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COMMENTS

PROPER PARTIES, PROPER RELIEF

William Baude* & Samuel L. Bray**

INTRODUCTION

In the last Term at the United States Supreme Court, standing was the critical question in several major cases: the two challenges to the Biden Administration's first student loan forgiveness plan, *Biden v. Nebraska*¹ and *Department of Education v. Brown*,² as well as the challenge to the Administration's immigration priorities in *United States v. Texas*³ and the race-discrimination challenge to the Indian Child Welfare Act in *Haaland v. Brackeen*.⁴ Standing has featured heavily in journalistic coverage of the decision in *303 Creative LLC v. Elenis*.⁵ And standing may have been the reason for the Court's stay of a lower court decision about the legality of the abortion drug mifepristone.⁶

The centrality of standing doctrine in contemporary U.S. law has many sources. One is procedural fusion, with the consequent loss of law and equity's distinctive formal structures.⁷ Another is a gradual shift over the twentieth century: from having public law questions answered defensively, when the law was being enforced against someone; to having such questions answered offensively, via suits for injunctions and declaratory judgments. Yet another is the shift beginning in the 1970s toward expansive preenforcement review of agency rules. Still other reasons standing has become more central are doctrinal developments

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¹ 143 S. Ct. 2355 (2023).

² 143 S. Ct. 2343 (2023).

³ 143 S. Ct. 1964 (2023).

⁴ 143 S. Ct. 1609 (2023).

⁵ 143 S. Ct. 2298 (2023). *E.g.*, Adam Liptak, *What to Know About a Seemingly Fake Document in a Gay Rights Case*, N.Y. TIMES (July 3, 2023). As a matter of doctrine, *303 Creative*'s standing was entirely orthodox and unremarkable, and the "seemingly fake document" was not material. The case was a preenforcement free speech challenge, based on stipulated facts, against the enforcement of a statute that had been recently enforced in the past, quite similar to the challenges permitted by a unanimous court in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). See *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1171–74 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023), cited favorably on this point by *303 Creative*, 143 S. Ct. at 2310. But the public attention to this issue reinforces the salience of standing, as well as the need for clear thinking about it.

⁶ *Danco Lab'ys, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075 (2023) (mem.).

⁷ See Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 818 (2004) ("Before the merger of law and equity in the Federal Rules of Civil Procedure, there was no justiciability doctrine known as standing.").

of the 1970s, not all of which have survived on their own: easy implication of statutory causes of action, the shift to enforcing public law rights primarily through injunctions rather than damages, and the growth of structural injunctions. All of these developments from the twentieth century put greater pressure on standing doctrine, as courts increasingly came to use it as a filter for the cases to be decided.

But one more source is especially important for the centrality of standing in the twenty-first century: the role of states as litigants against the federal government.⁸ There is an institutional side to the story, including a dramatic infusion of resources and expertise into the offices of state solicitors general. And there is a doctrinal side, especially the Supreme Court's decision in *Massachusetts v. EPA*.⁹ In that case, a narrow majority of the Court read state standing broadly, saying states were to be given "special solicitude in our standing analysis."¹⁰ The consequences have been predictable. In just the last decade and a half, states have come to dominate the public law scene. States — often large coalitions of states, all represented by attorneys general from the opposite political party of the President — now file suits challenging any important action taken by the executive branch.

The last decade and a half is not normal. Measured by the yardstick of the first two centuries of constitutional cases, it is not typical for so many of our major public law cases to have names like *United States v. Texas* and *Biden v. Nebraska*. The landmark decisions of our history, cases like *Dred Scott v. Sandford* and *Youngstown Sheet & Tube Co. v. Sawyer*, have not typically had state plaintiffs. If those cases had been decided in the twenty-first century, they might have been called *Massachusetts v. Buchanan* and *Ohio v. Truman*.

Although the new state standing has transformed the federal courts and reshaped their relationship to the executive branch, these transformations might prove temporary. This past Term at the Supreme Court saw what seems to be a deliberate turn by the Justices away from expansive conceptions of state standing. But it remains unclear whether the Court grasps the larger purpose of having a doctrine of standing, and whether it internalizes that purpose or treats standing doctrine as a box to be checked.

I. BASIC PRINCIPLES

Over the past fifty years, courts have developed an elaborate doctrine of "standing" to sue. This doctrine sometimes seems rootless, and it is

⁸ On the history of state standing, see generally Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995). On recent developments, see generally Symposium, *Federal Courts, Practice & Procedure: State Standing*, 94 NOTRE DAME L. REV. 1883 (2019).

⁹ 549 U.S. 497 (2007).

¹⁰ *Id.* at 520.

often criticized as highly malleable.¹¹ In elaborating standing, courts have run through various tests and terms, and even the term “standing” itself emerged only in the middle of the twentieth century.¹² But the modern doctrine of standing is only the surface. Beneath it, and other current doctrines of procedure, jurisdiction, and remedies, lie older, more foundational principles.

Article III of the Constitution vests the federal judiciary with “judicial Power” to decide an enumerated range of “Cases” and “Controversies.”¹³ Since the Founding, members of the Supreme Court have insisted that this means that they must act through certain forms — they cannot issue advisory opinions in response to executive inquiry,¹⁴ and they cannot opine on disputes when they do not have the power to issue binding relief.¹⁵ Federal courts cannot decide cases without litigants, or without remedies to award.¹⁶

In other words, Article III requires the proper parties, seeking proper relief.¹⁷ This logic has driven various permutations of justiciability doctrines. It explains why courts would classically reject cases without the

¹¹ See, e.g., *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41 (1982); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 501–07 (2008); Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 GREEN BAG 2D 17 (2002); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221–24 (1988); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996); see also JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* (2021); Caleb Nelson, *“Standing” and Remedial Rights in Administrative Law*, 105 VA. L. REV. 703 (2019).

¹² Sunstein, *supra* note 11, at 168–96.

¹³ U.S. CONST. art. III, § 2, cl. 1.

¹⁴ See Letter from John Jay, C.J. & Assoc. JJ., U.S. Sup. Ct., to George Washington, President (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488, 488–89 (Henry P. Johnston ed., 1891); see also RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 50–54 (7th ed. 2015) [hereinafter HART & WECHSLER] (reprinting and discussing this correspondence). But cf. Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 625 (2021) (arguing that “advisory opinions . . . would have been permitted at the Founding” while at the same time acknowledging that “courts’ consistent practice of rejecting them merits respect”).

¹⁵ See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410–14 (1792); cf. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1818–20 (2008).

¹⁶ See *Muskat v. United States*, 219 U.S. 346, 356 (1911) (“‘Judicial power,’ says Mr. Justice Miller in his work on the Constitution, ‘is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.’” (quoting SAMUEL FREEMAN MILLER, *LECTURES ON THE CONSTITUTION OF THE UNITED STATES* 314 (New York & Albany, Banks & Bros. 1891))).

¹⁷ William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 228 (2017) (“The fundamental inquiry that standing derives from is who is a ‘proper party’ to a given lawsuit.”); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695 (2004) (“The concept of proper parties is central to standing doctrine, and it may also infuse notions of a ‘Case.’”).

real party in interest, or parties of necessary importance.¹⁸ It explains why courts would not decide what they called “political questions” — meaning cases where the relief was effectively within the jurisdiction of the political branches and not the courts.¹⁹ It explains why courts would not issue judgments against nonconsenting sovereigns — they were not proper parties against whom proper relief could be issued.²⁰

A. *Standing*

This logic of proper parties and proper relief continues to animate standing doctrine, which is now attributed almost exclusively to Article III. Today, blackletter standing doctrine requires plaintiffs to show an “injury in fact.”²¹ This doctrinal requirement serves many purposes. One is to ensure that the court has the correct plaintiffs before it. Requiring the plaintiff to show injury will frequently operate as a rough proxy that ensures that the plaintiff has a legitimate reason to be in court, distinct from someone requesting an advisory opinion.

The injury-in-fact requirement has become more demanding over time — indeed, some would say to the point of absurdity.²² Even if a party has been given a private cause of action by Congress, the Court still demands *separate* proof of “injury in fact,” meaning that sometimes plaintiffs who face a square violation of their statutory rights will still lack standing.²³ But even here, the requirement of proper parties and proper relief helps explain the Court’s demand. As scholars of standing have explained, some injuries and claims are ones that properly belong to the public.²⁴ Part of the explicit rationale of these cases, as well as their implicit justification, is the concern that Congress might be trying

¹⁸ FED. R. CIV. P. 17(a); *see also* John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1016 n.109 (2008); *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 279–85 (2008) (recounting historical treatment of assignees for collection).

¹⁹ *See* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (“The mere question of right might perhaps be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savours too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.”); Fallon, *supra* note 11, at 1111; *see also* *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 76 (1868); John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 481–85 (2017).

²⁰ Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1573–75, 1591 (2002); *see also* *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 755–56 (1824); William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 640–41 (2021) (discussing this passage from *Osborn*).

²¹ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013).

²² *E.g.*, Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 349–51 (2022).

²³ *See* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571–78 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549–50 (2016); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204–05 (2021).

²⁴ F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276–77, 296–97 (2008); Woolhandler & Nelson, *supra* note 17, at 694–712.

to give to private plaintiffs enforcement powers that are the public's, and thus powers that should be exercised by the executive branch.²⁵

Additionally, standing doctrine strongly disfavors so-called “third party standing.”²⁶ These are cases in which even though the plaintiff *does* have an injury in fact and it *can* be redressed by her suit, she is denied standing nonetheless, because she is vindicating rights that more properly belong to somebody else.²⁷ The plaintiff can vindicate the rights of others only if she demonstrates a “‘close’ relationship” to that somebody else, and demonstrates something that is keeping that somebody else from asserting those rights directly.²⁸ This doctrine even more directly evidences the need for proper parties. It says that the blackletter standing test is necessary but not sufficient if there is a *more proper* party who could bring the case instead.

Professor Richard Re has observed a general pattern underpinning many modern standing decisions that he calls the “most interested plaintiff rule.”²⁹ Standing often is “made available on a *relative* basis,” taking into account “where the particular plaintiff before the court stands as compared” to other potential plaintiffs,³⁰ with standing often being awarded to “plaintiffs with the greatest stake in obtaining the requested remedy.”³¹ To take one recent example, in *Clapper v. Amnesty International USA*,³² the Court denied standing and concluded its analysis by pointing to other plaintiffs who would have “a stronger evidentiary basis for establishing standing than do respondents in the present case.”³³ To the extent that this is indeed a general pattern in the Court’s decisions, once again it points to the continuing influence of the fundamental principle of proper parties.

²⁵ Baude, *supra* note 17, at 227–31; *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1132–39 (11th Cir. 2021) (Newsom, J., concurring); *see also Lujan*, 504 U.S. at 559–61, 576–77; *TransUnion*, 141 S. Ct. at 2206–07.

²⁶ *See* Warth v. Seldin, 422 U.S. 490, 499 (1975) (“[E]ven when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”).

²⁷ *See id.*

²⁸ *Kowalski v. Tesmer*, 543 U.S. 125, 129–33 (2004).

²⁹ Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1196 (2014).

³⁰ *Id.* at 1195.

³¹ *Id.* at 1196.

³² 568 U.S. 398 (2013).

³³ *Id.* at 421–22. Note that the case for relative standing is strongest for what might be called “negative relative standing” — that a person’s standing can be defeated by someone’s having a stronger basis for suit. That is not the same thing as saying that there must always be a plaintiff with standing. Re endorses positive relative standing as well, Re, *supra* note 29, at 1197, but we are less convinced by that part of his argument. *Accord* *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“The assumption that if respondents have no standing . . . , no one would . . . , is not a reason to find standing.” (citing *United States v. Richardson*, 418 U.S. 166, 179 (1974))); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821) (conceding “that there may be violations of the constitution, of which the Courts can take no cognizance”).

B. Remedies

Remedies are also critical to the proper exercise of the judicial power. Indeed, blackletter standing doctrine requires the plaintiff's injury in fact to be connected to remedies. The injury must be *traceable* to the defendant, and it must be *redressable* by the relief that the plaintiff seeks.³⁴ Hence, "standing is not dispensed in gross,"³⁵ and "a plaintiff must demonstrate standing' . . . 'for each form of relief' that is sought."³⁶ If a plaintiff seeks an injunction, for instance, "case-or-controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.'"³⁷ Indeed, it would be no exaggeration to say that one of the most important reasons that plaintiffs must demonstrate their injury in the first place is so that they can demonstrate that they are seeking the proper relief to redress it.

Attention to remedies and redressability helps explain some of the classic early twentieth-century standing cases. Consider the 1923 case of *Frothingham v. Mellon*,³⁸ where the Court rejected a challenge to the Maternity Act³⁹ on the grounds that an individual plaintiff had no standing to sue. The case is often shorthanded as memorializing a rule against "taxpayer standing," but that is something of a misnomer.⁴⁰ Taxpayers do and have always had standing to challenge the *taxes* they pay.⁴¹ (Think of the property owner who challenged the tax in *Hylton v. United States*,⁴² or the manufacturer who challenged the tax in *Bailey v. Drexel Furniture Co.*⁴³) Harriet Frothingham's problem was that she had no legal objection to the taxes she paid, only to the way the government subsequently spent the money. And this is a problem, to use modern doctrinal terms, of redressability. If the taxes were lawfully collected from Mrs. Frothingham, once they entered the federal treasury she lost

³⁴ E.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

³⁵ *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)).

³⁶ *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler*, 547 U.S. at 352).

³⁷ *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)); see also Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 579 (2016) ("[C]ases about constitutional standing, ripeness, or abstention often emphasize the plaintiff's request for equitable relief, and many of those cases have suggested that these doctrines apply differently depending on whether legal or equitable relief is sought."); Fallon, *supra* note 11, at 1110–11 ("In actions for equitable remedies, the Court has occasionally said that the concerns bearing on standing merge along a spectrum with concerns about whether the relief sought would overreach the bounds of judicial competence or enmesh the issuing court in functions more properly reserved to democratically accountable institutions.").

³⁸ *Massachusetts v. Mellon and Frothingham v. Mellon*, 262 U.S. 447 (1923).

³⁹ Ch. 135, 42 Stat. 224 (repealed 1927).

⁴⁰ See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 430–33 (2017).

⁴¹ See *Flast v. Cohen*, 392 U.S. 83, 117 (1968) (Harlan, J., dissenting).

⁴² 3 U.S. (3 Dall.) 171 (1796).

⁴³ 259 U.S. 20 (1922).

any legal claim to them. And if she were somehow to obtain an injunction against the government's spending under the Maternity Act, that remedy would not benefit her as a taxpayer. The government would not need to refund the money; it could simply spend it on something else.

Or consider the next decade's case of *Ex parte Levitt*,⁴⁴ where the Court refused to entertain a lawyer's potentially explosive challenge to the legality of Hugo Black's appointment to the Supreme Court. The Court's extremely brief opinion described Levitt as an improper party, which is not obviously correct.⁴⁵ The even more fundamental problem sounded in remedies and jurisdiction. Levitt filed a "Petition for an Order to Show Cause" without identifying an established cause of action or a basis for equitable relief, and filed it in the Supreme Court as an original matter, even though the Supreme Court could not possibly have original jurisdiction in such a case.⁴⁶ To shorthand cases like these as "standing cases" and to reduce them to the problem of injury in fact is to miss something very important about the inquiry.

The importance of remedies to standing, and attention to proper relief, is especially evident in equity. The range, power, and flexibility of equitable remedies are a central part of equity's contributions to modern law. As Professor D.E.C. Yale put it, with some modest overstatement, "Equity is essentially a system of remedies."⁴⁷ Unsurprisingly, equity has tended to require a stronger showing of injury (or of a "grievance," to use language more apt for equity) before it will deal out a stronger remedy.⁴⁸ Thus, "in equity it all connects — the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be."⁴⁹

Some reasons for this practice are straightforwardly functional. For example, equitable remedies are often more intrusive to the parties,⁵⁰

⁴⁴ 302 U.S. 633 (1937) (per curiam).

⁴⁵ William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327, 343–46 (2019).

⁴⁶ *Id.* at 347–48.

⁴⁷ D.E.C. Yale, *Introduction* to LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA OF CHANCERY AND EQUITY" 3, 16 (D.E.C. Yale ed., 1965). This shorthand works best to describe equity's concurrent jurisdiction rather than its exclusive jurisdiction. For the classic statement of that distinction, see 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 33, at 32–33 (Boston, Hilliard, Gray & Co. 1836) ("The jurisdiction of a Court of Equity is sometimes concurrent with the jurisdiction of a Court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it.").

⁴⁸ Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1792–95, 1797–98 (2022); cf. EUGENE A. JONES, MANUAL OF EQUITY PLEADING AND PRACTICE 31 (1916) ("[T]he plaintiff's narrative of his grievance . . . must state a case remediable under some head of equity jurisdiction . . .").

⁴⁹ Bray & Miller, *supra* note 48, at 1797. This passage is quoted in *United States v. Texas*, 143 S. Ct. 1964, 1985 (2023) (Gorsuch, J., concurring in the judgment).

⁵⁰ Bray, *supra* note 37, at 572–78.

encroaching on liberty interests of private defendants and raising democratic concerns for public defendants. And equitable remedies are often more burdensome to the courts, because they can require supervision and updating over time.⁵¹ Another functional reason is an analogy to damages: there is an inherent symmetry between the amount of a plaintiff's injury and the amount of damages the defendant is required to pay.⁵² But no such symmetry is inherent in equitable remedies like injunctions, specific performance, and constructive trust.⁵³ Equity had to be conscious about whether the plaintiff's grievance was commensurate with the remedy sought, because otherwise a trifle of grievance could be the basis for a remedy that imposed massive costs on the defendant. The connection of the intensity of the plaintiff's grievance to the intensity of the remedy is grounded in equity's role as a secondary system.⁵⁴

And while the modern Supreme Court does not always make this explicit,⁵⁵ its cases show a pattern of requiring a stronger grievance for a stronger equitable remedy. The cases in which the Court emphasizes the standing-remedy connection are almost always cases about equitable remedies, such as *City of Los Angeles v. Lyons*,⁵⁶ *Lewis v. Casey*,⁵⁷ and *Gill v. Whitford*.⁵⁸ This is true of cases about redressability — which is the place in the *Lujan*⁵⁹ framework that most obviously integrates standing and remedy. And it is not just redressability but standing generally. In Professor Ernie Young's words, "the familiar landmarks of standing doctrine — *Data Processing*, *Warth v. Seldin*, *Allen v. Wright*, *Lujan v.*

⁵¹ See, e.g., Sys. Fed'n No. 91, Ry. Emps.' Dep't v. Wright, 364 U.S. 642, 647 (1961) ("The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.").

⁵² Cf. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 410 (2003) (not allowing even punitive damages to be awarded for injuries to nonparties, and noting that "nonparties are not normally bound by another plaintiff's judgment").

⁵³ See, e.g., Bray, *supra* note 37, at 578 ("[E]quitable remedies are often asymmetric in their effect, and sometimes dramatically so."); Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L. 1, 1 (2012) ("[T]he cost to defendant of complying with the injunction may exceed, or may greatly exceed, the benefit plaintiff would derive from the injunction.").

⁵⁴ To flesh out this point: as a secondary, backup system, equity needs to ration its resources and deploy them only when needed. See generally Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021). Small injuries therefore do not deserve its attention. This can be seen in how the courts developed the idea of "equitable jurisdiction" — the inquiry into whether this was the sort of suit that equity would entertain. Bray & Miller, *supra* note 48, at 1775 & nn.42–43; see also Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Jurisdiction*, 98 NOTRE DAME L. REV. 699 (2022). Equitable jurisdiction was a threshold question and simultaneously a question that implicated remedial issues: Was the legal remedy adequate? Was the proposed equitable remedy too burdensome? And so on.

⁵⁵ An important exception is *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (quoted *supra* p. 158).

⁵⁶ 461 U.S. 95.

⁵⁷ 518 U.S. 343 (1996).

⁵⁸ 138 S. Ct. 1916 (2018).

⁵⁹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

Defenders of Wildlife — all involved equitable relief.”⁶⁰ The stronger remedial medicine of equitable remedies is precisely where almost all the development of standing doctrine has been.⁶¹ This pattern points to the continuing influence of the fundamental principle of proper relief.

C. The Judicial Role

These doctrines and principles all serve an important separation of powers purpose, which the Court intones so frequently as to mark a cliché. The doctrines of justiciability define “the judiciary’s proper role in our system of government.”⁶² “The ‘law of Art. III standing is built on a single basic idea — the idea of separation of powers.’”⁶³ Thus, “[r]elaxation of standing requirements is directly related to the expansion of judicial power.”⁶⁴ And so on.⁶⁵ But why? What do these mantras mean? Is the Court making the tautological point that because standing is a judicial construction of the requirements of Article III, and because the separation of powers comprises Articles I, II, and III of the Constitution, any violation of the doctrine of standing must also be a violation of the separation of powers? If so, the invocation of separation of powers adds nothing but an air of seriousness.

Yet there is a deeper connection between standing, remedies, and the judicial role. The judicial role is the conclusive resolution by judges of legal disputes, which in turn are the sorts of disputes that can be conclusively resolved by judges acting as judges. Put less circularly, what judges do is enter judgments (“conclusive resolution”) of disputes that involve the rights of parties (“the sorts of disputes that can be conclusively resolved by judges”) according to law (“acting as judges”). Doctrines like standing operate to ensure that the federal courts act as courts. Requiring proper parties ensures that it is a judicially cognizable dispute, and requiring proper relief ensures that it is a judicially resolvable dispute. These requirements help to distinguish the court’s power to decide particular cases according to law from the legislature’s power to make law and the executive’s power to enforce it.

⁶⁰ Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1906 (2022); cf. Fallon, *supra* note 11, at 1110 (“Standing issues rarely emerge in suits for damages.”).

⁶¹ The two most salient recent exceptions are *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (holding that a statutory cause of action for damages was partly noncognizable under Article III); and *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) (holding that a request for only nominal damages nonetheless satisfied Article III).

⁶² *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341–42 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

⁶³ *TransUnion*, 141 S. Ct. at 2203 (quoting *Raines*, 521 U.S. at 820).

⁶⁴ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408–09 (2013).

⁶⁵ For more examples, see *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663 (1993); *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014); and *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 615 (2007) (Kennedy, J., concurring).

These doctrines of justiciability also serve practical purposes — but not only (or not particularly) the one that is too-often cited, of ensuring that the issue will be well litigated.⁶⁶ In important public law cases, the issue is almost always amply litigated by ideologically motivated parties and armies of amici.

Instead, the doctrines help protect the right of people to stay *out* of court. That is, they protect the right to be safe from the lawyers. The Supreme Court has called this “a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.”⁶⁷ More concretely, it means that when the proper parties do not *want* the courts to intervene in their business, they can continue to manage their own affairs without judicial oversight.⁶⁸ For a stark example, consider the fate of Gary Gilmore, who was executed by the state of Utah in 1977.⁶⁹ Because Gilmore’s execution was the first one after the Supreme Court declared a moratorium on the death penalty in 1972,⁷⁰ there were fair questions about the legality of his sentence. But Gilmore made a “knowing and intelligent” choice not to challenge it, accepting his fate.⁷¹ For the Supreme Court, that was reason enough not to intervene and decide any further legal questions, even a constitutional question on a matter of life and death.⁷² Gary Gilmore’s mother, Bessie, sought unsuccessfully to intervene, but the Justices in the majority concluded that she lacked “standing,”⁷³ that the Court was “without jurisdiction to entertain the ‘next friend’ application filed by Bessie Gilmore,”⁷⁴ and that “[w]ithout a proper litigant before it, this Court is without power to stay the execution.”⁷⁵

The justiciability doctrines also protect the courts from their own snap judgments. A consequence of the classical model of the judicial role is to ensure that the legal issues on the docket of the Supreme Court

⁶⁶ See Re, *supra* note 29, at 1197 (“As a number of scholars have observed, standing is often a poor proxy for good advocacy” (citing Elliott, *supra* note 11, at 474; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891–92 (1983); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1385 (1973)).

⁶⁷ Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

⁶⁸ See generally Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599 (2015).

⁶⁹ See *Gilmore v. Utah*, 429 U.S. 1012 (1976); see also William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 960 (1989) (reviewing ROBERT M. COVER ET AL., *PROCEDURE* (1988) (discussing critique of *Gilmore* under the “public rights thesis” of Professors Robert Cover, Owen Fiss, and Judith Resnik)).

⁷⁰ See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

⁷¹ *Gilmore*, 429 U.S. at 1013.

⁷² *Id.*

⁷³ *Id.* at 1014 (Burger, C.J., joined by Powell, J., concurring).

⁷⁴ *Id.* at 1016.

⁷⁵ *Id.* at 1017 (Stevens, J., joined by Rehnquist, J., concurring); see also *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (reaffirming *Gilmore*).

do not too neatly track the list of political issues at the front of the minds of the public.⁷⁶ Another consequence is to ensure that those issues come before the Court at a deliberate pace. In combination, these consequences provide another level of remove between the kinds of things the courts do and the kinds of things that would have been done by a council of revision.

It is worth noting, and is more than incidental, that these practical purposes presuppose that the courts are not infallible. If courts always got things right, always made things better rather than worse, there would be no reason other than resource constraints not to have them decide as many things as possible. And if their time must be rationed, there would be no reason not to give them the cases of the vastest scale and greatest importance first. The doctrines of justiciability that bind the judicial role recognize that this is not so. To ensure order, we sometimes *treat* judicial decisions as if they are infallible, but we must not confuse that practice with actual perfection.⁷⁷

There are important and valid questions about whether all of these principles have been cashed out in exactly the right places. One can certainly quibble with the details of existing doctrine. And one can argue more fundamentally that some of these inquiries should not be in a doctrine called or conceptualized as Article III standing, but instead should be handled by rules about causes of action, equitable jurisdiction, various civil procedure doctrines, and so on.⁷⁸ In fact, as is often the case, our legal system would be healthier if the answers to many important questions were traced not to the Constitution but to background

⁷⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 114 (Henry Reeve trans., Bantam Books 2004) (1835) (“It will readily be understood that by connecting the censorship of the laws with the private interests of members of the community, and by intimately uniting the prosecution of the law with the prosecution of an individual, legislation is protected from wanton assailants, and from the daily aggressions of party spirit.”); *see also* Frederick Schauer, *The Supreme Court, 2005 Term — Foreword: The Court’s Agenda — And the Nation’s*, 120 HARV. L. REV. 4, 9 (2006) (arguing that “neither constitutional decisionmaking nor Supreme Court adjudication occupies a substantial portion of the nation’s policy agenda or the public’s interest, as the Court’s work in the 2005 Term makes stunningly clear”).

⁷⁷ *See*, of course, *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) (“We are not final because we are infallible, but we are infallible only because we are final.”); *see also* 1 WILLIAM BLACKSTONE, *COMMENTARIES* *71 (“So that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law.”).

⁷⁸ *See, e.g.*, Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 60–76 (2021) (discussing both civil procedure rules and standing principles governing representative parties); Bray & Miller, *supra* note 48 (discussing equitable jurisdiction); Fallon, *supra* note 11, at 1111–12 (discussing the law of remedies); Fletcher, *supra* note 11 (focusing on the cause of action); Owen W. Gallogly, *Equity’s Constitutional Source*, 132 YALE L.J. 1213 (2023) (focusing on the text of Article III); John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911, 1912 (2022) (focusing on unwritten principles); Stephen E. Sachs, *How Standing Ate Procedure* (May 26, 2020) (unpublished manuscript) (on file with the Harvard Law School Library) (considering civil procedure doctrines).

principles embedded in our legal system,⁷⁹ where a few words do not have to be strained to do so much.

But whatever doctrinal boxes one may choose for the proper-party and proper-relief inquiries, these questions are critical to safeguarding the judicial role. One way or another, federal courts should be deciding only cases between the proper parties that result in proper relief.

II. THE *MASSACHUSETTS V. EPA* ERA AND THE SHIFTING JUDICIAL ROLE

The viability of this model of the judicial role has been challenged for decades. In 1976, Professor Abram Chayes wrote about the then-new “public law model” of litigation in which courts served more as law-declaring regulators than as resolvers of specific disputes.⁸⁰ On this model, a lawsuit:

focuses not on the fair implications of private interactions, but on the application of regulatory policy to the situation at hand. The lawsuit does not merely clarify the meaning of the law, remitting the parties to private ordering of their affairs, but itself establishes a regime ordering the future interaction of the parties and of absentees as well, subjecting them to continuing judicial oversight.⁸¹

But the seemingly ascendant Public Law Model has not been unhesitatingly accepted by the federal courts; some hawkishness on standing and remedies over the past fifty years, among many other things, has marked judicial hesitation.

A new variation of the Public Law Model, and a new threat to the traditional model of the judicial role, seemed to emerge after the Supreme Court’s 2007 decision in *Massachusetts v. EPA*. In this decision, the Court found that Massachusetts had standing to sue the Environmental Protection Agency for failure to regulate greenhouse gas emissions under the Clean Air Act. Although the injury that the state claimed was a loss of its coastline because of rising sea levels,⁸² this injury was difficult to trace directly to the EPA’s actions, and also difficult to redress by a prohibitory or even a mandatory injunction addressed to the EPA. It was exactly the kind of diffuse injury that would ordinarily not suffice to establish standing. But the Court held in a 5–4 decision that the state had standing because states should receive “special solicitude” in the standing analysis.⁸³

⁷⁹ Cf. Recent Case, *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022) (*en banc*), 136 HARV. L. REV. 2176, 2180 (2023).

⁸⁰ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

⁸¹ *Id.* at 1281.

⁸² *Massachusetts v. EPA*, 549 U.S. 497, 542 (2007) (Roberts, C.J., dissenting).

⁸³ *Id.* at 520 (majority opinion).

In the years following that decision — what we will call the “*Massachusetts v. EPA* era” — the number of lawsuits brought by state attorneys general challenging actions by the federal government skyrocketed. Now, when a Republican administration does something consequential and controversial, it will almost certainly be sued by a group of Democratic states, and when a Democratic administration does something consequential and controversial, the roles reverse.⁸⁴ Republican state attorneys general initiated 58 lawsuits against the Obama Administration; Democratic state attorneys general initiated 155 lawsuits against the Trump Administration; and Republican state attorneys general have already initiated 59 lawsuits against the Biden Administration.⁸⁵ As we will discuss in Part III, this dynamic was on continuing display in the October 2022 Term, which featured major challenges to the Biden Administration’s immigration policies and student loan forgiveness. (During the same time, lower courts issued nationwide relief in at least four more suits by states against the Biden Administration, in cases challenging immigration policies,⁸⁶ vaccination requirements,⁸⁷ and influence on social media platforms.⁸⁸)

The decision in *Massachusetts v. EPA* contributed to this dynamic, but it is not the only thing that did, and perhaps not even the most important thing that did. Other causes discussed include the rising sophistication and resources of state solicitors general, ideological polarization in Congress, changes in the preliminary injunction, the rise of the national injunction, and a trend toward major executive actions being taken with only an attenuated claim of legislative authorization. Whatever the precise accumulation of causes, however, *Massachusetts v. EPA* is a key part of the story because it allowed suits by states that would never have been considered cognizable under previous standing law.

A. *Massachusetts v. EPA*

What is clear about *Massachusetts v. EPA* is that it reflected a lax judicial attitude toward state standing. What is less clear is the exact basis for Massachusetts’s standing to sue. The specific nature of the state’s injury — and more importantly the connection between that

⁸⁴ See Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 *PUBLIUS* 469, 473–74 (2018).

⁸⁵ See *State Lawsuits Database*, ST. LITIG. & AG ACTIVITY DATABASE (Sept. 2, 2023), <https://attorneysgeneral.org/list-of-lawsuits-1980-present> [<https://perma.cc/5786-BW49>].

⁸⁶ *Florida v. United States*, No. 21-CV-1066, 2023 WL 2399883, at *35 (N.D. Fla. Mar. 8, 2023); *Florida v. Mayorkas*, No. 23-CV-9962, 2023 WL 3398099, at *7 (N.D. Fla. May 11, 2023).

⁸⁷ *Texas v. Becerra*, No. 21-CV-300, 2023 WL 2754350, at *33 (N.D. Tex. Mar. 31, 2023).

⁸⁸ *Missouri v. Biden*, No. 22-CV-01213, 2023 WL 4335270, at *73 (W.D. La. July 4, 2023). To be sure, state plaintiffs did not have a monopoly on nationwide relief against the Biden Administration. Other cases in the same short period include *Alliance for Hippocratic Med. v. FDA*, No. 22-CV-223, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023); *Braidwood Management Inc. v. Becerra*, No. 20-CV-00283, 2023 WL 2703229 (N.D. Tex. Mar. 30, 2023); and *Feds for Medical Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023) (en banc).

injury and the remedy the state sought against the EPA — were more speculative than in a typical administrative law suit. Not because climate change is speculative, to be clear, but because the nature of the problem is so global and systemic that it is hard to connect a future hypothetical EPA rulemaking to exact fluctuations in the coastline of the state of Massachusetts.

It is true that Congress had provided a statutory cause of action to challenge agency decisions like the one at issue.⁸⁹ The Court described that statutory cause of action as being “of critical importance to the standing inquiry.”⁹⁰ But under precedent at the time, and emphatically confirmed since, a statutory cause of action is not completely sufficient to answer the question of standing.⁹¹

To round out the argument for standing, the Court emphasized that states were entitled to special access to the federal courts. “States are not normal litigants for the purposes of invoking federal jurisdiction,” the Court wrote.⁹² States had “surrender[ed] certain sovereign prerogatives” by forming the United States, and could no longer vindicate their interests through war, treaties, or even some exercises of the police power.⁹³ Thus, concluded the Court: “Given that procedural right [in 42 U.S.C. § 7607(b)(1), discussed above,] and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”⁹⁴

The nature of this “special solicitude” was famously undefined.⁹⁵ As Chief Justice Roberts’s dissent in *Massachusetts v. EPA* put it: “It is not at all clear how the Court’s ‘special solicitude’ for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.”⁹⁶ Both the majority opinion and later cases suggested that *Massachusetts v. EPA* could undermine some important aspects of standing doctrine.

First, it could undermine the rule against *parens patriae* lawsuits that dates back to another standing case involving the Bay State, *Massachusetts v. Mellon* — the companion case to *Frothingham*. In *Massachusetts v. Mellon*, the Court refused to hear another lawsuit that challenged the federal spending in the Maternity Act as beyond federal

⁸⁹ *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (citing 42 U.S.C. § 7607(b)(1)).

⁹⁰ *Id.*

⁹¹ See cases cited *supra* note 23.

⁹² *Massachusetts v. EPA*, 549 U.S. at 518.

⁹³ *Id.* at 519.

⁹⁴ *Id.* at 520.

⁹⁵ See, e.g., Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2100 (2019); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 67–75 (2011); Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 19–37 (2007); see also Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 67–69 (2008) (suggesting this was an expedient compromise to get Justice Kennedy’s vote).

⁹⁶ *Massachusetts v. EPA*, 549 U.S. at 540 (Roberts, C.J., dissenting).

power, but this one was brought by the state of Massachusetts. Among other things *Mellon* squarely rejected the argument that “the suit may be maintained by the State as the representative of its citizens.”⁹⁷ While a state had many powers to regulate and entertain lawsuits in its own courts on its own citizens’ behalf, “[i]t cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.”⁹⁸ A state, one might say, is not the proper party to vindicate the rights of its citizens against the federal government.

In a long footnote, *Massachusetts v. EPA* pushed against *Mellon*. The Court warned against a “broad reading” of *Mellon*, and insisted that “there is a critical difference between allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).”⁹⁹ Even if this distinction did not formally allow states to reassume the role of *parens patriae* against the federal government, in practice it seemed to invite the creative reconceptualization of such suits.¹⁰⁰

Second, special solicitude could license a kind of broad economic speculation about the impact of federal policies on states, which might give states power to challenge every major administrative action. For instance, in Texas’s challenge to the Obama Administration’s Deferred Action for Parents of Americans (DAPA) program, the state relied in part on speculation about the financial impact of immigrant populations in Texas.¹⁰¹ The October 2022 Term cases featured such arguments as well, from the states challenging both the Biden Administration’s immigration policies and its student loan forgiveness.

⁹⁷ *Massachusetts v. Mellon and Frothingham v. Mellon*, 262 U.S. 447, 485 (1923).

⁹⁸ *Id.*; see also *id.* at 485–86 (“While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.” (citation omitted) (citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1901))).

⁹⁹ *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)).

¹⁰⁰ See HART & WECHSLER, *supra* note 14, at 285–86 (discussing this and other ambiguities in *Massachusetts v. EPA*).

¹⁰¹ Brief for the State Respondents at 27–30, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674); see also *id.* at 31–34 (invoking special solicitude under *Massachusetts v. EPA*). Texas also had a much narrower argument about the costs the states would incur from processing driver’s license applications. *Id.* at 18–26. This argument was more concrete and more plausible, but it was also out of all proportion to the national injunction against the enforcement of DAPA entirely, which was the remedy the state sought and received. See Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 895 (2016) (arguing that “[e]ven if Texas is correct that the DAPA program requires the State to issue driver’s licenses to DAPA beneficiaries, Texas has standing *only* to challenge that requirement and to seek redress for that harm — by requesting a court ruling that would lift the requirement and allow Texas to apply its state law as it saw fit” (footnote omitted)); see also *id.* n.215 (“A case like *Texas v. United States* strikingly illustrates the need for a link between the State’s injury and the request for relief.”).

Taken too far, these arguments could obliterate any demand for proper parties. States encompass enough people, places, and things that any significant administrative policy can be said to affect a state in some way.¹⁰² Call this the state-as-a-super-big-person problem¹⁰³ — and think in your mind of the massive human-shaped sovereign on the frontispiece of Thomas Hobbes’s *Leviathan*. If anything, given the sheer massiveness of state “persons,” the “injury in fact” test would need to be applied to them with *special skepticism*, not “special solicitude,” in order to establish whether they are the proper parties.¹⁰⁴

B. Inattention to Remedies

The pressure to shift the judicial role has come not just from a lax approach to standing, but also from inattention to proper relief. Three instances of this inattention are (1) the rapid rise of the national injunction, (2) the shifting and merits-centric understanding of the preliminary injunction, and (3) the one-good-plaintiff rule.

The first instance is the dramatic growth of the national injunction.¹⁰⁵ Ordinarily, an injunction regulates the conduct of the defendant vis-à-vis the plaintiff. The primary exception, if it is right to think of it that way, is the class action, but even then the defendant’s conduct is regulated vis-à-vis those who are effectively plaintiffs, virtually represented by the “named” plaintiff.¹⁰⁶ In many cases the Supreme Court has expressed this party-specific understanding of what equitable remedies do,¹⁰⁷ and it reflects centuries of equity practice.¹⁰⁸ By contrast, a national injunction “controls the federal defendant’s conduct against

¹⁰² Woolhandler & Collins, *supra* note 8, at 395 (“This potential universe of interests [for states] is so broad, and the Court’s current focus on ‘injury-in-fact’ so open-ended, as to render incoherent the prerequisite of an injury to a claim for relief.”); see also Aziz Z. Huq, *State Standing’s Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2142 (2019) (“Fiscal effects are of particular importance as a basis for state standing because it will almost always be the case that the state can gin up a fiscal effect based on another sovereign’s action.”).

¹⁰³ Alternatively, one could think of a state as a giant membership organization, to whom current doctrine also affords easy standing. See Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057, 2067 (2019).

¹⁰⁴ See Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2024–25 (2019).

¹⁰⁵ See generally Bray, *supra* note 40.

¹⁰⁶ For a list of the doctrinal categories that allow virtual representation — and the Court’s insistence that these are narrow exceptions that prove the rule — see *Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008).

¹⁰⁷ See, e.g., *California v. Texas*, 141 S. Ct. 2104, 2115 (2021); *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (“A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”); *Lewis v. Casey*, 518 U.S. 343, 358 (1996) (finding the plaintiffs and only the plaintiffs to be “the proper object of this District Court’s remediation”); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“[N]either declaratory nor injunctive relief can directly interfere with the enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs . . .”); see also Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037, 2055–56 (2023).

¹⁰⁸ Bray, *supra* note 40, at 425–27.

everyone”¹⁰⁹ — including people who are not parties to the case, and who are not represented by parties in the case.

The exact birthday of the national injunction is disputed,¹¹⁰ but what is not in dispute is that it was peripheral and inconsequential until the *Massachusetts v. EPA* era. Only in 2014 did the national injunction become central to our nation’s political life, and especially to judicial interventions in that life. The litany of vices is familiar, and they can be listed here without elaboration: heightened incentives for forum shopping, asymmetrical effects for a win by the plaintiff and a win by the defendant, circumvention of class action rules and *United States v. Mendoza*,¹¹¹ a risk of conflicting injunctions, a lack of percolation for major constitutional questions, and rushed decisionmaking by the Supreme Court. All of these consequences drive ever higher the partisan polarization that has American public life in its grip.

Standing and remedies are not completely separate, of course.¹¹² In fact, in *Massachusetts v. EPA* itself, the Court’s laxity about standing was in part a laxity about *redressability*, that is, about the question of remedies! So too, the growth of state standing and national injunctions may create a multiplier effect.¹¹³ It may be easier for judges to justify granting extremely broad relief when they are faced not with an individual plaintiff with an individual injury, but with what is effectively a collective, conceptual plaintiff that is really asserting a public injury. Indeed, some cases might feature a coalition of such collective, conceptual plaintiffs that purport to represent nearly half of the country. Having allowed lawsuits on the basis of broad, nonindividualized “injuries,” it seems only natural to grant broad, nonindividualized relief to “redress” them.

A second instance of judicial inattention to remedies issues is shown in the decadence of the preliminary injunction. It is standard remedial

¹⁰⁹ *Id.* at 425.

¹¹⁰ See, e.g., *id.* at 424–57; Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020); Samuel L. Bray, *A Response to The Lost History of the “Universal” Injunction*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 6, 2019), <https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray> [<https://perma.cc/D9PH-5RZK>]; Mila Sohoni, *A Reply to Bray’s Response to The Lost History of the “Universal” Injunction*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 10, 2019), <https://www.yalejreg.com/nc/a-reply-to-brays-response-to-the-lost-history-of-the-universal-injunction-by-mila-sohoni> [<https://perma.cc/6PLZ-WD4J>]. For a normative rather than historical defense, see Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018).

¹¹¹ 464 U.S. 154 (1984).

¹¹² See, e.g., Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).

¹¹³ In *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d* by an equally divided court, 136 S. Ct. 2271 (2016) (mem.) (per curiam), the case that began the modern trend of national injunctions, the phrase “special solicitude” appears fourteen times in the majority opinion.

doctrine that preliminary injunctions are supposed to be rare.¹¹⁴ They are not meant to decide the case, but are instead meant to hold things in place — “preserve the status quo” — so a court is able to decide the dispute.¹¹⁵ As such, they are a critical tool in equity’s arsenal. They are especially useful in allowing a court to stop a defendant from abusing the legal process by going ahead and taking the irreversible action that will moot or radically alter the case — selling the disputed pet, tearing down the disputed house, exporting the disputed Vermeer.

But that is no longer the primary function that preliminary injunctions serve. The emergent goal is to prevent *any* harm to a plaintiff, with a presumption that any violation of a right is inherently irreparable¹¹⁶ — which in public law cases has the effect of making preliminary injunctions almost automatic. What is purportedly a four-factor test for a preliminary injunction is, as the courts increasingly recognize, becoming a one-factor test that depends entirely on what the court thinks of the merits.¹¹⁷ What a district court thinks is also closer to a snap judgment than would be advisable — there is briefing, but there is no trial,¹¹⁸ and there is usually little or no experience over time with the challenged statute, rule, or policy.

This shift in preliminary injunction practice interacts with national injunctions and lax state standing. It most obviously overlaps with the rise of the national injunction, since most national injunctions are preliminary. The national injunction degrades judicial decisionmaking,

¹¹⁴ *E.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam) (“[A] preliminary injunction is ‘an extraordinary remedy never awarded as of right.’” (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008))); *Singh v. Berger*, 56 F.4th 88, 109 (D.C. Cir. 2022) (“[P]reliminary relief is the rare exception . . .”).

¹¹⁵ *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.”); *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1011–18 (10th Cir. 2004) (en banc) (McConnell, J., concurring), *aff’d and remanded sub nom. Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418 (2006); *see also* J.D. HEYDON, M.J. LEEMING & P.G. TURNER, *MEAGHER, GUMMOW & LEHANE’S EQUITY: DOCTRINES AND REMEDIES* § 21-340, at 759 (5th ed. 2015) (“The purpose of an interlocutory injunction is to preserve the status quo until the hearing of the main action.”).

¹¹⁶ F. Andrew Hessick, *The Challenge of Remedies*, 57 ST. LOUIS U. L.J. 739, 747 (2013) (“But many courts have dispensed with this requirement for constitutional claims, instead presuming irreparable harm for those claims.” (footnote omitted)).

¹¹⁷ For a candid admission of this point, *see Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam) (“Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors.”).

¹¹⁸ *See Camenisch*, 451 U.S. at 395. For instance, the district court’s stay of the FDA’s mifepristone decision was based entirely on the papers. *See* Transcript of Telephonic Status Conference at 16–17, *All. for Hippocratic Med. v. FDA*, No. 22-CV-223 (N.D. Tex. Apr. 7, 2023), ECF No. 133. On the similar lack of factual development in other national injunction cases, *see* generally Aaron-Andrew P. Bruhl, *Equity on Appeal* (Sept. 8, 2023) (unpublished manuscript) (on file with the Harvard Law School Library). *Cf.* DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 111 (1991) (“The reasons for being cautious with preliminary relief are clear. . . . Acting without a full presentation from either side and without time for reflection, the court is more likely to err.”).

and the shifts in preliminary injunction practice are pushing the courts further toward hasty, relatively fact-free resolution of major questions of public law. The changes in the preliminary injunction also interact with lax state standing. Put together, there is a shift from any real weighing of the equities of the particular injunction to a focus on just the merits — which means our biggest public law cases are presented as pure questions of law, presented by collective, conceptual plaintiffs, with no trial or real-life testing. And then courts are not even *deciding* these questions, but are simply predicting who would be “likely” to win. Making everything turn on judicial intuition about the merits is especially ill advised in a time of extreme political polarization with the easy forum shopping that comes to a coalition of plaintiff states.

A third instance of remedial inattention related to standing doctrine has been the Court’s endorsement of the so-called *one-good-plaintiff rule* in looking for standing.¹¹⁹ When faced with a slew of different appellant parties, many of whom may not be proper parties to the case, the Court likes to say that it needs to find only “one good plaintiff” before it can move on to the merits and ignore the standing of all the other plaintiffs. Viewed as a matter of standing doctrine alone, one can see some logic in this.¹²⁰ True, if one party has standing, the Court will need to resolve that party’s rights. But figuring out whether all, most, or merely one of the parties has standing will be exceptionally important for determining what relief a court should ultimately issue.¹²¹

Of course the Supreme Court’s inattention to these remedial issues may be partly explained, even if not justified, by the dynamic created by modern notions of judicial supremacy, reflected in opinions like *Cooper v. Aaron*.¹²² In *Cooper* the Court famously, or notoriously, equated its own judicial opinions with the Constitution itself, suggesting that the Supremacy Clause and the oath requirements of Article VI required all other government officials to swear fealty to Supreme Court opinions.¹²³ If this is taken seriously it can eclipse more nuanced analysis

¹¹⁹ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019). The leading critique is Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481 (2017).

¹²⁰ Yet even then the one-party rule causes confusion about who is bound by the appellate court’s judgment. See Bruhl, *supra* note 119, at 516–19.

¹²¹ See, e.g., *id.* at 508–14. The Court has acknowledged that there must in fact be one good plaintiff per remedy. See *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017) (noting that “[b]oth of the parties accept” that “[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint”).

¹²² 358 U.S. 1 (1958).

¹²³ *Id.* at 18 (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the

of remedies at the Supreme Court. Why should the Supreme Court worry about the details of the scope of relief if as a practical matter a Supreme Court opinion operates as if it were a national injunction? And if all the plaintiffs truly want is a Supreme Court opinion — whatever the actual remedy — then all they care about is one plaintiff who is good enough to get it.

But this inattention has had consequences, especially when it comes to the lower courts. Even if the Supreme Court believes that the Constitution requires all other officials to equate Supreme Court opinions with the Constitution itself, could it really believe that the same is true of opinions in the District of Hawaii and the Northern District of Texas?

C. *Institutional Realities*

These doctrinal developments are intertwined with institutional developments. One is the growth and polarization of litigating arms within each state (usually the state solicitor general's office).¹²⁴ As other scholars have recognized, states as litigants against the federal government are flying in the slipstream of Abram Chayes's Public Law Model.¹²⁵ Another is the lower court judges' increasingly sympathetic attitude toward state plaintiffs. This attitude could stem from heightened polarization of lower court judicial appointments.¹²⁶ Such polarization would in turn be exacerbated by forum shopping, allowing each cadre of plaintiffs to bring their case in front of a more sympathetic judge.¹²⁷

This change in attitude could also come from considerations of fairness and symmetry. Even a judge who was hawkish on standing, inclined to think that the Court had erred in letting Massachusetts lever

Constitution or Laws of any State to the Contrary notwithstanding.” (quoting U.S. CONST. art. VI). For critique, see John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 33 (2006); William Baude, *The Court, Or the Constitution?*, in MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 260 (Heidi Hurd ed., 2019).

¹²⁴ See Scott Keller, *Federalism as a Check on Executive Authority: The Perspective of a State Solicitor General*, 22 TEX. REV. L. & POL. 297 (2017–2018); Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 ARIZ. ST. L.J. 359, 393–96 (2022); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1255–57 (2019).

¹²⁵ Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 66 (2018) (“Just as public-rights cases brought by nongovernmental organizations seeking broad reforms became a critical category of litigation in the late twentieth century, requiring courts and scholars to rethink a litigation model predicated on the enforcement of private rights, so too litigation by state governments has increasingly taken on a public-law cast.” (footnote omitted)); see also Davis, *supra* note 124, at 1232–35.

¹²⁶ For one measure, see Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 112–16 (2021).

¹²⁷ See Scott Dodson, *The Culture of Forum Shopping in the United States*, in COMPENDIUM ON COMPARATIVE PROCEDURAL LAW AND JUSTICE (forthcoming 2025) (manuscript at 30–31) (on file with the Harvard Law School Library); Bonica & Sen, *supra* note 126, at 114. See generally Dodson, *supra*.

the judicial power against the EPA, might think that having wrongly granted standing to State *A*, it was only fair to grant it to State *B* as well.¹²⁸ This is especially true as the partisan control of the executive branch switches, and thus so does the partisan valence of the states inclined to sue it. If blue states get special solicitude, then red states should too.¹²⁹ Similarly, a judge skeptical of national injunctions might think that if a Democratic administration was required to endure them, then a Republican administration should too.¹³⁰

* * *

Whatever the exact mix of doctrinal details and institutional dynamics that got us to this point, the cumulative effect of the *Massachusetts v. EPA* era has been stunning. The legal system has been approaching a point of exhaustion and futility, like a high school theater play on the last night of the performance, when everyone knows the lines but is so tired of saying them. As soon as a presidential administration does something that matters, it will be sued immediately by a coalition of states whose attorneys general are of the opposite political party; the plaintiff States will wrap themselves up in “special solicitude” and point to downstream costs they may suffer from the federal policy, which is easy to do because every important federal policy will lead to costs *somewhere*; and the States will seek a preliminary injunction shutting down the federal policy *everywhere*. And then, because they sue in a friendly district court and circuit court, and because the preliminary injunction analysis is in essence little more than a judicial prediction of the merits,

¹²⁸ See, e.g., *United States v. Texas*, 143 S. Ct. 1964, 1997 (2023) (Alito, J., dissenting) (“We should not treat Texas less favorably than Massachusetts.”).

¹²⁹ See generally Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273 (2019).

¹³⁰ This dynamic appeared, during the Trump Administration, in the “good for the goose” citations to the broad remedial powers asserted against President Obama in the case that sparked the modern rise of the national injunction: *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (*per curiam*). See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1166–67 (9th Cir. 2017) (“[W]e decline to limit the geographic scope of the TRO. The Fifth Circuit has held that such a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy.” (citing *Texas v. United States*, 809 F.3d at 187–88)); see also *Pennsylvania v. President of the U.S.*, 930 F.3d 543, 575 (3d Cir. 2019), *rev’d and remanded sub nom.* *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 273 (4th Cir.), *vacated*, 138 S. Ct. 2710 (2018); *Hawaii v. Trump*, 859 F.3d 741, 787–88 (9th Cir.), *vacated and remanded*, 138 S. Ct. 377 (2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.), *vacated as moot sub nom.* *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017); *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857 (9th Cir. 2020); *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020), *vacated and remanded sub nom.* *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018); *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev’d and remanded*, 138 S. Ct. 2392 (2018).

they will almost certainly get the injunction they seek.¹³¹ And so we have arrived, for the first time in our national history, at a state of affairs where almost every major presidential act is immediately frozen by a federal district court.

This new but now familiar routine puts enormous pressure on our democratic system and on the Supreme Court. Instead of a presumption of legitimacy for action by the political branches,¹³² almost every important action they take will be judicially blocked. The Supreme Court is forced to act more quickly, without the percolation advantage of having several circuit courts consider the question.¹³³ And the political branches may even be tempted to authorize major policies as a sheer political gambit, knowing that the courts will quickly enjoin their enforcement, allowing proponents of a policy to score political points against the judiciary without having to accept any of the policy's costs or consequences. This is bad law and bad democracy. It cannot go on forever.

III. END OF AN ERA? TWO CHEERS FOR THE SUPREME COURT'S COURSE CORRECTION

Perhaps the most recent Term proves the truth of Stein's Law: "If something cannot go on forever, it will stop." Although the rise of the *Massachusetts v. EPA* era seemed inexorable, the October 2022 Term may have marked a turning point. There are two pieces of good news. First, the Court seems to recognize the need for a course correction. Second, the cases from this Term signal at least some understanding that this course correction — for both state and individual plaintiffs — will require attention to remedies. But at the same time, the Court is sometimes too lost among the trees of standing doctrine to see the way out of the woods.

A. Narrowing *Massachusetts v. EPA*

Taken together, the Court's standing decisions from this Term signal a substantial narrowing of state standing. The starting point is the arguments of the States. In both *Biden v. Nebraska* and *United States v. Texas*, the plaintiff States relied for standing on the kinds of broad

¹³¹ Additionally, the preliminary injunction inquiry is now heavily dominated by the merits at the expense of other equitable factors. See generally Samuel L. Bray, All Is Not Well with the Preliminary Injunction (July 31, 2023) (unpublished manuscript) (on file with the Harvard Law School Library).

¹³² Cf. *Dryfoos v. Edwards*, 284 F. 596, 603 (S.D.N.Y. 1919) (Hand, J.) ("In all the books we are told that to declare a statute unconstitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute till the case be finally decided."), *aff'd sub nom. Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146 (1919), and *aff'd sub nom. Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264 (1920).

¹³³ See, e.g., *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay); *Trump v. Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring).

interests that were given special solicitude in *Massachusetts v. EPA*.¹³⁴ In the States' main brief in *United States v. Texas*, for example, the table of authorities includes *Massachusetts v. EPA*, and the pages cited are “*passim*.”¹³⁵

The States' arguments were not entirely rejected by the Court. In one case brought by states the Court found standing (*Biden v. Nebraska*), and in the other it did not (*United States v. Texas*). And yet in neither case did the Court cite *Massachusetts v. EPA* favorably. In fact, in neither case did *any* of the nine Justices cite *Massachusetts v. EPA* favorably.¹³⁶ Instead, the opinion that was cited with approval — in opinions joined by six of the Justices — was the Chief Justice's dissent in *Massachusetts v. EPA*.¹³⁷

The absent presence of *Massachusetts v. EPA* is even more remarkable because its category of “special solicitude” for states would have arguably changed the outcome in one case and provided strong support for the Court's standing holding in another. Yet in neither case did the Court suggest there was any special advantage for states in the standing analysis.

Consider first *United States v. Texas*. In the opinion of the Court, Justice Kavanaugh on the first page completely identified the standing of states with the standing of private citizens. He quoted a case in which the Court held “that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.”¹³⁸ Then he immediately applied that holding to the States: “Consistent with that fundamental Article III principle, we conclude that the States lack Article III standing to bring this suit.”¹³⁹ As a matter of logic, that conclusion — no standing for an

¹³⁴ Response to Application to Vacate Injunction at 13, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22-506); Opposition to Motion for a Stay Pending Appeal at 21, 25–26, 28, *United States v. Texas*, 143 S. Ct. 51 (2022) (No. 22A17); Brief for Respondents at 11, 14, 16–18, 23, *United States v. Texas*, 143 S. Ct. 1964 (2023) (No. 22-58).

¹³⁵ Brief for Respondents, *supra* note 134, at vii. The challengers' briefs in *Biden v. Nebraska*, perhaps wisely, did not cite *Massachusetts v. EPA* by name, but many of their standing arguments were just as extravagant. See Brief for the Respondents at vi, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22-506).

¹³⁶ The closest thing to an endorsement of *Massachusetts v. EPA* was a passage invoking it as “relevant precedent” in a dissent by Justice Alito. *United States v. Texas*, 143 S. Ct. at 1998 (Alito, J., dissenting). Even so, Justice Alito's points of emphasis were the need for even-handed application and the uncertainty caused by stealth overruling: “So rather than answering questions about this case, the majority's footnote on *Massachusetts* raises more questions about *Massachusetts* itself — most importantly, has this monumental decision been quietly interred?” *Id.* at 1997.

¹³⁷ See *Biden v. Nebraska*, 143 S. Ct. at 2389 (Kagan, J., dissenting) (quoting the Chief Justice's dissent); *id.* at 2391 (quoting the Chief Justice's dissent); *United States v. Texas*, 143 S. Ct. at 1976 (Gorsuch, J., concurring in the judgment) (citing the Chief Justice's dissent); *id.* at 1977 (quoting the Chief Justice's dissent).

¹³⁸ *United States v. Texas*, 143 S. Ct. at 1968 (majority opinion) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)).

¹³⁹ *Id.*

individual citizen, ergo no standing for a state — follows only if there is no special solicitude for states.

Nor did the Court leave matters there. In two footnotes, the Court directly addressed the fact that the plaintiffs were States. In footnote 3, the Court began: “Also, the plaintiffs here are States.” But this did not become the basis for special solicitude, and if anything the Court drew from the identity of the plaintiffs as States the need for *special skepticism* of standing.¹⁴⁰ Then, in footnote 6, the Court was even more directly dismissive of *Massachusetts v. EPA*. First, the Court distanced itself from the citation, by attributing the citation to the plaintiff States.¹⁴¹ Second, the Court expressly noted “disagreements that some may have with *Massachusetts v. EPA*” (presumably including at least one member of the majority).¹⁴² Third, and most important for the future, the Court held *Massachusetts v. EPA* inapplicable because “[t]he issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking,”¹⁴³ a sharp limitation to the scope of the precedent.

The other Justices expressed even more explicit skepticism of *Massachusetts v. EPA*. Justice Gorsuch (joined by Justices Thomas and Barrett) found it “hard not to wonder why the Court says nothing about ‘special solicitude’ in this case. And it’s hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.”¹⁴⁴ Justice Alito’s dissent expressed similar surprise, culminating in the question: “[M]ost importantly, has this monumental decision been quietly interred?”¹⁴⁵

The next week this forecast of quiet abandonment seemed to come true. On June 30, 2023, the Court decided the student loan cases, *Biden v. Nebraska* and *Department of Education v. Brown*. In the former case,

¹⁴⁰ *Id.* at 1972 n.3 (“Also, the plaintiffs here are States, and federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer. To be sure, States sometimes have standing to sue the United States or an executive agency or officer. But in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending. And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State’s claim for standing can become more attenuated. In short, none of the various theories of standing asserted by the States in this case overcomes the fundamental Article III problem with this lawsuit.” (citations omitted) (citing *New York v. United States*, 505 U.S. 144 (1992); *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Florida v. Mellon*, 273 U.S. 12, 16–18 (1927); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992))).

¹⁴¹ *See id.* at 1975 n.6 (“As part of their argument for standing, the States also point to *Massachusetts v. EPA*.” (citation omitted) (citing *Massachusetts v. EPA*, 549 U.S. 497, 520, 526–27 (2007))).

¹⁴² *Id.* Chief Justice Roberts was the one Justice who had dissented in *Massachusetts v. EPA* to join Justice Kavanaugh’s majority opinion. The other dissenters in *Massachusetts v. EPA* who remained on the Court either concurred in the judgment in *United States v. Texas* (Justice Thomas) or dissented (Justice Alito).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1977 (Gorsuch, J., concurring in the judgment).

¹⁴⁵ *Id.* at 1997 (Alito, J., dissenting) (citing *id.* at 1977 (Gorsuch, J., concurring in the judgment)).

the Court concluded that the state of Missouri *did* have standing to challenge the Administration's student loan forgiveness plan,¹⁴⁶ though two individuals in the latter case did not.¹⁴⁷ Yet despite the Court's conclusion that the one good plaintiff was a State, there was no mention of *Massachusetts v. EPA* from any quarter. This curious incident of the Court's silence about *Massachusetts v. EPA* is telling, especially because the case would have reinforced the borderline state-standing claim that the Court accepted in *Biden v. Nebraska*. It appears that the Chief Justice's dissent in *Massachusetts v. EPA* is now considered more authoritative than the majority opinion.

B. Renewed Attention to Remedies

Moreover, and especially promising, the decisions from last Term also seemed to recognize that taming the latest onslaught of public litigation will require some attention to redressability and remedies. This recognition is especially apparent in some of the separate opinions in *United States v. Texas*, and the majority opinion in two other cases: *Department of Education v. Brown*, the student loan case brought by individual plaintiffs; and *Haaland v. Brackeen*, where the Court rejected both individual and state challenges to the constitutionality of the Indian Child Welfare Act.

Brackeen presented potentially seismic challenges to the constitutional status of federal Indian law, but the Court rejected all of them — some on the merits, some for lack of standing. On the merits, the Court concluded that the statute (and implicitly much of the rest of federal Indian law) was within Congress's Article I powers and did not violate principles of federalism.¹⁴⁸ There was an additional challenge on equal protection grounds — which one Justice described as “serious”¹⁴⁹ — that also had the potential to upend much of federal Indian law. It was dismissed for lack of standing.¹⁵⁰

In dismissing the equal protection challenge for lack of standing, the Court specifically emphasized the problem of remedies and redressability. The Court was willing to accept that the kind of race discrimination alleged by the challengers counted as an injury.¹⁵¹ But the important point was that their suit was not a suit *for redress of that injury*. The defendant was the Secretary of the Interior, but she was not the one enforcing the statute: “[E]njoining the federal parties would not remedy the alleged injury, because state courts apply the placement preferences,

¹⁴⁶ *Biden v. Nebraska*, 143 S. Ct. at 2368.

¹⁴⁷ *Brown*, 143 S. Ct. at 2354.

¹⁴⁸ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1627–38 (2023).

¹⁴⁹ *Id.* at 1661 (Kavanaugh, J., concurring).

¹⁵⁰ *Id.* at 1638–41 (majority opinion). The Court also rejected a more peripheral nondelegation challenge on standing grounds. *Id.* at 1641.

¹⁵¹ *Id.* at 1638.

and state agencies carry out the court-ordered placements.”¹⁵² Thus the proper parties would be the parties in a state-court adoption proceeding, and the proper relief would be a judgment deciding the adoption petition notwithstanding any unconstitutional statute to the contrary.¹⁵³

Brackeen’s discussion of redressability built on the recent precedent of *California v. Texas*,¹⁵⁴ in which the Court had dismissed a constitutional challenge to the Affordable Care Act because of similar flaws. The challenged parts of the statute were not enforced by federal officials, and potentially not even enforceable.¹⁵⁵ This created problems both of traceability and redressability. In an opinion by Justice Breyer, the Court explained the redressability problem in this way: “Remedies . . . ordinarily ‘operate with respect to specific parties’ . . . [;] they do not simply operate ‘on legal rules in the abstract.’”¹⁵⁶ And the Court explained that the plaintiffs could not possibly have sought any particular remedy, such as damages or an injunction, against any of the defendants — the executive branch had no power to enforce the law, and Congress was not a proper party to the suit either.¹⁵⁷ In both *Brackeen* and *California v. Texas*, restoring the centrality of remedies specific to the parties was a healthy development that can mitigate the new spread of public litigation.

Brackeen’s discussion went further still, emphasizing the distinction between judgments and opinions in a way that might eventually clear up the *Cooper v. Aaron* confusion.¹⁵⁸ The challengers in *Brackeen* suggested that redressability came from the fact that if the Court were to agree with them, then lower courts would surely follow the Supreme Court’s opinion as precedent. In response, writing for the Court, Justice Barrett said that “[r]edressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.”¹⁵⁹ And she concluded: “It is a federal court’s judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion,

¹⁵² *Id.* at 1639.

¹⁵³ See *id.* at 1640 n.10; *id.* at 1661–62 (Kavanaugh, J., concurring) (emphasizing this).

¹⁵⁴ 141 S. Ct. 2104 (2021).

¹⁵⁵ *Id.* at 2115–16.

¹⁵⁶ *Id.* at 2115 (quoting *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring)).

¹⁵⁷ *Id.* at 2116. In some respects *California v. Texas* was an easier case than *Brackeen* because the Court saw the challenged provision as entirely unenforceable. *Id.* (“How could they have sought any such injunction? The provision is unenforceable. There is no one, and nothing, to enjoin.”).

¹⁵⁸ See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999) (explaining this distinction); Baude, *supra* note 15, at 1844–45 (same).

¹⁵⁹ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1639 (2023) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in the judgment)) (emphasis in *Brackeen* and *Franklin*).

that demonstrates redressability. The individual petitioners can hope for nothing more than an opinion, so they cannot satisfy Article III.”¹⁶⁰

As a matter of text, history, structure, and legal technicalities, this distinction between judgments and opinions is correct, as well as critical to understanding the judicial power.¹⁶¹ But it is not the conception that has always held sway in the past sixty years, and it is still striking to see the Supreme Court saying, in effect: *plaintiffs cannot litigate a case merely on the assumption that people will follow Supreme Court opinions as law*. And lest one think the distinction between judgments and opinions was entirely a one-off, we also note that the Court’s extremely technical mootness discussion in *Moore v. Harper*,¹⁶² a prominent case from this Term about the meaning of the Elections Clause, also hinged on the formal distinction between opinions and judgments.¹⁶³ Renewed attention to opinions and judgments is a very promising form of renewed attention to remedies.

Attention to remedies was also somewhat apparent in the Court’s analysis in *Department of Education v. Brown*, one of the two student loan cases. Two individuals, Myra Brown and Alexander Taylor, challenged the Administration’s student loan relief plan on a somewhat indirect basis. The Court described their claim for relief this way:

First, because the HEROES Act does not substantively authorize the Plan, the Department was obligated to follow the typical negotiated-rulemaking and notice-and-comment requirements. Second, if the Department had observed those procedures, respondents might have used those opportunities to convince the Department (1) that proceeding under the HEROES Act is unlawful or otherwise undesirable, and (2) that it should adopt a different loan-forgiveness plan under the HEA instead, one that is more generous to them than the HEROES Act plan that they allege is unlawful. They assert there is at least a chance that this series of events will come to pass *now* if we vacate the Plan.¹⁶⁴

The Court found this argument “strange” and “unusual,”¹⁶⁵ and unanimously concluded that it could not support standing. In the Court’s view, “the deficiencies of respondents’ claim [were] clearest with

¹⁶⁰ *Id.* at 1640; *accord* *United States v. Texas*, 143 S. Ct. 1964, 1979 (2023) (Gorsuch, J., concurring in the judgment) (“Nor do we measure redressability by asking whether a court’s legal reasoning may inspire or shame others into acting differently. We measure redressability by asking whether a court’s judgment will remedy the plaintiff’s harms.”). As used here, *judgment* comprehends what in older usage would be both judgments (law) and decrees (equity). *See id.* at 1980; FED. R. CIV. P. 54(a).

¹⁶¹ Hartnett, *supra* note 158; *see also* Baude, *supra* note 15; Bamzai, *supra* note 107, at 2041.

¹⁶² 143 S. Ct. 2065 (2023).

¹⁶³ *Compare id.* at 2077 (“[A]lthough the defendants may now draw new congressional maps, they agree that the North Carolina Supreme Court overruled only the *reasoning* of *Harper I* and did not disturb its judgment . . .” (internal quotation marks and alterations omitted) (quoting Second Supplemental Letter Brief for Petitioners at 3, *Moore*, 143 S. Ct. 2065 (No. 21-1271))), *with id.* at 2096 (Thomas, J., dissenting) (describing “*Harper I*’s interlocutory judgment” as an “empty husk”).

¹⁶⁴ *Brown*, 143 S. Ct. at 2352.

¹⁶⁵ *Id.*

respect to traceability,” because “the Department’s decision to give *other* people relief under a *different* statutory scheme did not *cause* respondents not to obtain the benefits they want.”¹⁶⁶ Yet as the Court recognized, this problem of traceability also sounded in remedies, observing that it had never “accepted that an injury is redressable when the prospect of redress turns on the Government’s wholly discretionary decision to create a new regulatory or benefits program.”¹⁶⁷ The fundamental reason that the plaintiffs’ claim was so strange, and ultimately so unavailing, is that eliminating loan relief is not a natural remedy for those who seek expanded loan relief.

And then there is Justice Gorsuch’s concurrence in *United States v. Texas*. As discussed above, a majority of five Justices concluded that the states had suffered no cognizable injury from the Biden Administration’s enforcement discretion. But Justice Gorsuch’s concurrence began: “[R]espectfully, I diagnose the jurisdictional defect differently. The problem here is redressability.”¹⁶⁸ Justice Gorsuch zeroed in on several different remedies problems specific to the immigration case, such as the scope of a jurisdictional bar in the Immigration and Nationality Act,¹⁶⁹ the fact that eliminating the enforcement “Guidelines” would still leave the executive branch with the same discretion,¹⁷⁰ and the plaintiff States’ inattention to the traditional non-merits considerations in seeking equitable relief.¹⁷¹ We will leave the details of these redressability problems to one side. What is promising is that several Justices on the Court are stressing the importance of such details, and if all courts were to heed them, the inevitable challenges to federal immigration policy would proceed in a more orderly and lawful — a more judicial — fashion.

In addition to this, Justice Gorsuch’s concurrence also happily gave attention to another important remedial issue: the scope of relief under the Administrative Procedure Act¹⁷² (APA). In a nutshell the question is whether § 706 of the Act authorizes a remedy of “universal vacatur.” In recent decades, numerous federal courts have assumed that the Act authorizes this relief, because it instructs a reviewing court to

¹⁶⁶ *Id.* at 2353.

¹⁶⁷ *Id.*

¹⁶⁸ *United States v. Texas*, 143 S. Ct. 1964, 1976 (2023) (Gorsuch, J., concurring in the judgment).

¹⁶⁹ *Id.* at 1978–79 (discussing 8 U.S.C. § 1252(f)(1)).

¹⁷⁰ *Id.* In this discussion, Justice Gorsuch relied on the passage in *Brackeen* discussed above, *supra* pp. 178–79.

¹⁷¹ *United States v. Texas*, 143 S. Ct. at 1979–80 (Gorsuch, J., concurring in the judgment).

¹⁷² 5 U.S.C. §§ 551–559, 701–706; *United States v. Texas*, 143 S. Ct. at 1980–86 (Gorsuch, J., concurring in the judgment).

“set aside”¹⁷³ unlawful agency action.¹⁷⁴ There have also been recent scholarly voices in support of the conventional practice. For example, Professor Ronald Levin has argued that it is best to see the Act as a framework statute, and even though it was not understood at the time of enactment to authorize universal vacatur, that potent remedy has been developed by federal courts as they fill out the details of the congressional framework.¹⁷⁵

Nevertheless, as Justice Gorsuch noted, this remedy is looking increasingly shaky. There was no practice of “universal vacatur” before the Act;¹⁷⁶ no one at the time of the Act or in the immediately following decades — including Professor Kenneth Culp Davis and Professor Louis Jaffe — seems to have been aware that a new super-remedy was being created;¹⁷⁷ and most decisively of all to read “set aside” as a reference to remedies is in direct contravention of the text and structure of the Act, which places the “set aside” reference within a section on the scope of review and has a different section on remedies that directs courts to use traditional remedies such as injunctions.¹⁷⁸ Moreover, because there is no traditional legal or equitable remedy of “vacatur” (vacatur being what a reviewing court does to a judgment), there is an acute need for real congressional authorization if the courts are going to apply a new remedy,¹⁷⁹ especially a super-remedy that upends the traditional

¹⁷³ 5 U.S.C. § 706(2).

¹⁷⁴ See, e.g., *Texas v. United States*, 606 F. Supp. 3d 437, 500 (S.D. Tex.) (“When a federal court vacates a rule, relief is not limited to prohibiting the rule’s application to the named plaintiffs. . . . Here, the Government makes little effort at proposing an alternative path forward other than citing cases that discuss crafting injunctive relief — an entirely different exercise because this is not an injunction.”), *cert. granted before judgment*, 143 S. Ct. 51 (2022), and *rev’d*, 143 S. Ct. 1964 (2023). Note, however, that some of the cases frequently cited as authority for this practice do not purport to give a distinctive remedy of “vacatur” but instead understand the remedy granted as simply an injunction, no more and no less. E.g., *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1408–10 (D.C. Cir. 1998).

¹⁷⁵ Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2019–20 (2023). The remedy is also prominently defended by Professor Mila Sohoni. See Mila Sohoni, *The Power to Vacate A Rule*, 88 GEO. WASH. L. REV. 1121 (2020).

¹⁷⁶ *United States v. Texas*, 143 S. Ct. at 1981–82 (Gorsuch, J., concurring in the judgment); see Bamzai, *supra* note 107.

¹⁷⁷ *United States v. Texas*, 143 S. Ct. at 1983 (Gorsuch, J., concurring in the judgment); see John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119, 123–31 (2023).

¹⁷⁸ *United States v. Texas*, 143 S. Ct. at 1982–83 (Gorsuch, J., concurring in the judgment); see John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37, 41–47 (2020); see also Bamzai, *supra* note 107.

¹⁷⁹ See, e.g., *Nken v. Holder*, 556 U.S. 418, 433 (2009) (recognizing with respect to remedies a “presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident” (internal quotation marks omitted) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (“[A] major departure from the long tradition of equity practice should not be lightly implied.”); *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (“[I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.”).

relationship between the federal courts and the executive branch. Finally, there is an easy explanation for how courts could come to assume there was a vacatur remedy in the Act — review of agency action was often exclusive to the D.C. Circuit, which meant that a circuit precedent that a rule was unlawful had the practical effect of vacating it.¹⁸⁰ That is much easier to explain than how the Act, right on its face, created a novel remedial superpower that escaped everyone’s attention for decades. These points and others are being made now by an increasing number of scholars.¹⁸¹

It is no accident that the renewed attention to remedies is coinciding with new skepticism about vacatur. “Universal vacatur” is a remedial abstraction — it floats above the plaintiff and defendant, and with this putative remedy a court is acting directly on a rule or other agency-promulgated legal norm. But this is exactly what *California v. Texas* and *Haaland v. Brackeen* said that courts do not do. Courts redress the plaintiff’s injury by giving the plaintiff a remedy against the defendant.¹⁸² They may enjoin the enforcement of a statute or rule, but properly speaking the injunction runs against those who would enforce the statute or rule; it does not act directly on the legal norm itself.¹⁸³ Of course this is not to deny that a court’s decision has implications that run beyond the parties.¹⁸⁴ The precedents of the Supreme Court control

¹⁸⁰ Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 76 (2019); Jonathan H. Adler, *On Universal Vacatur, The Supreme Court, and the D.C. Circuit*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 1, 2023), <https://www.yalejreg.com/nc/on-universal-vacatur-the-supreme-court-and-the-d-c-circuit-by-jonathan-h-adler/> [<https://perma.cc/ZWZ7-UDAF>].

¹⁸¹ See, e.g., Adler, *supra* note 180 (offering explanation for development of vacatur remedy in the D.C. Circuit); Bamzai, *supra* note 107, at 2040 (concluding “that the APA’s text did not displace the background law of judgments and that background equitable principles generally require, where possible, the tailoring of relief to the parties before the court”); Bray, *supra* note 40, at 438 n.121; Cass, *supra* note 180, at 72–77; John Harrison, *Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law*, 48 BYU L. REV. 2077, 2145–49 (2023) (describing implications for universal relief debate of the fact that unlawful regulations are void ab initio); Harrison, *supra* note 177, at 123–31 (showing absence of recognition of “vacatur” remedy from enactment through *Abbott Laboratories v. Gardner*); Harrison, *supra* note 178, at 41–47 (describing structure of APA and incoherence created by reading “set aside” as a remedy); cf. Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 760 (2021) (concluding that “the debate underscores the unsettled nature of the scope of ‘set aside’ in the APA”). For skepticism regarding the argument for universal vacatur from Judges Sutton and Wilkinson, respectively, see *Arizona v. Biden*, 40 F.4th 375, 396–97 (6th Cir. 2022) (Sutton, C.J., concurring); and *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 262 n.8 (4th Cir.) (Wilkinson, J.), *vacated for reh’g en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021).

¹⁸² See *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021); *Haaland v. Brackeen*, 143 S. Ct. 1609, 1639–40 (2023).

¹⁸³ *Massachusetts v. Mellon and Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (“If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding.”).

¹⁸⁴ Bamzai, *supra* note 107, at 2068; Bray, *supra* note 40, at 474 (“[T]he way to resolve legal questions for nonparties is through precedent, not through injunctions.”).

the actions of the lower federal courts, which means that when the Court holds a statute to be unconstitutional or a rule to be unlawful, it may be *as good as vacated*. (Indeed, this may be even true for the D.C. Circuit when it has exclusive review.) But in certain moments of perspicuity, the Court has wisely insisted on precision about this point: the federal courts give judgments that redress the injuries of parties, and it is only in the performance of that duty — and not as an independent duty, or a distinct cause of action, or a stand-alone remedy — that federal judges will say what the law is and what it isn't.¹⁸⁵

This is not only a point about administrative law. It is emblematic of the broader concerns about standing and remedies — about proper parties and proper relief — that the current moment calls for. The tide of national injunctions over the last decade has put enormous pressure on the standing-remedy nexus, as minimal or even merely probabilistic injuries are made the basis for far-reaching injunctions. But that tide has been ebbing, and across the courts of appeals there have been many critical voices about the national injunction.¹⁸⁶ In response, there has recently been a marked shift by plaintiffs and courts to rely on “universal vacatur” as the preferred means of controlling how the federal government acts toward nonparties. This is a predictable hydraulic effect, and there will be no fundamental reset of the judicial role if every national injunction gets relabeled “universal vacatur.” Attention to proper relief in a sound analysis of standing should result in great skepticism about both of these forms of universal remedy, as judges both off and on the Supreme Court are increasingly noting.

C. Continued Confusion

At the same time, the Court is too distracted by the details of standing doctrine to fully sort out the challenges it faces in these cases.

Return to *United States v. Texas* but in slightly closer focus. While the Court reached the correct result in stopping the lawsuit, and while it sensibly backed away from the “special solicitude” of *Massachusetts v. EPA*, in other ways the Court’s opinion is a mess. The Court relied centrally on an earlier nonenforcement case, *Linda R.S. v. Richard*

¹⁸⁵ *California v. Texas*, 141 S. Ct. at 2115–16; *Muskraat v. United States*, 219 U.S. 346, 356–62 (1911); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

¹⁸⁶ See, e.g., *Arizona v. Biden*, 40 F.4th at 396–98 (Sutton, C.J., concurring) (“[N]ationwide injunctions have not been good for the rule of law.” *Id.* at 398.); *Doster v. Kendall*, 54 F.4th 398, 439 (6th Cir. 2022) (Murphy, J.) (“If, as the rising chorus would seem to suggest, courts eventually scrap these universal remedies, Rule 23(b)(2)’s importance will reemerge.”); *Georgia v. President of the U.S.*, 46 F.4th 1283, 1306 (11th Cir. 2022) (Grant, J.) (“Concerns that nationwide injunctive relief is both increasing in frequency and incompatible with the proper judicial role are widespread.”). *But cf.* *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 387 (5th Cir. 2023) (en banc) (“The Supreme Court has recently stayed nationwide injunctions. But the Court has yet to tell us they’re verboten.” (citation omitted) (citing *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.))).

D.,¹⁸⁷ which was about redressability, but the Court deployed it for a different point — to deny that Texas had sufficient injury, or more precisely to deny that Texas’s injury was “cognizable,”¹⁸⁸ creating doctrinal confusion. In addition to blending different parts of standing doctrine together, the majority also blended in the merits: important parts of the opinion seem to rely on a *substantive* conclusion that as a matter of statutory or constitutional law, the Administration had lawful enforcement discretion.¹⁸⁹ And the opinion contains a largely unexplained list of exceptions that are hard to trace to any consistent theory.¹⁹⁰ Several of the Court’s exceptions are merits-focused — a catalog of circumstances in which it would *not* be true that the executive branch was lawfully exercising enforcement discretion — which creates further confusion about the basis for the Court’s decision.¹⁹¹

The old doctrinal blinders are also apparent in *Biden v. Nebraska*. The Court found its one good plaintiff — the state of Missouri — and thus used the case to announce the unlawfulness of the Administration’s student loan relief program, concluding that the Administration had exceeded its statutory authority in multiple respects.¹⁹² While we agree with the Court’s ultimate disposition of the merits, its treatment of jurisdiction, and especially of remedies, was troubling.¹⁹³

Over the dissent’s objection, the Court found standing for the state. At a doctrinal level, the Court’s standing analysis was somewhat pedestrian and defensible. The Court eschewed, without comment, the broader and more implausible claims to standing made by the plaintiff states, such as those based on lost tax revenue or so-called “quasi-sovereign” interests.¹⁹⁴ Instead, it adopted the most concrete and modest theory of standing in the case — that the state of Missouri can sue because of harms suffered by the Missouri Higher Education Loan

¹⁸⁷ 410 U.S. 614 (1973).

¹⁸⁸ *United States v. Texas*, 143 S. Ct. 1964, 1970–71 (2023); *cf. id.* at 1986–88 (Barrett, J., concurring in the judgment) (criticizing majority’s use of *Linda R.S.*).

¹⁸⁹ *Id.* at 1971–73 (majority opinion).

¹⁹⁰ *Id.* at 1973–74; *cf. id.* at 1989 (Barrett, J., concurring in the judgment) (“The Court weaves together multiple doctrinal strands to create a rule that is not only novel, but also in tension with other decisions.”).

¹⁹¹ *Id.* at 1973–75 (majority opinion).

¹⁹² *Biden v. Nebraska*, 143 S. Ct. at 2375. For a discussion of these ambiguities, and a proposed doctrine of state immigration standing that would resolve them, see Jacob Hamburger, *Immigration Federalism Standing*, 66 B.C. L. REV. (forthcoming 2025) (manuscript at 36–46) (on file with the Harvard Law School Library).

¹⁹³ Full disclosure: the authors of this piece submitted an amicus brief arguing that although the loan forgiveness program was unlawful, the case should be dismissed for lack of standing. Brief for Samuel L. Bray and William Baude as Amici Curiae in Support of Petitioners, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22-506), and *Dep’t of Educ. v. Brown*, 143 S. Ct. 2343 (No. 22-535) [hereinafter Bray & Baude Amicus Brief].

¹⁹⁴ Brief for the Respondents, *supra* note 135, at 23; *see also id.* at 23–29.

Authority (MOHELA), which the Court treated as “also a harm to Missouri.”¹⁹⁵

The standing dispute turned on some fairly narrow points. All agreed that MOHELA would have had standing to sue on its own behalf, because it had lost money it otherwise could have collected by servicing the loans,¹⁹⁶ so the only remaining question was whether Missouri could sue for that injury instead. The majority said yes, stressing the ways in which MOHELA was a state actor; the dissent said no, stressing the ways in which MOHELA’s property and legal personhood were separate from the state.¹⁹⁷ In our view the dissent had the better of this argument, and we suspect that the majority’s conclusion would have been a great surprise to the Marshall Court, which distinguished the standing of government-created corporations from the government itself — most prominently when discussing the Bank of the United States.¹⁹⁸

Perhaps the biggest point of disagreement between the majority and the dissent on standing was how to read the Court’s precedent in *Arkansas v. Texas*,¹⁹⁹ where the state of Arkansas had standing to sue on behalf of the University of Arkansas. The majority believed that the University of Arkansas had a similarly separate legal personhood as MOHELA. It wrote: “[I]n *Arkansas*, the University of Arkansas could have asserted its rights under the contract on its own. . . . We permitted Arkansas to bring an original suit all the same.”²⁰⁰ While we have our

¹⁹⁵ *Biden v. Nebraska*, 143 S. Ct. at 2366.

¹⁹⁶ *But see* Michael C. Dorf, *A Standing Provocation: The Right’s Ploy to Overthrow Student Debt Relief*, THE NATION (Feb. 14, 2023) (rejecting standing even for MOHELA and analogizing its claim to “a manufacturer of electric chairs suing a state governor who signed legislation abolishing the death penalty on the grounds that abolition deprived the manufacturer of a lucrative revenue stream”).

¹⁹⁷ The district court had treated the question as whether MOHELA was “an arm of the state” of Missouri. *Nebraska v. Biden*, No. 22-CV-1040, 2022 WL 11728905, at *3 (E.D. Mo. Oct. 20, 2022). That question is itself complicated because of doctrinal confusion about what makes an entity an “arm of the state,” though in our view the best test is simply whether the entity has the power to sue and be sued on its own, *see* P.R. Ports Auth. v. Fed. Mar. Comm’n, 531 F.3d 868, 881 (D.C. Cir. 2008) (Williams, J., concurring); *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 198 (5th Cir. 2023) (Oldham, J., concurring); *Bray & Baude Amicus Brief*, *supra* note 193, at 7–8, in which case MOHELA would not be an arm of the state of Missouri. The Supreme Court entirely sidestepped this way of analyzing the case.

¹⁹⁸ *See, e.g., Bank of the United States v. Planters’ Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907–08 (1824) (“The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the Bank, and waives all the privileges of that character.”); *id.* at 908 (“The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by or against the Bank in the sense of the constitution. So with respect to the present Bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.”).

¹⁹⁹ 346 U.S. 368 (1953).

²⁰⁰ *Biden v. Nebraska*, 143 S. Ct. at 2368 (citation omitted).

doubts about that too, the majority's reading of the case is at least plausible.²⁰¹ So even if the Court was wrong to find standing, it found standing in the least wrong way.²⁰² Of course, if the Court was *straining* to find standing because of its desire to stop an executive branch overreach,²⁰³ that is itself a problem.²⁰⁴

More important than these quibbles, the Court's path to reaching the merits demonstrates inattention to the bigger standing picture. What about the remedial side of the case? The lower court had granted a national injunction pending appeal, which the Solicitor General had also challenged.²⁰⁵ After ruling against the Biden Administration on the merits, thanks to MOHELA, the Court ignored the remedial issue presented by the case below — dismissing the Solicitor General's challenge to the injunction as "moot."²⁰⁶

But is the Court really countenancing the possibility that a national injunction can issue against the Administration's student loan forgiveness to forty-three million people, because of the modest standing claim of . . . MOHELA?²⁰⁷ That because one state agency has lost some of its finder's fees, a lower federal court should have halted the entire national program? Why, in the lower courts, would the injuries to MOHELA (and apparently Missouri) not be fully redressed by ordering the United States to pay restitution to MOHELA (or Missouri)?²⁰⁸

Perhaps the Court was envisioning that even if the proper relief were narrow (which it neglected to tell the Eighth Circuit), everyone would

²⁰¹ Nothing in the Supreme Court's opinion in *Arkansas v. Texas* said that the University of Arkansas could sue on its own, and instead the opinion said that although the Board of Trustees was "'a body politic and corporate' with power to issue bonds which do not pledge the credit of the State," nonetheless "the State owns all the property used by the University," and "a suit against the University is a suit against the State." 346 U.S. at 370 (footnotes omitted). Notice that this last fact is the "arm of the state" question. See *supra* note 197.

Instead, the majority in *Biden v. Nebraska* relied for its interpretation of the precedent on general principles of Arkansas corporate law, see 143 S. Ct. at 2368 (citing *HRR Arkansas, Inc. v. River City Contractors, Inc.*, 87 S.W.3d 232, 237 (Ark. 2002)), and on a later Arkansas case where equitable relief was granted against the Board of Trustees of the University, ordering them not to enforce a statute that violated state constitutional law, *id.* (citing *Bd. of Trs. v. Pulaski County*, 315 S.W.2d 879 (Ark. 1958)). The latter is the state-law equivalent to an *Ex parte Young* suit, so it is not clear that it tells us much about the legal capacity of the University.

²⁰² *Accord* *Biden v. Nebraska*, 143 S. Ct. at 2386 (Kagan, J., dissenting).

²⁰³ *Cf.* Transcript of Oral Argument at 25, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22-506) ("JUSTICE ALITO: Well, would we be breaking new ground if we found that there was standing since we've never been presented, as you admitted earlier, with a case that presents precisely the issue that's here?").

²⁰⁴ See *infra* Part IV, pp. 187–91.

²⁰⁵ See Application to Vacate the Injunction Entered by the United States Court of Appeals for the Eighth Circuit at 32–35, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22-506), 2022 WL 17330762.

²⁰⁶ *Biden v. Nebraska*, 143 S. Ct. at 2376.

²⁰⁷ *But cf.* *Bray & Miller*, *supra* note 48, at 1797 ("[I]n equity it all connects — the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be.").

²⁰⁸ Alternatively, because equitable relief can always be subject to conditions, a court could enjoin the forgiveness of the student loans serviced by MOHELA, but condition that injunction on the federal government's failure to make MOHELA whole.

treat a Supreme Court opinion *as if* it were a national injunction, thanks to the legacy of *Cooper v. Aaron*. As a practical matter, Supreme Court decisions often do have this effect, thanks to principles of vertical precedent, comity shown by the executive to another branch, and the general willingness of the public to accept the inevitable. Supreme Court opinions are often treated as de facto national injunctions. But they are not the same thing, and in *Brackeen* and *United States v. Texas* just days earlier, the Court had been carefully attentive to these distinctions. In *Biden v. Nebraska* it apparently could no longer maintain this attention.

It would be embarrassing for the Court to favor nationwide relief on the basis of such a flimsy injury. But to reject the relief given below would have required the Court to grapple with the problems of remedies and redressability, which it may not have been ready yet to do. Silence leaves this question, which is so very capable of repetition, for another day.

IV. THE ENDURING CHOICE BETWEEN TWO APPROACHES TO STANDING

We have described the recent past and present of standing. But what is the future? Doctrine is one way to answer this question. Standing requires the proper parties. Standing requires an injury, not a circuitous and indirect injury, but a personal injury — even for a state. Standing requires available remedies that will redress the injury. And so on. If *Massachusetts v. EPA* and other developments have taken us off track, and if the Court is making a course correction, then maybe we are just back to doctrine as usual. That would be a tidy story with a satisfying ending.

Too tidy. In law, doctrinal rules are never enough. The rules are employed and applied by human beings in the setting of human institutions. To be sure, the application of legal rules is hemmed in by the rhetorical practices of legal argument — practices that constrain what is considered, and how it is considered, and by whom it is considered, and when it is considered. But while these practices constrain, they also liberate. Standing sets judges free to be judges, rather than carrying out some other commendable office of the state.

And rules and people are still not the full story. Judges employ and apply rules, including rules about standing, with a situation sense about what exactly it is that they are doing. And it is here that standing as a judicial practice is impossible to grasp if it is thought of merely as a collection of rules. Behind the use of these rules lie mindsets.

The first way to think about standing is as a body of external constraints. External, that is, in the sense of being external to the judge. Standing doctrine is a series of hurdles. This external concept of standing is roughly similar to an American football metaphor Justice Scalia

used for common law judges, as seen through the eyes of a first-year law student:

[T]he great judge — the Holmes, the Cardozo — is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal — good law.²⁰⁹

On this mindset, principles like standing are external to the judge, just as the opposing players are external to Justice Scalia's runner. The runner wants to get around the opposing players, and once he has done so, he is moving on. Standing is a box the judge has to check before getting on to the interesting and motivating stuff.

Judges often talk about standing this way. For example, if a judge wants to know "Can I do this or is there any precedent to stop me?", that suggests an external concept. Indeed, at oral argument in *Biden v. Nebraska*, Justice Alito pressed the Solicitor General of the United States to admit that there was no "case that presents precisely the issue that's here."²¹⁰ It also fits how judges sometimes seem to act, even when they don't talk about it. Judges sometimes seem "hungry" to get to the merits.²¹¹ In fact, that very charge was made by Justice Kagan against the majority in *Biden v. Nebraska*.²¹²

A second way of thinking about standing is quite different. It sees the practice of standing not as an external obstacle to the judge, but as something the judge is supposed to internalize.²¹³ You could think of standing as a judicial habit. It is an exercise in "judicial self-governance."²¹⁴

Standing, in other words, is a judicial virtue, an unwillingness to decide cases, no matter how attractive in achieving justice or preventing injustice, if the proper party is not before the court and a proper remedy is not available to that party. On this view, standing is a judicial kind of fortitude, with a reinforcing alloy of steady patience. In this concept

²⁰⁹ ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 9 (1997).

²¹⁰ Transcript of Oral Argument, *supra* note 205, at 25.

²¹¹ Cf. *United States v. Windsor*, 570 U.S. 744, 778–79 (2013) (Scalia, J., dissenting) ("The Court is eager — hungry — to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives.").

²¹² *Biden v. Nebraska*, 143 S. Ct. at 2385 (Kagan, J., dissenting).

²¹³ For a similar analysis of external vs. internal constraints in interpretation generally, see William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017).

²¹⁴ *Warth v. Seldin*, 422 U.S. 490, 500 (1975); see also *Massachusetts v. EPA*, 549 U.S. 497, 548 (2007) (Roberts, C.J., dissenting) ("Over time, *SCRAP* became emblematic not of the looseness of Article III standing requirements, but of how utterly manipulable they are if not taken seriously as a matter of judicial self-restraint.").

of standing we can think of traditional virtues such as fortitude and patience being adapted to the role morality of the judge. And moral virtues always need to be internalized; they are never *just* about following the rules.

The importance of this way of thinking may be reinforced by the salience of equitable relief in public law cases. A judge who thinks of an injunction as the automatic result of satisfying a four-factor test, who thinks of things like “irreparable injury” and “balancing the equities” as merely hurdles to be gotten over before getting on with the business of correcting what’s wrong with the world — such a judge is not doing equity.²¹⁵ Equity has always required an equitable mindset.²¹⁶ And as more and more important public law cases involve equitable relief, that may be an additional reason that standing requires an internal mindset.

In each concept there is plenty to criticize and to praise.

One criticism of the external concept of standing is that it is manipulable.²¹⁷ If standing doctrine is not the main thing, but a set of threshold obstacles to be gotten over if you can, then we should not be surprised if it is manipulated for a court to reach or avoid reaching the merits. This manipulation critique was recognized by the Supreme Court itself in *United States v. Texas*: “As this Court’s precedents amply demonstrate, Article III standing is not merely a troublesome hurdle to be overcome if possible so as to reach the ‘merits’ of a lawsuit which a party desires to have adjudicated”²¹⁸

Yet there are also good grounds for the external concept of standing. One is that the ultimate aim of a legal system is in fact justice, not standing. Imagine a nation with an enormous court building, as large as the Library of Babel in Borges’s short story, with millions of rows of boxes, containing hundreds of millions of complaints, each one sorted with exquisite care into boxes labeled “standing” or “no standing,” awaiting a merits determination that will never come. Is this justice? Is this even a substantial step toward justice?

²¹⁵ Compare *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.) (“[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree.”), with Randall Munroe, *Duty Calls*, XKCD, <http://xkcd.com/386> [<https://perma.cc/GWD6-7GUW>] (“Someone is *wrong* on the internet.”).

²¹⁶ See Lawrence B. Solum, *Equity and the Rule of Law*, in *THE RULE OF LAW: NOMOS XXXVI* 120 (Ian Shapiro ed., 1995); see also Samuel L. Bray & Paul B. Miller, *Christianity and Equity*, in *OXFORD HANDBOOK OF CHRISTIANITY AND LAW* (John Witte, Jr. & Rafael Domingo eds., forthcoming 2023) (manuscript at 23) (on file with the Harvard Law School Library) (“The result is that we are left with debates about the judicial powers of equity, with little attention to the judgment and virtue of those who wield them.”).

²¹⁷ See, e.g., *Biden v. Nebraska*, 143 S. Ct. at 2391 (Kagan, J., dissenting).

²¹⁸ *United States v. Texas*, 143 S. Ct. 1964, 1969 (2023) (internal quotation marks omitted) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982)).

Correspondingly, the internal concept of standing can be criticized for its elevation of judicial inaction. The internal concept might lead to a world where all judges are taught at the knee of Alexander Bickel, and they overlearn their lessons. Or to use another image, judges might be like clerks overzealous in finding reasons not to grant a writ of certiorari. But judges exist to do things, to decide cases and grant remedies. The greatest judge is not the judge who can find a way to make sure every one of her cases is dismissed as nonjusticiable. Another way to put this is that the internal concept runs the risk of making standing the main thing.

But the internal concept has two great advantages, and we consider these two advantages decisive. First, it aligns with the reason we have standing doctrine in the first place. Standing is not meant to be a filter to ensure that judges get a small enough set of cases that they can give each one proper deliberation. If standing were a solution to overwork, then a court with a small caseload, or a self-chosen caseload, might not even need it. But courts should not just do the right number of things, but the right things. Standing is meant to ensure that we have in place the basic requirements for this social practice of adjudication. Proper parties and proper relief help us have proper courts, that is, courts acting as courts. Without proper parties and proper relief, judges may do all kinds of wonderful things, and what they are doing may be “[m]uch more rational,” “but it would not be near so much like a [court].”²¹⁹

Second, the internal concept can partially ameliorate the manipulability concern. There is no “non-manipulable, serious version” of standing doctrine.²²⁰ But external rules that have no claim on the inner morality of a person are always more subject to manipulation. In part this is because the rules themselves offer one line of defense, whereas rules backed by habits or virtues offer two. But it is also because an individual who sees a rule as an external obstacle will be motivated to circumvent it, whereas an individual who internalizes a rule will be motivated to carry it out, even if that means new extensions to new circumstances. It is not an accident that moral teaching for millennia has emphasized the importance of this framing — rules we want to follow should not be framed as external. In the words of the Prophet Jeremiah, the law needs to be written on our hearts.²²¹

The Court’s rules about state standing are getting better, and it increasingly appears that *Massachusetts v. EPA* is recognized as a wrong turn that threw the standing jurisprudence of the federal courts into

²¹⁹ JANE AUSTEN, *PRIDE AND PREJUDICE* 38 (Donald Gray ed., 3d ed. 2016) (1813); *cf.* TOCQUEVILLE, *supra* note 76, at 110 (“But if he directly attacks a general principle without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority, he assumes a more important, and perhaps a more useful, influence than that of the magistrate, but he ceases to be a representative of the judicial power.”).

²²⁰ *Contra* Biden v. Nebraska, 143 S. Ct. at 2391 (Kagan, J., dissenting).

²²¹ *Jeremiah* 31:33.

confusion. But good rules about standing²²² are not enough. They need to be internalized. They need to be framed by judges not only as hurdles to surmount, but as habits to make one's own. A good court makes good decisions, but it only makes decisions as a court would — and that means giving proper relief to proper parties.

CONCLUSION

“Courts,” Judge Jerome Frank once wrote, “do business at retail, not at wholesale.”²²³ That assertion could be met with immediate challenges and qualifications, and Judge Frank anticipated one of them. He continued: “Wholesaling occurs in the *stare decisis* department, where the courts deliver pronouncements concerning the legal rules. But the facts of individual cases always ultimately divert the courts’ business into retail channels.”²²⁴ That Judge Frank’s point is still true at all, we think, is in large part due to the idea of standing. Standing requires proper parties and proper relief, and those requirements guide the courts toward retail decisionmaking. As Justice Kagan put it, standing is what makes a court “stay in its lane.”²²⁵

Yet as courts have come to govern so much of our political life, and as so many of us have come to expect them to do so, standing doctrine and its corresponding view of judicial power will always be under pressure. Unconstrained by such niceties, there is so much more a judge could do! This Term suggests that the Court is trying to nudge the judiciary toward the classical view of the judicial role, or at least toward the circa 2005 view of the judicial role, and if so that is a good development. But it will not be the end of the temptation. Constant pressure requires constant vigilance.

²²² See *supra* Part I, pp. 155–64.

²²³ Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1276 (1947).

²²⁴ *Id.*; see also Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (recognizing, even while critiquing, this basic aspect of our judicial practice).

²²⁵ *Biden v. Nebraska*, 143 S. Ct. at 2391 (Kagan, J., dissenting).