SYMPOSIUM: JUDICIAL REVIEW IN JEOPARDY?

INTRODUCTION: TO KEEP GOVERNMENT GENERALLY WITHIN THE BOUNDS OF LAW

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The current President of the United States has a relationship with the law that is casual at best and contemptuous at worst. Whether the nation is facing a constitutional crisis has thus become a topic of debate among scholars and the public.[1] The answer turns in important part on the degree to which the judiciary can help confine the emboldened Executive to constitutional limits.[2] But alongside individual judges,[3] the institution of judicial review (through which courts can determine whether government actions comply with the law and counteract them if not) is under attack. Combatants include President Donald Trump,[4]

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[1] *See* Adam Liptak, *Trump's Actions Have Created a Constitutional Crisis, Scholars Say*, N.Y. TIMES (Feb. 12, 2025), https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html [https://perma.cc/J3Z4-HDGB]; SARAH BRYNER ET AL., SNF AGORA INST. AT JOHNS HOPKINS UNIV. & PUB. AGENDA, UNDERSTANDING EVOLVING REPUBLICAN ATTITUDES TOWARDS DEMOCRACY 7 (2025), https://snfagora.jhu.edu/wp-content/uploads/2025/11/Understanding-Evolving-Republican-Attitudes-Towards-Democracy.pdf [https://perma.cc/Q8SM-EBGJ].

[2] *See* Liptak, *supra* note 1 (explaining that "legal scholars agree" that a constitutional crisis "is generally the product of presidential defiance of laws and judicial rulings"); *see also* Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 726 (2009) (stating that President Franklin Delano Roosevelt would "certainly" have "provoke[d] a public constitutional crisis" if he had openly defied the Supreme Court in particular cases).

[3] *See, e.g.*, Mattathias Schwartz & Abbie VanSickle, *Judges Fear for Their Safety amid a Wave of Threats*, N.Y. TIMES (Mar. 21, 2025), https://www.nytimes.com/2025/03/19/us/trump-judges-threats.html [https://perma.cc/A2DD-A5Z6].

[4] *See, e.g.*, Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (May 26, 2025, at 07:22 ET), https://truthsocial.com/@realDonaldTrump/posts/114573871728757682 [https://perma.cc/GF7N-XS4K] (stating that "USA HATING JUDGES WHO SUFFER FROM AN IDEOLOGY THAT IS SICK, AND VERY DANGEROUS FOR OUR COUNTRY" were "ON A MISSION TO KEEP" dangerous criminals "IN OUR COUNTRY SO THEY CAN ROB, MURDER, AND RAPE AGAIN" and imploring the Supreme Court to "SAVE US FROM THE DECISIONS OF THE MONSTERS WHO WANT OUR COUNTRY TO GO TO HELL").

Administration officials,[5] congressional partisans,[6] and state lawmakers.[7] Judges, including members of the Supreme Court, have entered the fray.[8]

This Symposium, titled "Judicial Review in Jeopardy?," seeks to make sense — and suggest some ways out — of these circumstances. To do so, this Introduction proposes, we should see judicial review through the lens of Professors Richard Fallon and Daniel Meltzer's contention that our constitutional structure "demands a system of constitutional remedies adequate to keep government generally within the bounds of law."[9] To realize that system, federal courts must remain willing — and recognize their authority — to both check *and* balance assertions of political power. By this, I mean that in agenda setting and doctrinal development, courts (including the Supreme Court) ought not rest on the abstract ability of judicial review to respond to some governmental abuses. Within methodological margins, courts should instead consider the actual extent and efficacy of constitutional remedies to confront a meaningful proportion of constitutional violations — a proportion, that is, capable of producing substantial deterrence across varied and evolving circumstances.

I. DEDICATION TO PROFESSOR FALLON

This Symposium is dedicated to Professor Fallon, whose untimely death from cancer last summer wrought an enormous loss to the legal profession. Teaching at Harvard Law School for forty-three years, Fallon devoted his career to helping students, scholars, lawyers, and citizens

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[5] *See, e.g.*, NEWSMAX, *Stephen Miller Highlights the "Judicial Tyranny" Being Used to Impede the Trump Administration*, at 00:34 (YOUTUBE, May 23, 2025), https://www.youtube.com/watch?v=EfWB4YMJF3U [https://perma.cc/8WW7-WPZF] (Deputy Chief of Staff for Policy and Homeland Security Advisor Stephen Miller stating that "communist, Marxist judges" are conducting a "judicial coup" "against the laws, Constitution, and democracy of the United States").

[6] *See, e.g.*, Nate Raymond, *Republicans Seek Impeachment of 2 More Judges Who Stymied Trump*, REUTERS (Mar. 24, 2025), https://www.reuters.com/world/us/republicans-seek-impeachment-2-more-judges-who-stymied-trump-2025-03-24 [https://perma.cc/PS97-JPVT].

[7] *See, e.g.*, Kimberly Kindy & Alice Crites, *The Texas Abortion Ban Created a "Vigilante" Loophole. Both Parties Are Rushing to Take Advantage.*, WASH. POST (Feb. 22, 2022), https://www.washingtonpost.com/politics/2022/02/22/texas-abortion-law-vigilante-loophole-supreme-court [https://perma.cc/JN6B-PM6K] (describing state legislation attempting to shield government officials from constitutional litigation).

[8] *See, e.g.*, Abbie VanSickle, *Courts Must "Check the Excesses" of Congress and the President, Roberts Says*, N.Y. TIMES (May 7, 2025), https://www.nytimes.com/2025/05/07/us/politics/supreme-court-roberts-judicial-independence.html [https://perma.cc/WVC4-LRSP] (discussing "rare public remarks" by Chief Justice Roberts and noting Justice Jackson's "critici[sm of] what she called 'relentless attacks' on judges" (quoting Justice Jackson)).

[9] Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

understand the capacity — and the constraints — of federal courts as instruments of justice.[10]

I became aware of Fallon long before I started teaching Federal Courts from the canonical "Hart and Wechsler" casebook he edited.[11] Indeed, I became aware of Fallon long before I thought I might become a law professor at all: as a Harvard undergraduate who heard friends rave about Fallon's introductory constitutional law course but who lacked the good judgment to enroll in it.[12] By the time I began my academic career, I was appropriately awed by Fallon's contributions.[13] So I was skeptical when a mentor insisted I should email Fallon a draft of my entry-level job-talk paper. And I was starstruck when he responded — quickly, kindly, with insightful feedback, and signed "Dick." A few years later, I was even more surprised when *he* sent *me* an article of his. I will always appreciate the dialogue we shared.

My story is not unique. Numerous other scholars have expressed gratitude for how Fallon encouraged them as relative nobodies and helped guide them through their careers.[14] Something I thought was distinctive, though, was the extent to which the line recounted above — that the U.S. constitutional structure "demands a system of constitutional remedies adequate to keep government generally within the bounds of law"[15] — affected my work. But this Symposium shows I am not alone. As detailed below, multiple Essays refer to that line, and even more reflect it.

II. JUDICIAL REVIEW AND POLITICAL RESISTANCE

In an earlier era, I found the assertion that our constitutional structure "demands a system of constitutional remedies adequate to keep government generally within the bounds of law" anemic.[16] Because this principle "can tolerate the denial of particular remedies, and sometimes

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[10] *See* Christine Perkins, *"A Pillar of Harvard Law School,"* HARV. L. TODAY (July 16, 2025), https://hls.harvard.edu/today/remembering-richard-fallon-a-pillar-of-harvard-law-school [https://perma.cc/6KSB-KKSA].

[11] *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015).

[12] *See* Caroline G. Hennigan & William C. Mao, *Harvard Law School Professor Richard Fallon Remembered as Lucid Scholar, Committed Instructor*, HARV. CRIMSON (July 23, 2025), https://www.thecrimson.com/article/2025/7/23/richard-fallon-obituary [https://perma.cc/F4WB-9V53] (discussing the course).

[13] *See* Perkins, *supra* note 10 (describing Fallon's accomplishments).

[14] *See, e.g.*, *id.* (statement of Professor Carol Steiker, discussing herself and Justice Kagan; statement of Provost John Manning; and statement of Professor Nikolas Bowie); Hennigan & Mao, *supra* note 12 (statements of Professors Daniel Francis, Curtis Bradley, and Rachel Barkow); William Baude, *Things to Read (Dick Fallon Tribute Edition)*, DIVIDED ARGUMENT (July 17, 2025), https://blog.dividedargument.com/p/things-to-read-dick-fallon-tribute [https://perma.cc/APP2-A95Z] (tribute by Professor William Baude).

[15] *See supra* note 9 and accompanying text.

[16] Fallon & Meltzer, *supra* note 9, at 1778–79.

of individual redress" altogether,[17] the key becomes the qualifier "generally" — a wily word that can cover a multitude of sins.[18] Indeed, I worried that the assertion was not only anemic, but perhaps also intended to ameliorate qualms about an increasingly statist Supreme Court.[19] Or maybe, I thought, it was an apologia for the majority opinion in *Harlow v. Fitzgerald*,[20] the foundation of the modern qualified-immunity doctrine,[21] which Fallon helped draft as a law clerk for Justice Powell.[22]

But Fallon knew more than I did. His account of judicial review has been recognized as descriptively accurate.[23] And my present concern is the opposite of my original fear. I no longer worry that Fallon's account was anemic. With the Trump Administration's actions, I worry instead that it was aspirational. Again, I am not alone, for others in this Symposium are sounding a similar alarm.

The premise of *Remedies for a Constitutional Crisis* by Professors William Baude, Samuel Bray, and Marin Levy is that we are indeed "slipping into a crisis of judicial authority," with "evidence" of the executive branch "ignoring [court] judgments," "accusing judges of fictitious wrongdoing," "tacitly encouraging retaliation against them," and more.[24] Baude, Bray, and Levy explore potential paths forward through both principled and practical considerations. Should judges "forecast" executive responses or not?[25] Should they "give and take" in an interbranch tug-of-war or just apply the law?[26] How should they calibrate the

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[17] *Id.* at 1779.

[18] *See* BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 938 (3d ed. 2011) (defining "weasel words"); Wayne Schiess, *Somewhat Qualified, Part 1*, LEGIBLE (Oct. 23, 2018), https://sites.utexas.edu/legalwriting/2018/10/23/somewhat-qualified [https://perma.cc/6BQP-RR96] (including "generally" among qualifiers akin to Garner's weasel words).

[19] *Cf.* William N. Eskridge, Jr., & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 45 (1994) (calling the Rehnquist Court "conservative and statist").

[20] 457 U.S. 800 (1982).

[21] *See* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1730–31 (2022).

[22] *See* Justice Lewis F. Powell, Jr., Memorandum to Richard Fallon, Jr., Law Clerk, U.S. Sup. Ct. 1–2, Harlow v. Fitzgerald, No. 80-945 (Mar. 1, 1982) (on file with Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr., Papers, Box 84), https://scholarlycommons.law.wlu.edu/casefiles/232 [https://perma.cc/HNE3-W5WV]. The word "apologia" is deliberate, as I believe an apology was neither intended nor necessary here. *See* Sherman J. Clark, Classic Revisited, *An Apology for Lawyers: Socrates and the Ethics of Persuasion*, 117 MICH. L. REV. 1001, 1001 (2019) (reviewing PLATO, *Apology of Socrates* (Benjamin Jowett trans., N.Y., Charles Scribner & Co. 1871), *reprinted in* SIX GREAT DIALOGUES: APOLOGY, CRITO, PHAEDO, PHAEDRUS, SYMPOSIUM, AND THE REPUBLIC (Tom Crawford ed., Dover Publ'ns 2007)) (explaining that "apologia" "means not so much apology as 'speech in defense' or even 'explanation'").

[23] *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 571 & n.193 (2003).

[24] William Baude, Samuel L. Bray & Marin K. Levy, *Remedies for a Constitutional Crisis*, 139 HARV. L. REV. 1747, 1747 (2026).

[25] *Id.* at 1754–55.

[26] *Id.* at 1756–58.

specificity of orders to achieve desired levels of compliance?[27] Should they focus on executive overreach or perceived problems with lower courts?[28] "[S]ay the sky is falling or simply carry on?"[29] The questions are illuminating, but the answers are often murky. As the authors make clear, however, reasoning through these dilemmas becomes essential to the possibility of upholding Fallon's account of a system in which "the government generally stay[s] 'within the bounds of law.'"[30]

Turning from what judges *could do* to what they *have done* (and should do) when faced with political defiance and reprisals, Professors Curtis Bradley and Neil Siegel look to history in *The Supreme Court Under Threat: Early Lessons in Judicial Self-Protection*.[31] From the Jeffersonian backlash after the elections of 1800 to Georgia's intransigence in the *Cherokee Cases*[32] to conflicts over Reconstruction-era military trials, Bradley and Siegel describe how the Court has at times adopted a defensive posture to preserve its institutional authority.[33] They explain that such "tools of judicial self-protection" can include avoiding or delaying decisions, constructing narrow or gradual rulings, designing remedies to reduce confrontation, and using strategic dicta, among other tactics.[34] Ultimately, they argue that evasive maneuvers in the short term have strengthened the Court's ability to safeguard the rule of law in the long run — such that judicial self-protection "can help sustain 'a system of constitutional remedies adequate to keep government generally within the bounds of law,'" as Fallon described.[35]

III. Constitutional Structure and Remedy Skepticism

Bradley and Siegel are advocates of structural constitutional reasoning — which "typically appeals to the proper functioning of the governmental institutions established or accepted by the Constitution" and the relationships among them.[36] The structural notion that judicial review maintains the rule of law by preventing "the arbitrariness and tyranny that could result if power were concentrated in the political branches" motivated Fallon's account of constitutional remedies.[37] And since the

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[27] *Id.* at 1759–60.

[28] *Id.* at 1760–63.

[29] *Id.* at 1765–68.

[30] *Id.* at 1753 (quoting Fallon & Meltzer, *supra* note 9, at 1736).

[31] *See* Curtis A. Bradley & Neil S. Siegel, *The Supreme Court Under Threat: Early Lessons in Judicial Self-Protection*, 139 HARV. L. REV. 1769, 1769 (2026).

[32] State v. Tassels, 1 Dud. 229 (Ga. 1830); Cherokee Nation v. Georgia, 30 U.S. (5. Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[33] Bradley & Siegel, *supra* note 31, at 1775–89.

[34] *Id.* at 1772–74.

[35] *Id.* at 1790 n.171 (quoting Fallon & Meltzer, *supra* note 9, at 1778–79).

[36] Curtis A. Bradley & Neil S. Siegel, *Court-Stripping, Court-Packing, and Court-Defying: Revisiting the Supreme Court's Essential Functions*, 104 TEX. L. REV. (forthcoming 2026) (manuscript at 35), https://ssrn.com/abstract=5259367 [https://perma.cc/43W9-UQ7E].

[37] Fallon & Meltzer, *supra* note 9, at 1787–89.

Founding, structural reasoning about the role of judicial review in confining institutions within constitutional constraints has pervaded the national discourse. Alexander Hamilton wrote in *The Federalist*, for instance, that "[l]imitations [on government authority] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."[38]

A common concern reflected in this Symposium is that, notwithstanding some notable cases,[39] the current Supreme Court may be hesitant to meet the moment or magnitude of constitutional disregard among political actors — to "preserve[]" the "[l]imitations" essential to the integrity of our governmental system, as Hamilton put it.[40] A principal cause, I submit, is that the Court selectively spurns structural constitutional reasoning. Despite embracing structural considerations to target perceived evils like prosecuting a former President,[41] the Court has repeatedly suggested that structural considerations were illegitimate when constitutional remedies were at stake. In particular, Justices have resisted the idea that they might not only check some instances of unlawful conduct in specific disputes, but also balance abuses of political power more generally by assessing the extent and efficacy of judicial remedies needed to produce substantial deterrence.[42] And they have done so despite a lack of meaningfully determinative text[43] — and despite a long tradition endorsing the judiciary's responsibility to check *and* balance the authority of other government institutions. "[T]he courts of justice are to be considered as the bulwarks of a limited

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[38] THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[39] *See, e.g.*, Learning Res., Inc. v. Trump, 146 S. Ct. 628, 637 (2026) ("Based on two words . . . in . . . [the International Emergency Economic Powers Act] — 'regulate' and 'importation' — the President asserts the independent power to impose tariffs on imports from any country, of any product, at any rate, for any amount of time. Those words cannot bear such weight."); Trump v. Illinois, 146 S. Ct. 432, 434 (2025) ("[A]t least in this posture, the Government has not carried its burden to show that [the statute at issue] permits the President to federalize the [National] Guard in the exercise of inherent authority to protect federal personnel and property in Illinois."); A.A.R.P. v. Trump, 145 S. Ct. 1364, 1368 (2025) (per curiam) ("Under the[] circumstances[of this case], notice [of removal from the United States to detainees] roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster.").

[40] THE FEDERALIST NO. 78, *supra* note 38, at 465.

[41] Trump v. United States, 144 S. Ct. 2312, 2327 (2024) ("We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office.").

[42] *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 538 (2021) (stating that "the 'chilling effect' associated with a potentially unconstitutional law being 'on the books' is insufficient to 'justify federal intervention' in a pre-enforcement suit" and that "this Court has always required proof of a more concrete injury and compliance with traditional rules of equitable practice" (quoting Younger v. Harris, 401 U.S. 37, 42, 50–51 (1971))).

[43] *See, e.g.*, Trump v. CASA, Inc., 145 S. Ct. 2540, 2585 (2025) (Sotomayor, J., dissenting) (noting that the decision depended on language from the Judiciary Act of 1789 simply granting jurisdiction over "all suits . . . in equity" (quoting ch. 20, § 11, 1 Stat. 73, 78)).

Constitution against legislative encroachments,"[44] Hamilton wrote, such that without robust judicial review, "all the reservations of particular rights or privileges would amount to nothing."[45]

Think *Whole Woman's Health v. Jackson*,[46] which effectively allowed Texas to implement an abortion ban that was clearly unconstitutional under extant precedent.[47] Justice Sotomayor argued that, by suggesting "that States had the right to 'veto' or 'nullif[y]' any federal law with which they disagreed," Texas's actions presented "a brazen challenge to our federal structure."[48] The majority responded as if Justice Sotomayor's position amounted to a policy preference, saying that "one thing this Court may never do is disregard the traditional limits on the jurisdiction of federal courts just to see a favored result win the day."[49] Or think *Trump v. CASA, Inc.*,[50] which proscribed universal injunctions against the backdrop of President Trump's plainly unlawful executive order on birthright citizenship.[51] There, the Court treated the scope of the judiciary's ambiguous authority as unrelated to the extent of the Executive's actual actions, again acknowledging the possibility of checks but not balances. "[F]ederal courts," the majority declared, "do not exercise general oversight of the Executive Branch; they resolve cases and controversies consistent with the authority Congress has given them."[52]

Professor Mila Sohoni notes the Supreme Court's inconsistent reliance on structural constitutional reasoning in *Rethinking Remedy Skepticism*.[53] In this Essay, Sohoni explores ideological divisions in the law of constitutional remedies — and, in particular, a question Fallon previously mentioned: "why skepticism of constitutional remedies should be an attitude that correlates strongly with [judicial] conservatism."[54] Sohoni offers the "historical hypothesis" that such skepticism derives in important part from the "broader constitutional agenda" of the Department of Justice under President Ronald Reagan's influential Attorney

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44 THE FEDERALIST NO. 78, *supra* note 38, at 468.

45 *Id.* at 465.

46 142 S. Ct. 522 (2021).

47 *See id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

48 *Id.* at 550 (alteration in original) (quoting Vice President John C. Calhoun, Address on the Relation Which the States and General Government Bear to Each Other (July 26, 1831), *in* SPEECHES OF JOHN C. CALHOUN 27, 28 (N.Y., Harper & Bros. 1843)).

49 *Id.* at 538 (majority opinion). On the structural significance of the *Ex parte Young* remedy at issue in *Jackson*, see Katherine Mims Crocker, *Ex parte* Young *Redux*, 103 WASH. U. L. REV. (forthcoming 2026) (manuscript at 16), https://ssrn.com/abstract=5881622 [https://perma.cc/J5XV-QSQN].

50 145 S. Ct. 2540 (2025).

51 *See id.* at 2573 (Sotomayor, J., dissenting).

52 *Id.* at 2562 (majority opinion).

53 *See* Mila Sohoni, *Rethinking Remedy Skepticism*, 139 HARV. L. REV. 1880, 1883–84 (2026).

54 *Id.* at 1880–81 (quoting Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1325 (2023)).

General Edwin Meese.[55] For instance, Sohoni explains, Meese advocated the departmentalist "idea that executive branch officials have the authority and obligation to interpret the Constitution and to act upon their interpretation" apart from judicial pronouncements in particular cases, and his DOJ trained "an originalist attack on the courts' usage of injunctions."[56] It is not difficult to see, Sohoni contends, how the roots of *CASA* and other recent cases circumscribing the judiciary's authority to issue equitable relief reach back to that earlier ground.[57]

Normatively, Sohoni cautions that "[i]f remedy skepticism is understood, even in part, as a contingent inheritance from a particular institution and time, . . . the connection between remedy skepticism and conservativism is not inevitable — and . . . can be undone."[58] While "the Meese DOJ took it as a premise that officials — including the President — would feel bound by their oath to the Constitution," times (and Presidents) change.[59] Invoking Fallon's case for "a system of constitutional remedies adequate to keep government generally within the bounds of law,"[60] Sohoni concludes that in the face of "unprecedented" executive-branch behavior, "the Court should not operate from a bequeathed playbook for judicial power that was crafted at a very different political moment, for a very different President, and by those focused on the interests of the executive branch, not the judiciary."[61]

Professors Portia Pedro and Adam Steinman further analyze *CASA* in *Aggregation and the "Universal" Injunction*.[62] Arguing that civil rights suits seeking aggregate "compliance" injunctions can be compelling candidates for class certification, Pedro and Steinman contest what they call "*CASA* creep" — the notion that broad remedies are "inherently suspect" under *CASA*'s "general gestalt."[63] *CASA* castigated universal injunctions for "circumvent[ing]" the "procedural protections" provided by class actions.[64] To turn around and see *CASA* as imperiling class actions, the authors contend, would undercut access to justice and represent "a troubling example of . . . 'disingenuous substitution,'" where courts deny relief by pointing to alternative remedies but then deny those remedies too.[65]

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[55] *Id.* at 1881.
[56] *Id.* at 1885.
[57] *Id.* at 1887–88.
[58] *Id.* at 1891.
[59] *Id.* at 1888–89.
[60] *Id.* at 1880 (alteration omitted) (quoting Fallon & Meltzer, *supra* note 9, at 1778–79).
[61] *Id.* at 1882.
[62] *See* Portia Pedro & Adam Steinman, *Aggregation and the "Universal" Injunction*, 139 HARV. L. REV. 1791, 1791–92 (2026).
[63] *Id.* at 1802–03.
[64] Trump v. CASA, Inc., 145 S. Ct. 2540, 2556 (2025).
[65] Pedro & Steinman, *supra* note 62, at 1804 & n.92 (quoting Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1482, 1512 (2018)).

IV. Abstract Review and Institutional Realism

One could attempt to chalk up recent restrictions on constitutional remedies to the Supreme Court's fidelity to the dispute-resolution understanding of judicial review over the law-declaration model.[66] The Court itself has tried to do so.[67]

That distinction proves too much, though, as Professor Garrett West suggests in *Abstract Review in Article III Courts*.[68] "The subconstitutional rules governing jurisdiction and remedies — along with the incentives of litigants — mean that the dispute-resolution model of Article III fails to describe judicial review of some government policies," West contends.[69] The upshot, he argues, is that the "crisis" that courts must confront may be neither one of efficacy, where (citing Fallon) "courts . . . fail[] to ensure that the government is acting generally within the bounds of the law" — nor one of excess, where courts fail "to comply with [the] constraints" on their own power.[70] Perhaps, West posits, those problems instead stem from a crisis of expansion, where "*decentralized* abstract review produces an excess of judicial review that erodes the efficacy of the system."[71] West maps a set of potential solutions that would push law-declaration functions toward appellate tribunals to centralize abstract aspects of judicial review while maintaining trial judges' capacity to address the more concrete pieces of particular disputes.[72]

Paying homage to Fallon's work differentiating concrete from abstract judicial review, Professor John Harrison responds to West in *The Power of Congress to Make the Supreme Court More Like a Council of Revision*.[73] As Harrison seems to see it, unless and until a court renders judgment for a particular claimant in a sufficiently concrete case, the Executive may act on that party as the Executive deems appropriate.[74] The President, of course, must "take Care that the Laws be faithfully

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66 *See, e.g.*, Samuel Bray, Opinion, *The Supreme Court Is Watching Out for the Courts, Not for Trump*, N.Y. TIMES (June 28, 2025), https://www.nytimes.com/2025/06/28/opinion/birthright-citizenship-supreme-court-injunction.html [https://perma.cc/SPP8-C22L].

67 *See CASA*, 145 S. Ct. at 2562 (stating that federal courts just "resolve cases and controversies consistent with the authority Congress has given them"); *id.* at 2560 (criticizing an alternate "law-declaring vision of the judicial function").

68 *See* E. Garrett West, *Abstract Review in Article III Courts*, 139 HARV. L. REV. 1892, 1896–1901 (2026).

69 *Id.* at 1893.

70 *Id.* at 1907.

71 *Id.* (emphasis added).

72 *Id.* at 1901.

73 John Harrison, *The Power of Congress to Make the Supreme Court More Like a Council of Revision*, 139 HARV. L. REV. 1909, 1909 & n.3 (2026) (citing Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487 (2018); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011); Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000)).

74 *See id.* at 1914.

executed."[75] But Harrison indicates that decisions about what conduct discharges executive responsibilities as an initial matter fall within the executive, not the judicial, purview.[76] The Executive, Harrison contends, has the power and maybe the duty to exercise independent review of statutes' constitutionality — and to refuse to acquiesce in judicial precedent with which it disagrees.[77] Given that understanding, Harrison evaluates to what extent Congress could implement West's suggestion of centralizing abstract aspects of judicial review, especially in the Supreme Court. With respect to vertical "relations inside the judicial hierarchy," Harrison agrees with West "that Congress's authority is extensive and probably adequate to the task."[78] But with respect to horizontal relations between courts and "government officials and private persons,"[79] Harrison contends that congressional competence is more limited — including by principles concerning the coverage and temporal reach of judicial rulings and by Article III standing doctrine.[80]

For the system of executive review and nonacquiescence that Harrison propounds to work without shading into authoritarianism, I submit, something must prompt the Executive to undertake good-faith constitutional appraisals in a critical mass of real-world decisions. In theory, an internal role morality should help perform that function.[81] But President Trump, at least, appears to feel no compunction about his Administration committing unconstitutional acts.[82] The logical alternative to internal control is external constraint. So if, as Harrison suggests,[83] the U.S. constitutional structure does *not* "demand[] a system of constitutional remedies adequate to keep government generally within the bounds of law,"[84] then what times are these in which we live?[85]

Professors Thomas Schmidt and Gillian Metzger spin out implications of the role-amoral Executive in *Some Realism About Constitutional Remedies*.[86] In his famous "Dialogue," Professor Henry Hart

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[75] U.S. CONST. art. II, § 3.

[76] *See* Harrison, *supra* note 73, at 1911.

[77] *See id.*

[78] *Id.* at 1912–13.

[79] *Id.*

[80] *Id.* at 1913–14.

[81] *See* Katherine Mims Crocker & Jack Goldsmith, Essay, *Prudence, Role Morality, and Restraint: Judge Wilkinson on the Separation of Powers*, 110 VA. L. REV. ONLINE 269, 275 (2024) (discussing role morality).

[82] *See, e.g.*, Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Feb. 15, 2025, at 12:53 ET), https://truthsocial.com/@realDonaldTrump/posts/114009179225169296 [https://perma.cc/7TM7-34WP] ("He who saves his Country does not violate any Law.").

[83] *See* Harrison, *supra* note 73, at 1914.

[84] Fallon & Meltzer, *supra* note 9, at 1778–79.

[85] *See* Bertolt Brecht, *An die Nachgeborenen [To Those Who Follow in Our Wake]* (1939), *translated in* HARPER'S MAG. (Scott Horton trans., Jan. 15, 2008), https://harpers.org/2008/01/brecht-to-those-who-follow-in-our-wake [https://perma.cc/NHU4-BR6P].

[86] *See* Thomas P. Schmidt & Gillian E. Metzger, *Some Realism About Constitutional Remedies*, 139 HARV. L. REV. 1834, 1836–41, 1852–56 (2026).

posited that choices between remedies "can rarely be of constitutional dimension."[87] In *The Path of the Law*, later-Justice Oliver Wendell Holmes, Jr., imagined "a bad man, who cares only for the material consequences" that knowledge of the law "enables him to predict" (as opposed to a "good" man, "who finds his reasons for conduct . . . in the vaguer sanctions of conscience").[88] Holmes undermines Hart, Schmidt and Metzger suggest, when refracted through Trump's presidency.[89] "In a legal system that functions well, norms of public law guide and constrain the officials to whom they are addressed without the constant need for judicial enforcement," they argue.[90] But for a Holmesian bad man, "more robust judicial remedies become necessary" (here comes Fallon) to "ensure 'a general structure of constitutional remedies adequate to keep government within the bounds of law.'"[91]

Schmidt and Metzger apply that logic to suits alleging unlawful terminations of some federal grants and improper firings of certain federal officials.[92] Both present a choice for the judiciary between confining cases to the Court of Federal Claims while limiting relief to money damages or permitting equitable remedies in district courts.[93] Looking through an institutionally realist lens,[94] Schmidt and Metzger assert that the former option will fail to maintain the rule of law to an adequate degree.[95] "A bad man President," they argue, "will not be deterred from self-interested lawlessness by the prospect of money damages down the road — especially because the President will not be responsible for paying those money damages personally."[96]

V. CIVIL RIGHTS AND ENFORCEMENT DEFICITS

With respect to line-level civil rights enforcement, broad immunities and related barriers have long endangered the existence of a "system of constitutional remedies adequate to keep government generally within

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87 Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953).

88 O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

89 *See* Schmidt & Metzger, *supra* note 86, at 1840, 1852, 1854–55.

90 *Id.* at 1836.

91 *Id.* at 1855–56 (quoting Fallon & Meltzer, *supra* note 9, at 1736).

92 *See id.* at 1841–52.

93 *Id.* at 1835.

94 *See* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (2014) (explaining that institutional realism "entail[s] constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrine to take account of how these institutions actually function in, and over, time").

95 *See* Schmidt & Metzger, *supra* note 86, at 1835.

96 *Id.* at 1852.

the bounds of law."[97] The remaining Essays in this Symposium offer important insights into such issues.

Professors James Pfander and Alexander Reinert's Essay, *Exploring the Limits of Qualified Immunity Under* Harlow*'s Discretionary Function Test*, seeks to reinvigorate the limitation of qualified immunity to government officials performing "discretionary functions."[98] Pfander and Reinert delve into the development of official immunity during the nineteenth and early twentieth centuries.[99] Although they argue that *Harlow* meant to preserve the traditional space for high-level policymaking while reifying the rule of law against application-level action, courts have applied qualified immunity expansively to executive conduct in general.[100] Assuming the doctrine's continued viability, Pfander and Reinert advocate restoring the discretionary-function criterion by looking to "the availability of remedial alternatives,"[101] "the degree to which the official's action calls for the formulation of policy,"[102] and "the degree to which liability depends on the defendant's state of mind"[103] — a test, it seems, that could further the rights-protective yet practical focus of the remedial system Fallon articulated.

Finally, Professors Joanna Schwartz and Fred Smith remind us that while commentators often spotlight controversies centered in Washington, D.C., everyday Americans feel the effects of constitutional violations — and vindication — far from the national halls of power.[104] Their Essay, *Civil Rights Deserts*, illuminates jurisdictions with "a combination of people, rules, and practices that prevent legal remedies from reaching those whose rights have been violated and who deserve relief."[105] In painful and powerful detail, Schwartz and Smith recount experiences from two Mississippi counties — one "where a self-proclaimed 'Goon Squad' of [law-enforcement officers] terrorized residents for nearly two decades"[106] and the other where "odious" jail conditions have persisted despite years of judicial involvement.[107] These examples, they argue, "lay bare" that "profound remedial gaps

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97 Fallon & Meltzer, *supra* note 9, at 1778–79; *see, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that the Court's "approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment").

98 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see* James E. Pfander & Alexander A. Reinert, *Exploring the Limits of Qualified Immunity Under* Harlow*'s Discretionary Function Test*, 139 HARV. L. REV. 1813, 1813–14 (2026).

99 Pfander & Reinert, *supra* note 98, at 1815–27.

100 *Id.* at 1825–27.

101 *Id.* at 1831.

102 *Id.* at 1832.

103 *Id.*

104 *See* Joanna C. Schwartz & Fred O. Smith, Jr., *Civil Rights Deserts*, 139 HARV. L. REV. 1857, 1857–58 (2026).

105 *Id.* at 1858.

106 *Id.*

107 *Id.* at 1868; *see id.* at 1860–79.

emerging at both federal and local levels" threaten Fallon's vision of a system "sufficient to keep government actors 'generally within the bounds of law.'"[108] Just as "oases can emerge" from barren ground, however, Schwartz and Smith report on recent progress in the Mississippi counties to argue that certain "strategic interventions" (including litigation "targeting egregious cases," "[s]ustained judicial oversight willing to escalate interventions," and "coordinated pressure from media, community advocates, and federal authorities"[109]) can help close "even the most entrenched accountability and enforcement gaps."[110]

CONCLUSION

Fallon and Meltzer concluded their article by exalting decisionmaking about the distribution of constitutional remedies "governed 'not by metaphysical conceptions of the nature of judge-made law, nor by the fetich of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice.'"[111] By balancing legal formalism with institutional realism and doctrinal care with civic concern, this Symposium reflects considerations of "the deepest sentiments of justice" — and, I believe, does Fallon proud along the way. Judicial review *is* in jeopardy. But the contributions here offer hope that the peril need neither persist nor prevail.

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[108] *Id.* at 1876–77 (quoting Fallon & Meltzer, *supra* note 9, at 1778–79).

[109] *Id.* at 1878.

[110] *Id.* at 1860.

[111] Fallon & Meltzer, *supra* note 9, at 1833 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148–49 (1921)).