judicial department." Madison Report, *supra* note 178, at 613.

would be if the Court tried to resolve them). They are, rather, potentially controversial questions in areas where courts are more at sea than usual, more lacking in the sort of legal resources that enable them to insulate their decisions from easy political counterattack. Sometimes this is because the constitutional text and history leave the Court more adrift than usual; other times it turns on the inherent nature of the issue itself. But at the core of the political question doctrine, as Alexander Bickel elegantly explained it nearly three decades ago, is:

[T]he Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.²³⁴

So the Court declared that it had no role to play in enforcing the Guaranty Clause when asked to judge the winner of a small-scale civil war in Rhode Island.²³⁵ And it has made very clear that its competence is limited when it comes to foreign policy, renouncing any authority to decide when a war has begun or ended,²³⁶ when a foreign government can be or has been recognized,²³⁷ whether a treaty survives the fall of a foreign government,²³⁸ and how the President may use his war powers.²³⁹ Likewise, the Court has shied away from cer-

²³⁴ Bickel, *supra* note 31, at 184.

²³⁵ *Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849). The Court has reaffirmed this holding in other contexts. See, e.g., *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (denying review of state's use of ballot initiatives); *Taylor & Marshall v. Beckham*, 178 U.S. 548 (1900) (declining to review state's resolution of disputed gubernatorial race).

²³⁶ See *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923) ("A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time . . .").

²³⁷ See *United States v. Belmont*, 301 U.S. 324, 328 (1937) (holding that "conduct of foreign relations was committed by the Constitution to the political departments of the government"); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("[T]he propriety of what may be done in the exercise of [conducting foreign relations] is not subject to judicial inquiry or decision."). The Court has also held that recognition of Indian tribes is a political matter. See *United States v. Sandoval*, 231 U.S. 28, 45-47 (1913).

²³⁸ See *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) ("[T]he question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and the courts ought not to interfere with the conclusions of the political department in that regard."); cf. *Goldwater v. Carter*, 444 U.S. 996, 1002-04 (1979) (plurality opinion) (proclaiming that rescission of treaties is political matter).

²³⁹ See *Chemerinsky*, *supra* note 98, at 157-58 (discussing lower court cases refusing to review challenges to United States military policy in Vietnam, El Salvador, and Persian Gulf).

tain questions involving the structure of politics, including some important aspects of political parties.²⁴⁰ And, of course, the Court has found that challenges to the impeachment process are nonjusticiable.²⁴¹ This is but a sampling of cases invoking the political question doctrine, but enough, we think, to convey its essential flavor—which is the erratic and inconsistent renunciation of jurisdiction in cases where the Court feels it has little to offer and something to lose.

2. *Principles of Federalism*

Over the course of American history, no issue has come close to federalism as a chronic source of political friction. It was the major bone of contention in the campaign to adopt the Constitution. It shaped the partisan battles that took the nation to the brink of civil war by 1800. It defined the struggle over slavery that led to civil war in 1861, and it continued to dominate politics right up until the controversy over the New Deal. Federalism then emerged as a rallying cry for opponents of the civil rights movement in the 1950s and of the Great Society in the 1960s, and it has once again become a crucial battleground in the 1990s.

Naturally, federal courts have not been immune from this friction, which has been as important in defining the role of the federal judiciary as it has for the rest of the national government. The debate over Article III in Philadelphia and during ratification was dominated by fears that a powerful federal bench would swamp the state courts, fears that drove judicial politics in the early Republic and have persisted ever since.²⁴² Questions about the scope of federal jurisdiction invariably have been described in terms of a zero-sum game, with any extension of federal judicial authority seen as producing a corresponding loss for the states. The federal courts are under relatively constant pressure to curtail their authority vis-à-vis state courts, and this pressure has produced a number of major controversies over time.

One unsurprising consequence of these historic struggles has been to make federal judges particularly sensitive when it comes to their relationship with their state counterparts. Because this relationship has so often been a source of controversy, federal judges are acutely attentive to state interests. This is reflected in an impressive body of judicially created doctrines that limit or renounce federal jurisdiction in favor of state courts. Because these, too, could easily be

²⁴⁰ See *O'Brien v. Brown*, 409 U.S. 1 (1972) (refusing to decide challenge to seating of delegates at 1972 Democratic Convention).

²⁴¹ *Nixon v. United States*, 506 U.S. 224 (1993) (rejecting challenge by district court Judge Walter Nixon—not *that* Nixon—to Senate procedures in trying his impeachment).

²⁴² See Ellis, *supra* note 36, at 10-16.

the subject of an independent treatise, we simply offer a brief survey of some familiar and prominent examples.

On their face, the statutes that confer federal jurisdiction appear very broad. Diversity jurisdiction, for example, which has existed since the first Judiciary Act, is conferred over all civil actions that meet a \$75,000 amount-in-controversy requirement and are between "citizens of different states."²⁴³ Federal question jurisdiction is bestowed in equally generous terms and extends (with no minimum amount in controversy) to "all civil actions arising under the Constitution, laws, or treaties of the United States."²⁴⁴ Yet the Supreme Court has, in both cases, interpreted the statutory language narrowly to exclude a huge portion of the cases that are potentially within its reach.

Take diversity jurisdiction. The Constitution requires no more than what has come to be known as "minimal diversity": there must be *a* plaintiff who is from a different state than *a* defendant.²⁴⁵ Nothing in the language of the statute requires more than this, which was also true of the first statute to confer diversity jurisdiction in 1789.²⁴⁶ Yet in one of its earliest decisions interpreting the reach of federal jurisdiction, the Supreme Court held that the statute requires "complete diversity"—meaning that *every* plaintiff must be from a different state than *every* defendant.²⁴⁷ The requirement of complete diversity keeps an enormous number of multiparty cases out of federal court, an effect that is exacerbated by parties who manage to avoid unwanted federal litigation by artfully selecting their opponents.²⁴⁸

The complete diversity rule is a solid fixture in the law of federal jurisdiction, and both Congress and subsequent Courts have bypassed numerous opportunities to curtail or eliminate it. What makes this fact so interesting is that the complete diversity rule has required enormous effort to administer, including numerous additions and re-

²⁴³ 28 U.S.C. § 1332(a)(1) (2002).

²⁴⁴ § 1331.

²⁴⁵ See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (holding that "minimal diversity" is constitutional).

²⁴⁶ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (allowing federal jurisdiction where "the suit is between a citizen of the State where the suit is brought, and a citizen of another State"). The requirement that one of the parties be from the state where the suit was brought was eliminated in the Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

²⁴⁷ *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

²⁴⁸ While parties may artfully plead themselves out of federal court, there is a statute that precludes them from similarly scheming their way in. See 28 U.S.C. § 1359 (depriving district court of jurisdiction over actions "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court").

finements to preserve its essence,²⁴⁹ even though its rationale is weak, if not downright silly.²⁵⁰ Yet the only serious reform efforts under consideration are to reduce diversity jurisdiction still further or to eliminate it altogether, with the complexity of the complete diversity rule frequently offered as one of the arguments in favor of abolition.²⁵¹ These reforms are strongly supported by the Judicial Conference and by most federal judges, who would be delighted to get rid of diversity jurisdiction, which they recognize as an "intrusion" in state lawmaking that causes needless friction.²⁵² (Unfortunately for the opponents of diversity, lobbying efforts by well-heeled plaintiffs' and de-

²⁴⁹ Tom Rowe has documented the "pernicious effects" of administering diversity jurisdiction, most of which are derived from the requirement of complete diversity, including: (1) problems associated with determining the proper alignment of parties; (2) litigation required to determine whether diversity has been created improperly or by collusion; (3) problems in adjudicating questions of "indispensable," "necessary," and "proper" parties under the joinder provisions in Federal Rule of Civil Procedure 19, and what to do when joining these parties will destroy complete diversity; (4) similar problems in litigating questions of permissive intervention and intervention of right; and (5) the wide variety of problems that arise in sorting out difficult issues of supplemental jurisdiction. Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv. L. Rev. 963 (1979).

²⁵⁰ Diversity jurisdiction is supposed to be necessary to protect outsiders from state court discrimination. This is a controversial claim, see Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. Rev. 97, 119-21, but conceding that the problem exists, the premise underlying the requirement of complete diversity—that any fear of bias disappears when there are parties from the same state on both sides of the litigation—is patently ridiculous given how easily judges and juries can distinguish between parties on the same side in rendering their verdicts in most cases.

²⁵¹ See David P. Currie, *The Federal Courts and the American Law Institute* (pt. I), 36 U. Chi. L. Rev. 1, 6 (1968); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. Rev. 247, 281-82; Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 Alb. L. Rev. 151, 154-58 (1987); Rowe, *supra* note 249, at 964-66.

²⁵² See Comm. on Revision of the Fed. Judicial Sys., Dep't of Justice, *The Needs of the Federal Courts* 14 (1977); Report of the Proceedings of the Judicial Conference of the United States, Sept. 21, 1987, in 1987 Dir. of the Admin. Office of the U.S. Courts Ann. Rep. 47, 72 (recommending abolition of diversity jurisdiction); Report of the Proceedings of the Judicial Conference of the United States, Mar. 12-13, 1986, in 1986 Dir. of the Admin. Office of the U.S. Courts Ann. Rep. 1, 17 (same); Report of the Proceedings of the Judicial Conference of the United States, Sept. 19-20, 1979, in 1979 Dir. of the Admin. Office of the U.S. Courts Ann. Rep. 51, 66 (same); Report of the Proceedings of the Judicial Conference of the United States, March 9-10, 1978, in 1978 Dir. of the Admin. Office of the U.S. Courts Ann. Rep. 1, 7-8 (same); Report of the Proceedings of the Judicial Conference of the United States, Sept. 15-16, 1977, in 1977 Dir. of the Admin. Office of the U.S. Courts Ann. Rep. 43, 52 (same); Report of the Proceedings of the Judicial Conference of the United States, Mar. 10-11, 1977, in 1977 Dir. of the Admin. Office of the U.S. Courts Ann. Rep. 1, 8-9 (same); Long Range Plan, *supra* note 74, at 29-32; Miner, *supra* note 251, at 154.

fendants' bar organizations, both of which adore the forum-shopping opportunities diversity creates, make serious reform unlikely.)²⁵³

Federal courts have been more active, and considerably more creative, in finding ways to limit federal question jurisdiction. In *Osborn v. Bank of the United States*,²⁵⁴ the Supreme Court gave a remarkably generous reading to Article III's provision for federal question jurisdiction. According to Chief Justice Marshall, the Constitution permits Congress to confer jurisdiction over any case in which a federal interest might be denied or impaired even *indirectly* by a state law ruling; there could be federal jurisdiction whether or not the federal "ingredient" had to be pleaded as part of the plaintiff's claim and even if it were not actually contested in the lawsuit.²⁵⁵ But while recognizing that Congress has broad power to confer federal jurisdiction, the Court has been extremely reluctant to find that Congress actually did so. The first statute conferring general federal question jurisdiction copied the language of the Constitution exactly, granting jurisdiction over "all suits of a civil nature . . . arising under the Constitution or laws of the United States."²⁵⁶ What legislative history exists suggests that this language was intended to do just what it says and to confer the entirety of the federal question jurisdiction permissible under Article III.²⁵⁷ Yet the Supreme Court has never read the statute any-

²⁵³ Under the leadership of Representative Robert Kastenmeier of Wisconsin, the House of Representatives actually passed a bill calling for the abolition of diversity jurisdiction. Claudia Kolker, Rep. Bob Kastenmeier Joined Other Members of a Blue-Ribbon Study Panel Monday in Delivering Over 100 Recommended Reforms of the Federal Court System, Sts. News Service, Apr. 2, 1990, LEXIS, News Group File. Vigorous lobbying killed the legislation in the Senate, and Kastenmeier was targeted successfully for defeat in the subsequent election. See Vivienne Levy, Gloom Hits Wisconsin Delegation After Defeat of Kastenmeier, Sts. News Service, Nov. 7, 1990, LEXIS, News Group File.

²⁵⁴ 22 U.S. (9 Wheat.) 738 (1824).

²⁵⁵ *Id.* at 821-23. *Osborn* itself was an easy case for federal jurisdiction: The Bank of the United States (BUS) was suing for an injunction to prevent state officials from seizing its assets pursuant to a state tax that the BUS claimed was unconstitutional under *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Osborn*, 22 U.S. at 789. More difficult was *Osborn's* companion case, *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824), in which the BUS sued a state bank for refusing to honor bonds. *Id.* at 904-05. The only conceivable federal questions were the capacity of the BUS to sue and to make a contract to purchase bonds—potential defenses that were not being raised by the defendant. Having noted in *Osborn* that ordinary contract cases of this sort were the hardest in which to justify federal jurisdiction, the Court in *Planters' Bank* nevertheless upheld the federal court's power to hear the case, referring readers back to *Osborn*, which, Chief Justice Marshall said, "fully considered" and disposed of the matter. *Id.* at 905. The Court obviously feared that, given state hostility to the BUS, a state court might deny its claim by misapplying state law, effectively destroying the federal bank without having to say a word about federal law.

²⁵⁶ Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

²⁵⁷ See Fallon et al., *supra* note 82, at 909 (quoting Senator Carpenter, bill's sponsor, explaining that it "gives precisely the power which the Constitution confers—nothing

where near this broadly, but instead has limited it in a variety of ways over the years.

The most prominent judicially crafted limitation on federal question jurisdiction is the “well-pleaded complaint rule,” which holds that, for statutory purposes, “a suit arises under the Constitution and laws of the United States only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution.”²⁵⁸ Federal question jurisdiction exists, in other words, only if one of the essential elements of the plaintiff’s claim is federal or raises a federal question, something to be determined “upon the face of the complaint unaided by the answer.”²⁵⁹ This is crucial because, since 1887, defendants have been allowed to remove a case to federal court only if the plaintiff could have filed it there in the first place.²⁶⁰ The result is a substantial diminution in federal question jurisdiction through the elimination of cases in which the federal issue comes up as a defense or a reply to a defense.

As with the complete diversity rule, making the well-pleaded complaint rule work has required courts to formulate complex corollary doctrines,²⁶¹ while commentators have attacked the whole project as wrongheaded, particularly in denying defense removal.²⁶² One can justify the well-pleaded complaint rule, however, as the rational response of a federal judiciary seeking to limit its own authority in order to protect that of state courts.

Consider the problem in choice-of-law terms: It is easy to assign jurisdiction in cases raising only state law issues or only federal law issues. These are, in effect, “false conflicts” in terms of jurisdiction. The difficulty arises in mixed cases, where, because there are both

more, nothing less” 2 Cong. Rec. 4987 (1874)); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 65-69 (1928) (discussing myriad forces leading to 1875 statute implementing federal question jurisdiction).

²⁵⁸ *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

²⁵⁹ *Gully v. First Nat’l Bank*, 299 U.S. 109, 113 (1936).

²⁶⁰ See 28 U.S.C. § 1441(a)-(b) (2002).

²⁶¹ See, e.g., *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) (holding that, to determine whether well-pleaded complaint rule is satisfied in declaratory judgment action, court must ask what lawsuit would look like if no such remedy were available); see also *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986) (declaring there was no federal question jurisdiction, even though well-pleaded complaint rule is satisfied, where state law incorporates federal standard from statute creating no private federal remedy); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983) (extending *Skelly Oil* to actions filed under state declaratory judgment statute); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900) (ruling there is no federal question jurisdiction even though federal law creates remedy and substantive standard is matter of state law).

²⁶² See Am. Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* § 1312 (1969); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Probs.* 216, 233-34 (1948).

state and federal issues, both state and federal courts could have an interest in exercising jurisdiction. If adopted as a statutory rule, *Osborn* would sweep all these mixed cases—or “true conflicts”—into federal court. The well-pleaded complaint rule can thus be viewed as a choice-of-law rule for jurisdiction that apportions the mixed cases to keep those least suited for federal adjudication in the state courts. One might attempt such an allocation on a case-by-case basis, but that would delay any final determination of jurisdiction at least until after the pleading stage, and it would invite wasteful litigation over a preliminary question unrelated to the merits.

Instead, the Court has adopted a bright-line rule, distinguishing cases in which the federal issue is part of the claim from those in which it arises as a defense or reply. This rule presumably is justified on the ground that, generally speaking, the essential elements of the claim are more likely to be reached and are more important in litigation. The well-pleaded complaint rule is, to be sure, both over- and underinclusive (like all rules). But it prevents the grant of general federal question jurisdiction from absorbing an enormous portion of the business of the state courts, while still leaving Congress the choice to extend federal jurisdiction in any particular area if it chooses.

Federal courts have further circumscribed federal question jurisdiction with a variety of abstention doctrines under which they renounce or refuse to exercise authority otherwise conferred by Congress for the specific purpose of avoiding undue political friction. Because these doctrines have been crafted by federal judges on a case-by-case basis over the past sixty years, their contours—including just how many abstention doctrines exist—remain ill-defined.²⁶³

As a technical matter, abstention can be justified on statutory interpretation grounds: Like many of the doctrines and rules discussed above, the federal courts interpret broad grants of jurisdiction narrowly to take account of circumstances in which exercising jurisdiction appears troublesome. Congress is then implicitly invited to overrule or modify the courts' decisions if Congress decides that they are wrong. In the case of abstention, the Supreme Court has also invoked the discretion traditionally available to judges asked to award equitable relief, and it is unclear whether abstention is ever permitted in a

²⁶³ The Supreme Court refers sometimes to two and sometimes to three abstention doctrines, while a leading treatise refers to four forms of abstention plus the related doctrine of “Our Federalism.” Compare *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 477 (1977) (listing two abstention doctrines) with *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814-16 (1976) (listing three abstention doctrines), and 17A Charles Alan Wright et al., *Federal Practice and Procedure* § 4241, at 28-29 (1988) (listing four abstention doctrines plus “Our Federalism”).

damages action.²⁶⁴ Be that as it may, what matters for our present purposes is that the various abstention doctrines all share a common concern for avoiding “needless federal conflict with the state[s]”²⁶⁵ in order to advance “harmonious federal-state relations.”²⁶⁶ Whether postponing jurisdiction to avoid questions of unsettled state law, as in *Pullman* abstention,²⁶⁷ or renouncing jurisdiction to avoid interfering with a state regulatory scheme, as in *Burford* abstention,²⁶⁸ or ongoing state judicial proceedings, as in *Younger* abstention,²⁶⁹ the basic pre-

²⁶⁴ See *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730-31 (1996) (limiting *Burford* abstention to cases involving equitable relief, but noting that federal court might properly postpone exercising jurisdiction in some damages actions); *id.* at 733 (Kennedy, J., concurring) (noting that abstention might be proper in damages claims in other contexts); *id.* at 731-32 (Scalia, J., concurring) (joining Court’s opinion only because he understands that it does rule out abstention in any case involving only damages).

²⁶⁵ *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943).

²⁶⁶ *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959).

²⁶⁷ *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* abstention comes into play whenever the resolution of a federal constitutional issue turns on an unsettled question of state law: The federal court is required to abstain from exercising its admitted jurisdiction so that the parties can refile in state court and have the state law issue settled there. In *Pullman* itself, for example, the Supreme Court ruled that the lower federal courts should have refrained from deciding a challenge to an assertedly unconstitutional order of the Texas Railroad Commission so that state courts could decide whether the Commission had authority to issue the order under state law. *Id.* at 500. In theory, federal proceedings merely are postponed pending resolution of the state law issue in state court; the plaintiff may reserve the right to return to federal court, if still necessary, for a decision on the federal issue once the state proceedings have concluded. See *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 421-22 (1964). In practice, problems of delay and the expense of litigating twice renders this right more illusory than real.

²⁶⁸ *Burford*, 319 U.S. at 332. *Burford* abstention calls for federal judges to decline jurisdiction where this would disrupt or interfere with a complex state administrative program. See *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341, 345 (1951); *Burford*, 319 U.S. at 332. It differs from *Pullman* in two respects. First, because abstention is justified to permit state courts to administer regulatory schemes that require harmony and consistency, it applies without regard to the presence of a federal question (i.e., even if jurisdiction is based on diversity). *Id.* at 317-18. Second, the federal court dismisses the action rather than merely postponing the exercise of its jurisdiction. *Ala. Pub. Serv. Comm’n*, 341 U.S. at 350; *Burford*, 319 U.S. at 334. *Burford* is closely related to *Thibodaux* abstention, which calls upon federal courts to defer to state courts on questions like eminent domain, which involve matters “close to the political interests of a State” that are “intimately involved with sovereign prerogative.” *Thibodaux*, 360 U.S. at 28-29; see also *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968) (per curiam) (justifying abstention based on importance of water rights in New Mexico). Like *Burford*, *Thibodaux* applies even in the absence of a federal question, but only if state law is unclear. See *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

²⁶⁹ *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* stands for the proposition that federal courts will not assert jurisdiction when doing so interferes with certain categories of pending state judicial proceedings. See *id.* By far the most complicated of the abstention doctrines, the main problem has been how broadly or narrowly to define the class of proceedings requiring abstention. In its most recent encounter with the problem, *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 373 (1989), the Court emphasized that the mere availability or pendency of state judicial proceedings was not

mise is the same: to avoid entangling federal courts in controversies likely to generate friction with state governments.

Two final doctrines warrant brief discussion while we are on the subject of abstention. Although neither is classified formally as "an abstention doctrine," both resemble these doctrines closely enough to be included at this point. First is the so-called *Rooker-Feldman* doctrine, named after two Supreme Court cases holding that plaintiffs may not use 42 U.S.C. § 1983 to challenge state-court judgments.²⁷⁰ Although there appears to be federal jurisdiction under both §§ 1331 and 1343(3) to argue that a state court decision deprived the plaintiff of a federal right, federal scrutiny of state court judgments ordinarily is confined to appellate review in the Supreme Court. The *Rooker-Feldman* doctrine thus bars a party losing in state court "from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights."²⁷¹ A recent resurgence in the use of *Rooker-Feldman* has triggered a lively debate. Some commentators question the doctrine's actual significance in light of *Younger* and federal rules of res judicata,²⁷² while others find it an "extremely valuable tool" for plugging gaps "that would otherwise wreak havoc on our system of dual courts."²⁷³ One thing for sure is that lower courts have extended *Rooker-Feldman* beyond its precedential roots, sometimes with surprising results.²⁷⁴

Second is the venerable "domestic relations" exception to diversity jurisdiction, which excludes "[t]he whole subject of the domestic relations of husband and wife, parent and child," together with pro-

enough to exclude federal jurisdiction. Reaffirming the applicability of *Younger* to any criminal and civil enforcement proceedings, the Court limited its use in private civil litigation to "orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 367-68. No one is yet sure just what this means.

²⁷⁰ See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923).

²⁷¹ *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994).

²⁷² See, e.g., Chemerinsky, *supra* note 98, at 450; Susan Bandes, *The Rooker-Feldman Doctrine: Evaluating Its Jurisdictional Status*, 74 *Notre Dame L. Rev.* 1175, 1177-79 (1999); Jack M. Beermann, Comment, *Comments on Rooker-Feldman or Let State Law Be Our Guide*, 74 *Notre Dame L. Rev.* 1209, 1233 (1999).

²⁷³ Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 *Notre Dame L. Rev.* 1085, 1100, 1128 (1999).

²⁷⁴ See Barry Friedman & James E. Gaylord, *Rooker-Feldman*, from the Ground Up, 74 *Notre Dame L. Rev.* 1129, 1140-73 (1999). See, for example, *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), a legal malpractice action brought in federal court by absent class members, who challenged the settlement of a state class action: The federal court dismissed the action under *Rooker-Feldman*, without regard for whether the state court that entered the judgment had personal jurisdiction over the plaintiffs. See *id.* at 512.

bate matters, from federal jurisdiction.²⁷⁵ The exception does not preclude every action between family members, but it does deprive federal judges of power to probate wills, administer estates, or hear cases “involving the issuance of a divorce, alimony, or child custody decree.”²⁷⁶ Often criticized by commentators, federal judges have steadfastly adhered to this self-imposed qualification on their authority. Withholding federal jurisdiction is justified, we are told, because of “the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts.”²⁷⁷ Add to this the extreme emotional and political reaction that family law matters are known to provoke—as demonstrated in recent years by the “Baby M” and Elian Gonzalez incidents—and this exception begins to make considerable sense.

Our inventory of federalism-inspired, self-imposed restraints on the power of the federal courts is hardly exhausted by these interpretive glosses on §§ 1331 and 1332. Consider next the Supreme Court’s winding course in dealing with the writ of habeas corpus. Federal judges had no authority to grant the Great Writ to state prisoners until after the Civil War, when Congress gave them the power as part of its effort to reconstruct the South.²⁷⁸ Of course, the same Congress also slapped the Supreme Court down when it threatened to use this power in a way that interfered with congressional plans,²⁷⁹ but the Justices avoided further controversy by interpreting their authority narrowly and limiting habeas corpus relief to cases in which a state sentencing court lacked jurisdiction over the prisoner.²⁸⁰ As time passed, the Court relaxed this position slightly, expanding the writ by allowing prisoners to challenge their sentences for a handful of additional reasons.²⁸¹ But it was not until the Warren Court got hold of it

²⁷⁵ *In re Burrus*, 136 U.S. 586, 593-94 (1890). See also Chemerinsky, *supra* note 98, at 300-01.

²⁷⁶ *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992).

²⁷⁷ *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978).

²⁷⁸ See Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

²⁷⁹ See *supra* note 84 and accompanying text.

²⁸⁰ See Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure* 972 (4th ed. 2000); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 474-83 (1963).

²⁸¹ See, e.g., *Waley v. Johnston*, 316 U.S. 101 (1942) (coerced guilty plea); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (ineffective assistance of counsel); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob-dominated trial); *Ex parte Siebold*, 100 U.S. 371 (1879) (unconstitutional statute under which defendant was convicted); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873) (double jeopardy). The Court made these extensions by analogizing the denial of the right in question to a flaw so fatal as, in effect, to deprive the trial court of jurisdiction.

that habeas corpus jurisdiction took off. Beginning in 1953 with the decision in *Brown v. Allen*,²⁸² followed a decade later by the dramatic trilogy of *Fay v. Noia*,²⁸³ *Sanders v. United States*,²⁸⁴ and *Townsend v. Sain*,²⁸⁵ the Supreme Court liberated federal trial courts to rehear virtually any federal claim de novo while removing various other procedural obstacles that formerly had limited the use of the writ.

These were momentous decisions. After *Brown v. Board of Education*,²⁸⁶ the Warren Court is most known (or most notorious, as the case may be) for its decisions expanding the rights of criminal suspects and defendants, particularly at the state level through incorporation of most of the Bill of Rights into the Due Process Clause. The same Court's unprecedented expansion of habeas corpus gets less attention but is probably more responsible for whatever changes actually took place in the states. For the Supreme Court could do little on its own. There were (and still are) simply too many cases for the Court ever to hear more than a smattering on direct review. By opening the doors of the federal trial courts to habeas corpus petitioners seeking to vindicate their newly recognized rights, the Supreme Court was able to enlist the entire federal judiciary in its effort to remodel criminal justice at the state level. And the use of habeas corpus soared, particularly after the 1963 trilogy. Only 560 petitions were filed by state prisoners in 1950, a number that had crept up to 660 by 1955, two years after *Brown v. Allen*, and 871 by 1960; in 1965, nearly 5000 such petitions were filed, and this grew to more than 9000 by 1970.²⁸⁷ Even adjusting for changes in the prison population, this was a more than ten-fold increase in the number of habeas corpus petitions filed between 1962 and 1970.²⁸⁸

According to Bator, it was only in *Waley* that the Court finally abandoned this fiction. Bator, *supra* note 280, at 495.

²⁸² 344 U.S. 443, 463-64 (1953) (holding that federal district court may relitigate constitutional claims previously decided in state court). Eric Freedman argues that *Brown* produced no momentous changes and that later decisions revolutionized the writ. Eric M. Freedman, Milestones in Habeas Corpus (pt.3): *Brown v. Allen*: The Habeas Corpus Revolution That Wasn't, 51 Ala. L. Rev. 1541 (2000).

²⁸³ 372 U.S. 391, 438 (1963) (proclaiming that procedural default in state court will not bar habeas claim unless petitioner "deliberately by-passed" opportunity to present claim below).

²⁸⁴ 373 U.S. 1 (1963) (establishing liberal rules allowing successive petitions).

²⁸⁵ 372 U.S. 293 (1963) (defining circumstances when federal court must rehear findings of fact made by state court).

²⁸⁶ 347 U.S. 483 (1954).

²⁸⁷ See Fallon et al., *supra* note 82, at 1363 (reporting statistics).

²⁸⁸ See Charles D. Weisselberg, Evidentiary Hearings in Federal Habeas Corpus Cases, 1990 BYU L. Rev. 131, 162-63 (noting that fewer than 0.5 petitions filed per 100 prisoners in 1945 grew to 5.05 in 1970).

The year 1970 is a good place to draw a line, for by then the Court's activities had provoked substantial opposition in the states and from the public at large. Richard Nixon ran for office on a law-and-order platform, vowing to undo the Warren Court's criminal codding (a goal in which he was aided by the opportunity to make four appointments during his first term in office).²⁸⁹ Responding to the pressure, and with its new members, the Supreme Court soon reversed course. As quickly as it had begun, the federal judiciary's foray into state criminal justice ended, as the Burger and Rehnquist Courts handed down an uninterrupted stream of decisions erasing everything their predecessor had done to make habeas corpus more broadly available. To list just a few examples (in no particular order), the Court toughened the exhaustion requirement,²⁹⁰ limited the filing of successive petitions,²⁹¹ circumscribed the cognizable issues,²⁹² required greater deference to state fact-finding,²⁹³ made it easier for states to prove harmless error,²⁹⁴ barred review of claims that had been procedurally defaulted in state court,²⁹⁵ and forbade petitioners from raising arguments based on anything other than wholly settled legal principles.²⁹⁶ Congress recently has codified and extended many of these decisions,²⁹⁷ though some commentators claim that this legislation has had little actual effect on judicial practice.²⁹⁸ Indeed, so little remains of the writ today that teachers of federal courts (including one of us) have begun either to drop the subject from their classes altogether or to treat it as a matter of mostly historical interest.

We conclude this portion of the discussion by considering two final issues of long-standing historical import in debates about the federal judiciary: its powers with respect to common law and the

²⁸⁹ See Theodore H. White, *The Making of the President 1968*, at 136 n.3 (1969).

²⁹⁰ See *Rose v. Lundy*, 455 U.S. 509 (1982); see also Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 Ohio St. L.J. 393, 424-31 (1983).

²⁹¹ See *McCleskey v. Zant*, 499 U.S. 467 (1991).

²⁹² See *Stone v. Powell*, 428 U.S. 465 (1976) (holding that Fourth Amendment exclusionary rule claims are not cognizable in habeas corpus proceedings).

²⁹³ See *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Sumner v. Mata*, 455 U.S. 591 (1982).

²⁹⁴ See *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

²⁹⁵ See *Coleman v. Thompson*, 501 U.S. 722 (1991), overruling *Fay v. Noia*, 372 U.S. 391 (1963); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

²⁹⁶ See *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Teague v. Lane*, 489 U.S. 288 (1989).

²⁹⁷ See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codifying exhaustion requirement, deference to state fact-finding, limitations on second and successive petitions, and limitations on time period to file).

²⁹⁸ See Eric M. Freedman, *Milestones in Habeas Corpus* (pt. 2): *Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 Ala. L. Rev. 1467, 1471 n.13 (2000).

doctrine of state sovereign immunity. Few issues were more controversial in the early Republic than the relationship between the federal courts and the common law. The question first arose in connection with a criminal prosecution brought in 1793 against Gideon Henfield for serving aboard a French privateer—a practice that, if widely emulated, threatened to undo George Washington's painstaking effort to keep the United States neutral in the war between France and England.²⁹⁹ No resolution was reached, and the controversy subsided after a jury returned a verdict of not guilty.³⁰⁰ It reemerged several years later, again in connection with foreign relations and France, when Federalists started prosecuting pro-French Republican newspaper editors for seditious libel. The first cases were brought under common law indictments,³⁰¹ but the Federalists soon raised the stakes considerably by passing the Sedition Act³⁰² and defending it on the grounds that common law offenses could be committed against the United States and Congress could modify the elements of these offenses by statute.³⁰³ Here was a grab for power that terrified Republicans, and not just because of the immediate political context. Thomas Jefferson voiced opposition concerns in a letter to Edmund Randolph written in the midst of the crisis:

Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force & cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The bank law, the treaty doctrine, the sedition act, alien act, the undertaking to change the state laws of evidence in the state courts by certain parts of the stamp act, &c., &c., have been solitary,

²⁹⁹ See 3 Dumas Malone, *Jefferson and His Time: Jefferson and the Ordeal of Liberty* 119-21 (1962) (discussing Henfield case).

³⁰⁰ See Francis Wharton, *State Trials of the United States During the Administrations of Washington and Adams with References, Historical and Professional, and Preliminary Notes on the Politics of the Times* 49-89 (Philadelphia, Carey & Hart 1849) (reporting Henfield case).

³⁰¹ See John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* 65-66 (1952) (discussing prosecution of Benjamin Bache for common law libel against President and government).

³⁰² An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798).

³⁰³ See H.R. Rep. No. 5-110, in *American State Papers: Documents, Legislative and Executive, of the Congress of the United States* 181 (Walter Lowrie & Walter S. Franklin eds., Washington, D.C., Gales and Seaton 1834) (Report of a Committee of the House of Representatives on the Repeal of the Alien and Sedition Laws, Feb. 21, 1799). The Federalists further defended their authority to pass the Sedition Act by noting that it liberalized the common law in several respects (though, as Republicans were quick to point out, the Sedition Act toughened the common law in others). See Elkins & McKittrick, *supra* note 176, at 590-93, 700-01.

unconsequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the U S, without the adoption of their legislature, and so infinitively beyond their power to adopt. If this assumption be yielded to, the state courts may be shut up, as there will then be nothing to hinder citizens of the same state suing each other in the federal courts in every case, as on a bond for instance, because the common law obliges payment of it, & the common law they say is their law.³⁰⁴

To understand why Jefferson and his supporters found this business so menacing, we need to recapture the peculiar station of the common law in the eighteenth century. Today, we think of the common law as a power: the power of judges to make law, which can exist in any field or domain and which, for us, presents mainly a question of separation of powers. The eighteenth-century view was different. Then, the common law was seen as a distinct *field* of law, one that covered most of the ordinary affairs of life in a world where legislation was still exceptional.³⁰⁵ The scope of this field was defined by a set of principles, found in judicial opinions, but originally derived from "maxims and customs . . . of higher antiquity than memory or history can reach."³⁰⁶ The field of the common law existed independently of, and alongside, various other fields, each defined by its own distinct set of principles, such as the law of nations, equity, the law merchant, admiralty—and, within each jurisdiction, statutory law.

Two implications followed. First, a political society could choose to "receive" the common law's body of principles for itself, but doing so required an express positive political act in its constitution or by way of legislation.³⁰⁷ Second, once a society had adopted the common law, its judges were authorized to interpret that law in all the cases to which it applied, employing the uniquely legal form of "artificial reasoning" by which judges molded the principles of the common law to fit the exigencies of the day. Reception further authorized the legislature to modify or replace common law rules by statute, but unless and until the legislature had acted, it was the judges' special task to determine how the common law resolved particular cases. In so doing, the

³⁰⁴ Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), in 7 *The Writings of Thomas Jefferson*, supra note 52, at 383, 383-84.

³⁰⁵ See Kramer, supra note 8, at 281-83.

³⁰⁶ 1 William Blackstone, *Commentaries on the Laws of England* 67 (Univ. of Chi. ed., Univ. of Chi. Press 1979) (1765).

³⁰⁷ Thus, upon declaring their independence, eleven of the original thirteen colonies immediately adopted "receiving statutes" expressly incorporating the common law as state law. See Elizabeth Gaspar Brown, *British Statutes in American Law 1776-1836*, at 24-26 (1964); Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 *Vand. L. Rev.* 791, 798-800 (1951).

judges were participating in a collective project of shaping a general body of legal principles that was shared with judges everywhere the common law system had been received.³⁰⁸

Given this understanding, the Republicans' panic over the Federalist position is more easily appreciated. Common law offenses could be committed against the federal government only if that government had received the common law. Yet if it had, suits based on common law would present federal questions that could be litigated in federal court as cases "arising under . . . the Laws of the United States"³⁰⁹—an extension of federal jurisdiction that made a mockery of Article III's carefully prescribed limits. Worse, since reception of the common law necessarily included the power to change it by legislation, it also followed that Congress could repeal or modify any rules within the whole domain of the common law—even in areas beyond Article I's enumeration of legislative powers. Such an expansion of federal authority was, to Republicans, not just unthinkable but obscene. And so they fervently, passionately denied that federal courts could exercise jurisdiction to hear common law crimes³¹⁰—a position the Supreme Court officially endorsed in 1812, in the wake of Republican political ascendancy. While the question "is brought up now, for the first time to be decided by this Court," Justice Johnson (a Republican appointee) explained, "we consider it as having been long since settled in public opinion."³¹¹

This conception of the common law helps us to understand as well why no one was similarly upset in 1842, when the Supreme Court

³⁰⁸ This rather complex idea—complex partly because it is so foreign to modern conceptions of law—has nowhere been better explained than by Joseph Beale in his treatise on conflict of laws. Speaking of the relationship between the positive law of a state and the common law as a received system of law, Beale states:

But though [the common law] is received in several states, it is necessarily distinct from the law of each of these states, since such laws are not the same; and in each state therefore the local law may, and practically must, vary to some extent from the accepted general system. The common law is received in Massachusetts as the basis of its law; but the positive law of Massachusetts, by mistake or design, is gradually differentiated from it: "So shakes the needle and so stands the pole," as stands the general system of the common law to the unwritten law of a particular state. The common law is one law; the law of Massachusetts, even her unwritten law, is another. To confuse the two is easy, since one is based upon the other, and this accounts for the fact that the difference is often not realized.

1 Joseph H. Beale, *A Treatise on the Conflict of Laws* § 4.5, at 34-35 (1935).

³⁰⁹ U.S. Const. art. III, § 2, cl. 1.

³¹⁰ In addition to Jefferson's letter to Randolph, *supra* text accompanying note 304, see Madison's lengthy and scholarly (though no less impassioned) repudiation of the Federalists' argument in his Report of 1800 defending the Virginia Resolves, Madison Report, *supra* note 178, at 632-44.

³¹¹ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812).

held in *Swift v. Tyson*³¹² that federal judges were not bound by state-court decisions in *civil* actions based on the common law and brought in federal court based on diversity, and why *Swift* had to fall once this conception changed. Obviously the absence of protest over *Swift* was not due to waning interest in states' rights—not in 1842, with the Jacksonians in charge and the slavery problem brewing. But the question in *Swift* was different because no one was claiming that common law was federal law. Federal jurisdiction was based on diversity, and Justice Story was simply saying that federal judges were as capable as state judges of deciding what the common law was in a particular case; as capable, in other words, of participating in the collective project of interpreting a system that had legal force because it had been adopted by the states but that still consisted of general principles. Where a state had modified or revised these general principles—as by “local statutes or local usages of a fixed and permanent operation”³¹³—federal judges were, of course, bound by the state’s particular declarations. But where the general common law system was still in place, its principles furnished the governing law, and a court called upon to apply those principles had to discover for itself how best to do so. The decisions of other courts—state courts, English courts, even other federal courts—were “at most, only evidence of what the laws are; and are not of themselves laws.”³¹⁴ Such decisions were, in other words, data for the judge to use in determining the correct result in the particular case.³¹⁵

Swift became problematic when this premodern conception of common law was replaced by the Austinian model of positivism that became dominant after 1860.³¹⁶ For if there were no general law, but only the law of some state, then federal judges had no business ignoring the authoritative voice of state courts as to the meaning of state law, and they had no power to make federal law without authority

³¹² 41 U.S. (16 Pet.) 1 (1842).

³¹³ *Id.* at 18-19.

³¹⁴ *Id.* at 18.

³¹⁵ This is confirmed by certain aspects of the *Swift* regime that were inconsistent with the fears expressed by Jefferson in 1799 and that would otherwise have been quite anomalous, such as the fact that federal common law decisions did not afford plaintiffs a basis for federal question jurisdiction and did not preempt inconsistent state law. But, then, common law decisions of federal judges in diversity cases were not “federal law” at all: They were merely federal judges’ determinations of the proper interpretation of the general common law.

³¹⁶ See 1 John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* 204 (Robert Campbell ed., 5th ed. 1911). Austin’s view was that all law “properly so called” consisted of prescriptions clothed with legal authority by a sovereign empowered to do so. *Id.* at 206-07. The common law, which Austin called “judicial legislation,” was merely that part of a state’s law that judges were permitted to make. *Id.* at 204-05.

from Congress or in areas outside the scope of federal legislative jurisdiction. The rise of positivism, in other words, re-created in the diversity context all of Jefferson's fears about the implications of allowing federal courts to make their own common law decisions.³¹⁷ With that, *Swift* had to fall. Its demise was retarded for a time by the force of stare decisis, but the Court finally renounced its general common law-making powers in 1938 in *Erie Railroad Co. v. Tompkins*.³¹⁸

Of equal longevity is the doctrine of state sovereign immunity, so much in the news of late, which removes potentially controversial matters involving states from the business of the federal courts (or, indeed, of any court at all in some instances). For our purposes, the story begins in 1793, a difficult year for the new federal courts. In addition to the controversial Henfield prosecution and the turmoil caused by Washington's request for advice about neutrality,³¹⁹ the Supreme Court provoked an outcry by ruling in *Chisholm v. Georgia*³²⁰ that citizens of South Carolina could bring suit in federal court against the state of Georgia on a contract claim. This led, a short two years later, to the adoption of the Eleventh Amendment. By its terms, the Eleventh Amendment did no more than literally overturn the holding in *Chisholm*.³²¹ And based on its language, together with certain assumptions about Federalist aims, many commentators have argued that state sovereign immunity should be limited to cases like

³¹⁷ As Justice Field, protesting continued repetition of the idea of "general law" to justify ignoring state common law decisions, explained in 1893:

[T]here stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting); see also *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting) ("Whether [a state court can] be said to make or to declare the law, it deals with the law of the State with equal authority [to the legislature] however its function may be described."); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting) ("The law of a State does not become something outside of the state court and independent of it by being called the common law.").

³¹⁸ 304 U.S. 64 (1938).

³¹⁹ See *supra* notes 183-91, 299 and accompanying text.

³²⁰ 2 U.S. (2 Dall.) 419 (1793).

³²¹ See U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

Chisholm—diversity cases based on state law—and not extend to claims arising under federal law.³²²

While this could be a plausible position, the Supreme Court itself has never espoused it. The Justices have recognized, of course, that the actual terms of the Eleventh Amendment repudiate only *Chisholm*'s particular holding; that much is unmistakable. According to the Court, however, in taking this step the American people meant to do more than just overrule *Chisholm*: They meant to reaffirm a general principle of state sovereign immunity that never should have been questioned in the first place.³²³ Whether rightly or wrongly, moreover, the Court has stuck to this position with remarkable consistency throughout American history. It has, when necessary, modified or reshaped aspects of the broader doctrine to account for changing circumstances. So, for example, in *Ex parte Young*,³²⁴ changes in the nature of governmental activity led the Court to enlarge the personal cause of action that traditionally had been available against individual officials.³²⁵ And in a line of cases beginning with *Edelman v.*

³²² See Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 90-105 (1972); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 *Stan. L. Rev.* 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889 (1983); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 *Cornell L. Rev.* 1269 (1998). These commentators have been supported in recent years by a persistent minority on the Supreme Court. See, e.g., *Alden v. Maine*, 527 U.S. 706, 760-814 (1999) (Souter, J., dissenting) (arguing that Court should enforce federal rights under Fair Labor Standards Act against state violations); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting) (contending that Court's Eleventh Amendment jurisprudence is based on "flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect").

³²³ See *Hans v. Louisiana*, 134 U.S. 1, 11-12 (1890). As the Court recently explained, the states' immunity thus "derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden*, 527 U.S. at 728.

³²⁴ 209 U.S. 123 (1908).

³²⁵ The impact of sovereign immunity was softened by the opportunity to personally sue the government official allegedly responsible for a wrong. The plaintiff would bring an action based on an ordinary common law theory, such as trespass or conversion; the defendant-official would answer that his conduct was authorized by law; and the plaintiff would reply that this law was illegal or unconstitutional, an argument that, if successful, stripped the official of any protection. See David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 *Sup. Ct. Rev.* 149, 154-56. Because most governmental activities in the late-eighteenth and early-nineteenth centuries required officials to enter land or seize property or do something that fell within one of the common law forms of action, this "official action" meant that a remedy was available as a practical matter for most aggrieved plaintiffs. There were, to be sure, some instances in which sovereign immunity effectively barred all relief because no action was possible against the official personally, but these were rarer than one might otherwise suppose. See *id.* at 151.

By the late-nineteenth century, government was doing new sorts of things that did not require an official to do anything encompassed by a traditional common law cause of ac-

Jordan,³²⁶ the Court limited the forms of relief available in such actions to reflect new sorts of claims being brought.³²⁷ But with very few exceptions (since overturned), the Supreme Court has adhered closely to the idea that states cannot be sued in federal courts—thus avoiding a broad category of potentially troublesome political controversies.³²⁸

tion. *Ex parte Young*, for example, involved an allegedly confiscatory rate regulation that was enforced through ordinary criminal proceedings at a time before any action for malicious prosecution was available. *Ex parte Young*, 209 U.S. at 130-31. This new development threatened to upset the traditional balance between immunity and liability, leaving many more plaintiffs without any remedy at all. The Court solved the problem by enlarging the official action, holding that government officials could be sued personally for acting with apparent authority in violation of federal law, essentially the same theory that underlies § 1983. *Id.* at 167. In so doing, the Court closed a potential gap in the availability of relief, restoring the traditional balance without having to repudiate or alter state sovereign immunity itself.

This explains, by the way, why the modern Court's repeated insistence that actions under *Ex parte Young* are some sort of latecomer that involves a legal fiction is mistaken. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105, 111-14 & n.25 (1984) (describing *Young* as "fiction" several times). The "fiction" that officials could be sued personally for illegal action taken in their official capacity has been built into sovereign immunity from the start. All *Ex parte Young* did was to enlarge this cause of action in a thoroughly conventional manner to reflect new activities not already covered by common law.

³²⁶ 415 U.S. 651 (1974).

³²⁷ See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (disallowing permanent injunction against state protecting tribal property rights); *Green v. Mansour*, 474 U.S. 64 (1985) (decreeing that notice relief is only available as case-management device); *Quern v. Jordan*, 440 U.S. 332 (1979) (holding that notice relief cannot include amount of money citizen was denied); *Hutto v. Finney*, 437 U.S. 678, 689-700 (1978) (limiting relief to bad-faith violations); *Milliken v. Bradley*, 433 U.S. 267, 288-91 (1977) (granting prospective as opposed to retrospective money damages).

Under *Ex parte Young*, plaintiffs could obtain injunctive relief to compel an official to cease illegal or unconstitutional official activity. This worked well for many decades, but the expansion of class actions and the development of new causes of actions in the 1960s and 1970s began to put pressure on the doctrine. In *Edelman*, for example, the plaintiff class sought declaratory and injunctive relief against Illinois state officials for withholding welfare payments, asking both that future payments be made and that past payments be adjusted. The Court concluded that an injunction awarding past payments was formally and functionally so indistinct from a damages action against the state that it could not be permitted. *Edelman*, 415 U.S. at 677. The cases since *Edelman* reflect the Court's ongoing effort to regulate the remedy in such a way as to preserve the state's immunity without at the same time rendering the *Ex parte Young* action meaningless.

³²⁸ For the exceptions, see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). *Union Gas* held—in what must stand as one of the Court's all-time most tortured and poorly reasoned opinions—that Congress could constitutionally abrogate a state's sovereign immunity by exercising its power under the Commerce Clause. *Union Gas*, 491 U.S. at 23. It was overturned a short seven years later in *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). *Parden* held (1) that just by engaging in regulated activity the state constructively waived its immunity, and (2) that federal statutes should be construed liberally to find that Congress has abrogated a state's immunity. *Parden*, 377 U.S. at 190, 196. The second holding was overturned in *Welch v. Texas*

3. *Rules of Constitutional Interpretation*

Ultimately, the real significance of judicial independence is felt in the day-to-day administration of justice. Only a microscopic fraction of cases present questions of constitutional law, much less of great constitutional moment, while the litigants in all those ordinary lawsuits still care just as much about the quality of the adjudication they receive. Despite this, the stakes in the debate about judicial independence are perceived to revolve mainly around the Constitution. This is partly because the charter's national character means that everyone is interested in it and pays attention, especially to Supreme Court decisions. And it is partly because the handful of cases every year, or every few years, that present genuinely important issues of constitutional law go far toward defining our national legal identity. For many, then, the question of judicial review and the question of judicial independence are one and the same, which makes it all the more striking (and important) to realize just how little the federal courts actually do, even in this domain.

In saying that federal courts do little in the domain of constitutional law, we mean, of course, relative to what the text and best understanding of the Constitution suggest that they might otherwise do. The point is similar to one that our colleague Lawrence Sager first made some two decades ago, that the Constitution is to a striking degree "underenforced."³²⁹ "Our constitutional jurisprudence," Sager observed,

singles out comparatively few encounters between the state and its citizens as matters of serious judicial concern. After threats to speech, religion, and the narrow band of activities that fall under the rubric of privacy, after the disfavor of persons because of their race or gender (or possibly, because of their nationality or the marital status of their parents), and after lapses from fairness in criminal process, the attention of the constitutional judiciary rapidly falls off.

Department of Highways & Public Transportation, 483 U.S. 468, 475-78 (1987), followed a few years later by the reversal of the first holding in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 635 (1999).

The only other important decision that even arguably reflects a different, less stringent, understanding of state sovereign immunity is *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which ruled that Congress could abrogate state sovereign immunity by exercising its powers under Section 5 of the Fourteenth Amendment, which was designed specifically to empower Congress to reform state government.

³²⁹ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993) [hereinafter Sager, *Justice in Plain Clothes*].

By default, everything else falls in the miasma of [judicially unenforced] economic rights.³³⁰

If Sager's reckoning of what courts do seems anything but modest, consider the much larger domain of things that are within the judicial reach but that the judiciary has chosen not to grasp. Remember, judicial forbearance need not take the form of holding some matter formally nonjusticiable. The Court sometimes does this, as we saw above in our discussion of the political question doctrine.³³¹ But it is far more typical for the Court to exercise jurisdiction while applying substantive legal tests that leave political actors free to choose their course of action without any realistic threat of judicial intercession.

We need not tax readers with an exhaustive inventory of constitutional doctrines because a partial tally of prominent examples is more than sufficient to make the point. Start with the clauses granting affirmative powers to Congress and the Executive, virtually all of which historically have been left to the essentially unlimited discretion of the political branches.³³² These include some rather important powers, too, such as the war power,³³³ the treaty power (and foreign affairs powers generally),³³⁴ and the powers to tax and spend.³³⁵ The Court has recently begun to exercise aggressive judicial scrutiny under the Commerce Clause and Section 5 of the Fourteenth Amendment,³³⁶ and its rhetoric in these cases suggests the possibility of an even more dramatic expansion of judicial interference.³³⁷ If so, both history and

³³⁰ Sager, *Justice in Plain Clothes*, *supra* note 329, at 410-11.

³³¹ See *supra* notes 229-41 and accompanying text.

³³² Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215, 227-33 (2000).

³³³ There is no single case dealing with the war powers, which have evolved even more than most as a matter of practice and experience over time. But the courts have never interfered here. For a general discussion, see 1 Laurence H. Tribe, *American Constitutional Law* § 4-6 (3d ed. 2000).

³³⁴ See *Perez v. Brownell*, 356 U.S. 44 (1958) (allowing revocation of citizenship based on vote in foreign election); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (upholding congressional embargo); *Missouri v. Holland*, 252 U.S. 416 (1920) (enforcing legislation against states pursuant to treaty).

³³⁵ See *South Dakota v. Dole*, 483 U.S. 203 (1987) (permitting drinking-age condition on highway spending); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding social security tax); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (same).

³³⁶ See *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (ruling money damages under disability discrimination law barred by Eleventh Amendment); *United States v. Morrison*, 529 U.S. 598 (2000) (declaring gender-motivated violence law beyond Congress's powers under both Section 5 of Fourteenth Amendment and Commerce Clause); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that age discrimination law provisions beyond Congress's powers under Section 5 of Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (pronouncing law barring guns near schools beyond congressional Commerce Clause power).

³³⁷ See Kramer, *supra* note 233, at 130-58.

our model would predict trouble. In the meantime, and for the moment at least, the Court's actual intrusions remain modest.

Separation of powers is another arena in which the degree of judicial deference is remarkable. Here the Court has occasionally intervened, either when it has viewed the Constitution or some settled practice as unmistakably clear,³³⁸ or when Congress has sought to aggrandize its own position in the separation-of-powers scheme.³³⁹ But apart from these relatively narrow circumstances, the Court has for the most part left the political branches free to experiment—a freedom they have exploited liberally over the years. Hence the independent agencies, and legislative courts, and broad delegations of authority, and executive agreements, and much, much more. To reiterate: We are not saying that the Court plays no role in separation of powers; that would be a gross exaggeration. But in thinking about judicial independence, one needs to focus on the eighty or ninety percent of the glass that is empty as well as the ten or twenty percent that is full.

Even when we turn to the domain of individual rights, where the Court has been its most active, we mostly find restraint. Start with the Equal Protection Clause, which is theoretically applicable to everything government does, because all laws draw lines and create legal categories. Yet rather than use the clause ambitiously, the Court created tiers of scrutiny: strict, intermediate, and rational basis. Carefully confining the first two categories to a small subset of laws, the Justices allocated the vast majority of what government does into the third category, which means leaving it undisturbed.

Indeed, the use of rational basis scrutiny is ubiquitous in constitutional law, liberating most of what government does from serious judicial oversight whether it be under the Due Process Clause, the Takings Clause, the Contract Clause, or the Necessary and Proper Clause. The Court effectively has read the Fourteenth Amendment's Privileges or Immunities Clause out of the Constitution,³⁴⁰ while completely ignoring important parts of the Bill of Rights, including the Second and Ninth Amendments. To be sure, a few recent decisions suggest that clauses everyone thought were completely dead—like the

³³⁸ See *Clinton v. City of N.Y.*, 524 U.S. 417 (1998) (striking down line-item veto); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951-59 (1983) (finding legislative veto unconstitutional).

³³⁹ Compare *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (holding that Congress can limit President's removal power), with *Bowsher v. Synar*, 478 U.S. 714 (1986) (ruling that Congress cannot give itself removal power), and *Myers v. United States*, 272 U.S. 52 (1926) (same).

³⁴⁰ See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

Takings Clause or the Privileges or Immunities Clause—may have a bit of life in them after all.³⁴¹ But barely breathing is a long way from being a significant restriction on politics, and dire or hopeful predictions about a renaissance in the protection of economic liberties seem farfetched in reality.

The Court has been more aggressive with some provisions of the Constitution. There is the law of privacy, and, as Sager suggests, the Court's equal protection jurisprudence has been quite aggressive in the areas of race and gender.³⁴² First Amendment doctrine is similarly robust, both as to matters of speech and religion. But the Court's once equally robust criminal-procedure jurisprudence has fallen on hard times,³⁴³ and most of the rights recognized in the halcyon days of the 1960s have long since been undone. In much the same way, while adhering to its practice of policing the political system on matters of race, the Court has retreated from more daunting problems like political gerrymandering.³⁴⁴ On the whole, then, if one considers how easily the Justices could make their presence felt over a much broader range of governmental activity, it is hard not to agree with Sager that the domain the Court has put beyond the reach of constitutional case law is "considerabl[e]."³⁴⁵

If language in the Court's recent opinions is to be taken seriously, things may not stay this way for long. Ours is a dynamic system, in which the Supreme Court is responsive to perceptions of its own vulnerability and the risk of punishment from the political branches. If this threat grows faint—whether from the passage of time or a lack of political will due to divided government or any number of other possible factors—the Court's ambitions can be expected to swell. This describes the present Court, which, in a period of divided government, has ridden a wave of credibility generated (ironically) by the Warren Court to become the most active and aggressive Supreme Court since the *Lochner* era. Yet if the Justices persist, there will, eventually, be a reaction. It may take no more than rumblings from Capitol Hill or a few timely appointments to lead the Court to retreat. But Congress was given power over the Court's budget and jurisdiction for a reason, and judicial abuse requires a response no less than abuses from any

³⁴¹ See *Saenz v. Roe*, 526 U.S. 489, 502-04 (1999) (interpreting Privileges and Immunities Clause); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (applying Takings Clause).

³⁴² See Sager, *Justice in Plain Clothes*, *supra* note 329, at 410-11.

³⁴³ See *supra* notes 282-98 and accompanying text.

³⁴⁴ See *Davis v. Bandemer*, 478 U.S. 109 (1986) (declining to order state legislature to change reapportionment plan).

³⁴⁵ Sager, *Justice in Plain Clothes*, *supra* note 329, at 410.

other part of the government. The weakest branch is weak only if and for so long as its political vulnerability is real, and every once in a while, a reminder may be needed.

C. Evaluating Equilibrium

Old-style conservative commentators frequently lament the absence of a judicial morality of self-restraint and propose therefore to appoint only judges who adhere to some such ideology—be it constitutional originalism or textualism with respect to statutes. Given the constitutional protections that surround federal judges, these commentators doubt that there are effective institutional checks that can restrain them. The only effective way of controlling the federal judiciary, they say, is to appoint judges who are committed to beliefs about the fundamental value of judicial restraint in a constitutional system of government.³⁴⁶ Obviously, based on the materials we have presented, we think this claim is false and that the federal judiciary has surrounded itself with institutional and doctrinal devices of self-restraint.

Indeed, from our point of view, the remarkable fact is how reluctant the federal judiciary has historically been to take an expansive view of its jurisdiction or its authority. Even when the political branches might want courts to take a more active role in guiding social change, judges have established doctrinal barriers permitting them either to decline the invitation or to respond in a circumscribed and cautious manner. There have undeniably been periods when the federal courts were more aggressive—the *Lochner* Court is the most famous example, though the Rehnquist Court seems poised to overtake it—but such periods are rare, and their accomplishments often prove fragile and temporary.

Not surprisingly, the Supreme Court generally has been at the center of this institutional conservatism. This is so because the Court is uniquely in a position to take the perspective of the whole federal judiciary into account and to seek the public good of imposing judicial restraint. So, while some judges or some lower courts might, at times, undertake a venturesome jurisprudence, the Supreme Court retains and employs its authority to limit or stop these experiments if they threaten to provoke a political retaliation that would affect the federal court system generally.

³⁴⁶ Cf., e.g., Antonin Scalia, *Originalism: The Lesser Evil*, William Howard Taft Constitutional Law Lecture (Sept. 16, 1988), in 57 U. Cin. L. Rev. 849, 864 (1989) (praising originalism since it “lead[s] to a more moderate rather than a more extreme result”).

It is, of course, possible to see in this picture a judicial system that is *too* vulnerable to external political pressures, one that anticipates retaliation at every turn and imposes self-denying ordinances in response to foolishly imagined as well as real political threats. Does this accurately describe our federal courts? Should we say that the Marshall Court was cowardly in *Marbury v. Madison*³⁴⁷ and *Stuart v. Laird*³⁴⁸ for failing to throw down the gauntlet to the Republicans? Or was it farsighted in finding a way to salvage some tactical advantage out of what might have been a disastrous period for the courts? In *Marbury*, Chief Justice Marshall successfully asserted the Court's authority to review statutes and to interpret the Constitution, institutional prerogatives that have grown in authority and importance over time. Marshall was not permitted the luxury of assuming that these prerogatives were securely embedded in the constitutional fabric, though we take them for granted today. Faced with an imminent and dangerous threat to the authority of the judiciary, he found a way to craft *Marbury* that recognized and took account of political reality without abandoning his understanding of fundamental principles, at least not entirely.

There are dual lessons here. On the one hand, anyone worried about judicial independence must fear external political threats. On the other hand, an approach that worries only about such threats is insufficient. A more internal view, one that examines jurisprudential developments of the courts' own making, is also necessary. For the maintenance of an independent judiciary rests as much in the judges' hands as it does in hands outside the judiciary. And the way courts define their role through doctrinal development is crucial in finding and defining a workable counterbalance to the pressures of popular politics.

The imposition of legal sanctions in a constitutional democracy rests on two ideas, democracy and the rule of law, reflecting two separate conceptions of legitimacy: democratic legitimacy, which flows from the responsiveness of policy to the people's will, and legal legitimacy, which arises from the fact that judicial decisions can be understood to fit within an accepted, ongoing legal system. Because we as a people insist on both values, we are particularly vulnerable to the moments when they tug in opposite directions. We ask our leaders to pull us back from these dangerous moments, and doing so occasionally requires some fancy footwork. This Article has emphasized the role played by judicial leaders, those sitting on the Supreme Court,

³⁴⁷ 5 U.S. (1 Cranch) 137 (1803).

³⁴⁸ 5 U.S. (1 Cranch) 299 (1803).

but we could in another setting speak of political leaders like Dwight Eisenhower, who accepted unpopular judicial decisions in order to avert a constitutional crisis. For the reality of judicial independence ultimately depends on the interactions among these leaders, acting within a malleable institutional framework that encourages them to behave responsibly while still protecting the interests of their institutions.