ABSTRACT REVIEW IN ARTICLE III COURTS

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INTRODUCTION

That federal courts resolve only "Cases" and "Controversies"[1] when assessing the legality of government policies is increasingly a myth. Many cases decided by the federal courts technically resolve legal disputes between the parties and issue remedies designed to redress legal wrongs, but functionally courts resolve important legal issues about the general legality of federal and state legislation, administrative rules, and executive orders. So federal district courts have blocked state laws regulating social media,[2] the Biden Administration's guidance regarding immigration-enforcement priorities,[3] and the second Trump Administration's executive orders on birthright citizenship.[4] Because of aggregate and representative litigation, lax rules for pre-enforcement review, the remedies available in aggregated pre-enforcement review, and plaintiff-friendly forum selection rules available to ideological litigants,[5] the federal courts sometimes work like councils of revision for state and federal policies.[6]

Call this phenomenon abstract review in Article III courts.[7] Abstract review is found in other legal systems, where specialized constitutional

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[1] *See* U.S. CONST. art. III, § 2.

[2] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1084, 1096 (N.D. Fla. 2021), *aff'd in part, vacated in part and remanded sub nom.*, NetChoice, LLC v. Att'y Gen., 34 F.4th 1196 (11th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

[3] Texas v. United States, 606 F. Supp. 3d 437, 449, 451, 501 (S.D. Tex. 2022), *rev'd*, 143 S. Ct. 1964 (2023).

[4] CASA, Inc. v. Trump, 763 F. Supp. 3d 723, 728, 746 (D. Md. 2025); *see* Barbara v. Trump, 790 F. Supp. 3d 80, 87, 105–06 (D.N.H.), *cert. granted before judgment*, 146 S. Ct. 879 (2025).

[5] *See* E. Garrett West, *Taming the Shadow Docket*, 112 VA. L. REV. 347, 351 & n.9, 352–53, 361–62, 373, 385 (2026).

[6] *See* WILLIAM BAUDE ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 12 (8th ed. 2025). For an argument that the formal structure of abstract review in European systems *and* under a council of revision still differs from the formal structure of adjudication in the United States, see John Harrison, *The Power of Congress to Make the Supreme Court More Like a Council of Revision*, 139 HARV. L. REV. 1909 (2026).

[7] For similar observations about the Supreme Court, see Jamal Greene, *The Supreme Court, 2013 Term — Comment: The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 142–43 (2014), and Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1370 (1973).

courts review the constitutionality of legislation without concrete disputes about the legislation's application.[8] Article III courts, on the other hand, are supposed to resolve only concrete disputes about the legal rights of parties.[9] But our legal system is functioning like a system of abstract review. 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. Thus, if abstract review is understood in a functional and relative sense, such review occurs whenever a court's review of government policy effectively resolves a legal issue for all potentially affected plaintiffs, for all potential officials implementing the policy, and in all potential applications.[10] In those circumstances, the formal requirements of Article III do not perform the function of maintaining a system of concrete review.

That functional drift into abstract review, however, poses a threat to judicial review of illegal government action. Unlike other systems that formally embrace abstract review, abstract review in Article III courts occurs within a decentralized judiciary. Any district court has the power to engage in such review, and plaintiffs have an incentive to litigate in a district court inclined to agree with their position.[11] Decentralization thus risks conflict with the political branches, because federal district courts selected by the plaintiffs adjudicate the general legality of government policy. The risk is that decentralized abstract review will, ultimately, erode the political support for judicial review by blocking the policies of the executive branch. That dynamic is one potential structural theory of the conflict between the courts and political actors during the last few presidential administrations, and it may contribute to the sense — implicit in the subject of this Symposium — that judicial review is somehow in "jeopardy."

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[8] *See infra* notes 21–26 and accompanying text.

[9] *See* BAUDE ET AL., *supra* note 6, at 65.

[10] *Cf.* Michael C. Dorf, *Abstract and Concrete Review*, *in* GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 3, 3–4 (Vikram David Amar & Mark V. Tushnet eds., 2009) (defining abstract review in "relative rather than absolute terms," *id.* at 4). The functional definitions elide several technical distinctions. Some distinguish between abstract and concrete review concerning the *theory of illegality*, as when plaintiffs in the United States claim that a statute is facially unconstitutional (abstract) or unconstitutional as applied (concrete). *See* Alec Stone Sweet & Martin Shapiro, *Abstract and Concrete Review in the United States*, *in* ON LAW, POLITICS, AND JUDICIALIZATION 347, 349–51 (2002). Another distinction concerns the *scope of relief*, as when a judgment is binding erga omnes (abstract) or only inter partes (concrete). *See* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 85–88 (1971). And abstract and concrete review might refer to different *procedures* for initiating review, as when adjudication occurs without a prior controversy between the parties (abstract) or requires review to occur within a prior dispute about the parties' legal entitlements (concrete). *See* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 44–45 (2000); Stone Sweet & Shapiro, *supra*, at 351–52.

[11] *See* West, *supra* note 5, at 351.

I discuss potential reforms that could rationalize abstract review. The reforms would centralize abstract review in courts of appeals and the Supreme Court, but without reducing the capacity of federal district courts to engage in relatively concrete review of government policy. Centralizing reforms might include, for example, presumptive stays pending appeal, certification from courts of appeals to the Supreme Court, a mechanism to transfer cases from federal district courts to the Supreme Court's original jurisdiction, and a specialized court composed of trial and appellate judges drawn from throughout the country to hear certain challenges to major government policies.

Part I offers two stylized models of judicial review: a classic American model of decentralized concrete adjudication and a European model of centralized abstract review. Part II shows that the American model increasingly operates like a system of decentralized abstract review. Part III offers concrete reforms that could rationalize our system of abstract review by channeling abstract review to the appellate courts or the Supreme Court. A conclusion returns to the question of the conference: Is judicial review in jeopardy? I suggest and reject two possible crises before proposing a third that this paper's proposals begin to address.

I. Concrete and Abstract Review

Consider two stylized forms of judicial review. The first is the standard description of judicial review in the American system. The federal courts resolve only "Cases" and "Controversies."[12] They have no power to "review statutes" or "executive actions" unless "necessary 'to redress or prevent actual or imminently threatened injury to persons caused by . . . official violation of law.'"[13] The injuries that justify intervention must be "concrete, particularized, and actual or imminent; fairly traceable to the [defendant's] action; and redressable" by judicial order.[14] Each plaintiff must have "standing for each claim" pressed and "each form of relief" sought.[15] Accordingly, the resolution of legal issues, including the legality of executive action and legislation, is an incident to the resolution of cases and controversies, and every federal court has the same basic authority to resolve cases and controversies.[16] Judicial review is thus decentralized because it occurs throughout the federal (and

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[12] U.S. Const. art. III, § 2. *But see* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447, 450 (1994). *See generally* James E. Pfander, Cases Without Controversies (2021) (arguing that "nineteenth-century Americans understood" federal courts to have the power to adjudicate "uncontested matters of federal law," *id.* at 12).

[13] Murthy v. Missouri, 144 S. Ct. 1972, 1985 (2024) (omission in original) (quoting Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009)).

[14] *Id.* at 1986 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (internal quotation marks omitted)).

[15] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

[16] *See* United States v. Raines, 362 U.S. 17, 20 (1960).

state) judiciary, concrete because the constitutional analysis occurs in a particular dispute between litigants with remedies confined to those litigants, and incidental because legality determinations are justified only if necessary to resolve grievances between parties.

Importantly, functional benefits are supposed to flow from the formal case-and-controversy requirement. The requirement ensures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party."[17] It ensures that courts do not "oversee legislative or executive action."[18] It prevents courts "from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."[19] It rations judicial resources, preserves the Court's political capital, ensures that judicial decisions involve the application of recognizably legal rather than political considerations, and "sharpens the presentation of issues" in the adversarial system by ensuring that the litigants have "a personal stake" in the dispute.[20] In other words, the formal structure of Article III is supposed to ensure that federal courts engage in functionally concrete adjudication.

The second model, which we might call the European model of abstract review, involves a very different formal structure of constitutional decisionmaking. Constitutional adjudication occurs in a specialized constitutional court that has the exclusive authority to resolve constitutional questions.[21] Ordinary courts, by contrast, resolve nonconstitutional legal questions, settle disputes between the parties, and do not ordinarily engage in judicial review.[22] The specialized constitutional court exists to perform primarily, or mostly, constitutional adjudication, and the outcome is not a discrete remedy for the parties but a determination of constitutionality that has "universal (erga omnes) binding effect."[23] Often the specialized constitutional court engages in abstract review of the relevant statute before the statute becomes effective.[24] And sometimes review is instigated only by a limited set of political actors, like the leader of a minority party in the legislature.[25] Constitutional adjudication is thus centralized because it occurs in a specialized

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17 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974).

18 *Summers*, 555 U.S. at 493.

19 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)).

20 Baker v. Carr, 369 U.S. 186, 204 (1962).

21 WOJCIECH SADURSKI, RIGHTS BEFORE COURTS 93 (2d ed. 2014).

22 *See* Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy,* W. EUR. POL., Jan. 2002, at 77, 80.

23 Juliane Kokott & Martin Kaspar, *Ensuring Constitutional Efficacy*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 795, 814 (Michel Rosenfeld & András Sajó eds., 2012).

24 *See* Stone Sweet, *supra* note 22, at 87.

25 *Id.*; *see* SADURSKI, *supra* note 21, at 93.

constitutional court, abstract because the constitutional analysis occurs without a reference to a concrete dispute between the litigants, and non-incidental because the constitutional determination is the primary function of the specialized court.[26] In reality, of course, the idealized forms do not describe any particular legal system, but these stylized models of abstract and concrete review offer contrasting ideal types.

II. Decentralized Abstract Review

The classic model of American judicial review does not describe how the system works within a substantial class of disputes about the legality of government policy. While courts continue to (mostly) adhere to the formal case-and-controversy requirement, the system does not functionally behave like one of pure concrete review. Instead, federal courts routinely issue decisions that effectively resolve the constitutionality or legality of government policy for everyone or nearly everyone. This Part explains what makes adjudication in the federal courts functionally similar to abstract review.[27]

1. Aggregation & representation. — An increase in the set of parties whose interests are represented in adjudication tends to increase the relative abstractness of review. If concrete review concerns the legality of a rule applied to one person's discrete circumstance, abstract review concerns the legality of a rule in general and with respect to no one in particular. As the set of persons represented (actually or effectively) in litigation increases, adjudication will tend to become more abstract. This is true even if the presence of represented parties renders the adjudication formally concrete.[28] Thus, there would be no significant functional difference between an adjudication in which the plaintiffs included "all persons" and one in which the court assessed the legality of a policy in the abstract.

Prior to *Trump v. CASA, Inc.*,[29] universal injunctions permitted effectively abstract review without formally aggregating plaintiffs.[30] When federal district courts entered universal injunctions, they precluded the "applic[ation] [of] the policy to *anyone* in the country."[31] The application of a policy to "anyone," whether a party or not, permitted a kind of representational litigation in which some plaintiffs challenging a policy's legality could represent all persons potentially affected by the policy. And the effect of such an injunction — if all relevant defendants

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[26] *See also* Cappelletti, *supra* note 10, at 69–72 (contrasting incidental and principal review).

[27] I set aside facial challenges and First Amendment overbreadth, because those doctrines would not broadly reorient judicial review without the other procedural rules discussed below. *But see* Stone Sweet & Shapiro, *supra* note 10, at 348 (characterizing those doctrines as abstract review).

[28] *See* Dorf, *supra* note 10, at 3 (noting that "permissive standing rules" might replicate abstract review).

[29] 145 S. Ct. 2540 (2025).

[30] *Id.* at 2548, 2555–56.

[31] *Id.* at 2549.

were named — mirrored the "universal (erga omnes) binding effect" of abstract review by specialized constitutional courts.[32] The effect was maximally decentralized abstract review: Any plaintiff could ask a district court to enjoin all defendants from applying a policy to anybody.

Even without universal injunctions, other jurisdictional and remedial rules perpetuate decentralized abstract review.[33] Federal courts have aggregation mechanisms that replicate the universal injunction by increasing the number of parties and the scope of relief. First, plaintiffs may file class actions purporting to represent all persons potentially impacted by the relevant policy,[34] and the putative class may seek complete relief for the class.[35] The class mechanism makes the claim formally consistent with the case-and-controversy requirement, but a class of "all affected persons" is functionally equivalent to a claim on behalf of anybody. Second, associational plaintiffs might have standing to bring claims on behalf of all of their members and to seek relief for them.[36] An association with members affected by the policy might have so many members that resolving the issue for those members might resolve the matter for anybody that could be affected.[37] Third, the plaintiff might be a state government asserting some injury to its financial interests.[38] If the remedy required to undo that harm is broad enough, then the remedy becomes indistinguishable from an order not to enforce the relevant policy — and thus functionally analogous to a general determination of illegality.[39]

The aggregation mechanisms comply with the formal structure of the case-and-controversy requirement because the plaintiffs, technically, are parties to the litigation and request tailored relief. But these mechanisms might also function as a substitute for abstract review, because the litigants challenging the legality of a policy seek resolution of a legal dispute for a broad set of persons.

2. Timing. — The timing of adjudication, along with the remedies available at earlier stages of review, likewise may increase the relative abstractness of review. To see that point, note that judicial review that occurs after the illegal action has occurred or during the application of a policy will tend to be more concrete than anticipatory adjudication. First, the aim of judicial review after the alleged illegality is, usually, to fashion retrospective relief for the plaintiff based on factual

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[32] Kokott & Kaspar, *supra* note 23, at 814.

[33] *See* West, *supra* note 5, at 352.

[34] *See, e.g.*, CASA, Inc. v. Trump, 793 F. Supp. 3d 687, 690–91 (D. Md. 2025).

[35] *See id.* at 700.

[36] *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 342 (1977).

[37] *E.g.*, League of United Latin Am. Citizens v. Exec. Off. of the President, 780 F. Supp. 3d 135, 223 (D.D.C. 2025).

[38] *E.g.*, Texas v. United States, 606 F. Supp. 3d 437, 467 (S.D. Tex.), *cert. granted before judgment*, 143 S. Ct. 51 (2022), *and rev'd*, 143 S. Ct. 1964 (2023).

[39] *Id.* at 500.

circumstances that have already materialized.[40] Second, the aim of judicial review during a proceeding that applies a policy to a civil or criminal defendant is to determine whether the relevant government action must be nullified.[41] Both forms of adjudication — review of past illegality or of an asserted application of policy — involve a concrete focus on persons injured by or potentially threatened by the illegality.

Anticipatory challenges to a policy, however, potentially increase the abstractness of review. Pre-enforcement review requires courts to adjudicate the application of a policy to persons who might be affected. Pre-enforcement review is formally consistent with the case-and-controversy requirement because of the risk of future harm,[42] but it permits aggregation techniques to increase the scope of relevant parties. If the number of persons who might be harmed by an illegal policy is larger than the number of persons whom the government does enforce the policy against, and if aggregation tends to increase the abstractness of adjudication, then anticipatory adjudication will tend to be more abstract. Likewise, the relative abstractness of pre-enforcement review will tend to increase as the likelihood of enforcement needed to seek pre-enforcement review decreases. Thus, as courts relax requirements for pre-enforcement review, more litigants may join in aggregated challenges to government policies.[43]

3. Remedies. — The remedies now available to parties also increase the relative abstractness of review. The formalities of the case-and-controversy requirement compel plaintiffs — including aggregations of plaintiffs — to show that the injury alleged is redressable for each plaintiff by an appropriate judicial order.[44] But the redressability prong of the standing inquiry depends on the kinds of remedies available in federal court. Stricter remedial rules might prevent abstract review by requiring courts to make particularized findings about the parties before issuing a particular remedy, and looser remedial rules permit courts to adjudicate legality more abstractly.[45] The remedies available in anticipatory adjudication — for example, declaratory relief and

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[40] *See* E. Garrett West, *Constitutional Private Law*, 103 WASH. U. L. REV. 409, 427 (2025).

[41] *See id.* at 453–54.

[42] *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59 (2014).

[43] On the expansion of pre-enforcement review, see Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 974 (2022), and Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1337–39 (2014).

[44] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021); Murthy v. Missouri, 144 S. Ct. 1972, 1986 (2024).

[45] *Cf.* Trump v. CASA, Inc., 145 S. Ct. 2540, 2566–67 (2025) (Alito, J., concurring) (noting that "[l]ax enforcement of the requirements for third-party standing and class certification would create a potentially significant loophole" to the central holding against universal injunctions).

injunctions — impose few additional restraints that would make adjudication more concrete.[46]

As noted, litigants seeking pre-enforcement review of state or federal policies often sue under *Ex parte Young*[47] (or § 1983[48]) and request declaratory and injunctive relief.[49] In some forms, these remedies impose no constraints at all on the abstractness of review. For example, a declaratory judgment is supposed to be available in cases in which some underlying legal process could be available and the legal issues are sufficiently concrete.[50] But where the underlying legal process is the application of an allegedly illegal law, and where the set of plaintiffs to whom the declaratory judgment might apply is broad, and where all defendants who might enforce the policy are named, a declaratory judgment might just declare that the relevant policy is illegal. That kind of declaratory judgment approximates the "remedy" available in some forms of abstract review: a declaration of invalidity that applies in general.

The same is true of injunctions. A tailored injunction that instructs specific defendants not to do such-and-such to specific plaintiffs — for example, an injunction that balances the equities differently for different parties — might make the adjudication relatively concrete. But some injunctions entered against state and federal policies simply forbid their enforcement.[51] The "hold unlawful and set aside" remedy under the Administrative Procedure Act[52] (APA) has the same effect.[53] All told, then, the remedies available formally satisfy the redressability prong of the case-and-controversy requirement but, functionally, do little to concretize adjudication for aggregative plaintiffs seeking pre-enforcement review of government policy.

4. Incentives. — The incentives of plaintiffs to seek abstract review likewise contribute to the systemic availability of decentralized abstract review. First, much litigation that proceeds as abstract review is undertaken by ideologically motivated litigants, like state governments controlled by the political party opposed to the presidential

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[46] *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 449–52 (2017) (speculating that changing judicial conceptions of injunctions and declaratory judgments might have contributed to the rise of universal injunctions).

[47] 209 U.S. 123 (1908).

[48] 42 U.S.C. § 1983.

[49] *See Young*, 209 U.S. at 159–60; *see, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532, 538 (2021); Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2197, 2199 (2022); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 487, 491 n.2 (2010).

[50] Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1301–02, 1302 n.106 (2010).

[51] *E.g.*, Hawaii v. Trump, 265 F. Supp. 3d 1140, 1161 (D. Haw. 2017).

[52] 5 U.S.C. §§ 551–559, 701–706.

[53] *Id.* § 706(2); *see, e.g.*, United States v. Texas, 143 S. Ct. 1964, 1981 (2023) (Gorsuch, J., concurring in the judgment).

administration.[54] These litigants presumably seek maximal interference with a challenged policy. Second, these plaintiffs have few disincentives to seek relatively more abstract review. Litigation might be somewhat more cumbersome and expensive if it requires class certification, for example, but costs should not increase by much if the plaintiff requests an (effectively) universal injunction instead of one that protects discrete interests of specific plaintiffs. Third, litigation begins with a lawsuit filed in a district court selected by the plaintiff, and the courts' analyses are likely to be systemically tilted in plaintiffs' favor.[55] The net effect is an incentive structure encouraging ideological plaintiffs to seek and obtain abstract review from favorable judges.

5. Abstract review at the Supreme Court. — The emergence of abstract review is even more pronounced at the Supreme Court. Though the Court insists that its cases must satisfy the case-and-controversy requirement,[56] the Court acts as if its task is the resolution of important legal issues rather than disputes. Thus, the Court selects the issues that it will resolve based on their importance,[57] looks for cases that serve as good "vehicles" to resolve such important legal questions,[58] and sometimes edits the questions presented by the parties to state a legal issue that it wants to answer.[59]

The case-and-controversy requirement is particularly unlikely to prevent the Court from engaging in functionally abstract review. The Court, like all federal courts, may resolve an issue as long as one plaintiff has standing to bring a claim.[60] In the lower courts, the precedential effect of any opinion resolving an issue is limited. But when the Court resolves an issue for even one plaintiff, the rules of precedent and features of institutional design make its opinions de facto binding erga omnes. The issue resolved will be binding precedent on the entire judiciary,[61] and the executive branch now claims to obey its precedents too.[62]

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[54] *See generally* Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 LAW & SOC'Y REV. 657 (2014) (giving an overview of outsized influence of state governments in litigation).

[55] Paul R. Gugliuzza, *Procedure, Substance, and Judge Shopping*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 23, 25–26), https://ssrn.com/abstract=5212982 [https://perma.cc/Z7TS-3SJW].

[56] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983).

[57] SUP. CT. R. 10(b)–(c).

[58] Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1733–34 (2000).

[59] Benjamin B. Johnson, Essay, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 864 (2022).

[60] Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 52 n.2 (2006).

[61] *Cf.* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (identifying precedential control of Supreme Court decisions).

[62] *See* Jack Goldsmith, *The Supreme Court, 2024 Term — Essay: Interim Orders, the Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86, 121–24, 122 n.207 (2025) (citing Transcript of Oral Argument at 54–55, Trump v. CASA, Inc., 145 S. Ct. 2540 (2025) (No. 24A884), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24a884_7lhn.pdf [https://perma.cc/3AD3-AFL3]).

The result is that the Court selects issues for their importance, resolves them if even one party has standing, and makes determinations that de facto bind all courts and executive officials.

III. CENTRALIZING ABSTRACT REVIEW

The United States has, at least in high-salience challenges to government policies, a system of judicial review that approximates abstract review. But the American system of abstract review is also decentralized. That is an unusual combination. Legal systems that permit abstract review of legislation tend to vest that responsibility in a specialized court.[63] If the current system seems to be an awkward combination of abstract review in a decentralized judicial system, then what would it take to rationalize that system? One option would be a project of restoration, under which the system of review is recalibrated to restore concrete adjudication.[64] Another approach would be to embrace and rationalize a system of abstract review in the United States. This section discusses some potential mechanisms to centralize abstract review while leaving more concrete review to the district courts.

1. Presumptive stays. — A way to preclude abstract review would be to deploy administrative stays and stays pending appeal. Appellate courts could preclude or limit abstract review in district courts by instructing those courts to stay any injunctions (or other judgments) of sufficient abstractness.[65] The approach would mean that, where that presumption applies, district courts could not block a policy without appellate approval. The presumptive stay mechanism could be a doctrinal test, a circuit rule, or a bonding requirement.

First, the doctrinal reform could revise the standard for stays pending appeal to consider the relative abstractness of the dispute. Appellate courts could adopt a presumption that a government is more likely entitled to a stay pending appeal as the scope of relief broadens. That presumption would differ from the current tests for equitable relief.[66] Under the current framework, the balance of equities and irreparable harm increase symmetrically for the parties, because relief that would block a broader application of a policy against more litigants would also interfere more with government policy. The presumption could also differ from a proposed presumption of constitutionality,[67] because that presumption would apply to all legislation (and potentially executive

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[63] *See* Stone Sweet, *supra* note 22, at 80.

[64] *See* West, *supra* note 5, at 127–49 (suggesting reforms that would be necessary to restrict the capacity of lower courts to block state and federal policies). *But see id.* at 154–59 (suggesting reasons that disempowerment of the lower courts might not be desirable).

[65] *See generally* Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941 (2022) (examining the uses and limits of temporary administrative stays).

[66] For the current tests, see *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (preliminary injunction), and *Nken v. Holder*, 556 U.S. 418, 434 (2009) (stay).

[67] *See* William Baude, *Fear of Balancing*, 2024 SUP. CT. REV. 169, 180 (2025).

actions), whereas this approach would place a heavier thumb on the scale as adjudication becomes more abstract. The doctrinal test for presumptive stays could use open-ended standards (for example, require a stronger showing on the equities as the number of plaintiffs increases) or categorical rules (for example, require a stronger showing on the equities for state plaintiffs).

Second, appellate courts could alter their circuit rules to automatically issue administrative stays or stays pending appeal. Currently, in the immigration context, some courts of appeals have local rules that automatically stay removal if a petitioner moves to stay an order of removal.[68] Courts of appeals could similarly adopt special rules for stays pending appeal. Such rules might provide that a district court's order is automatically stayed pending appeal if a motion for a stay pending appeal is filed by a state government or the United States, if the government is appealing some form of prospective relief, and if such relief was entered on behalf of a substantial number of plaintiffs (defined, for example, to mean a class action, a certain number of natural persons, or an association representing the interest of such a set).[69] There are other possible triggers too, and the precise language would need to consider how the rule should apply to preliminary and final injunctions, declaratory relief, and vacatur under the APA.

Third, appellate courts could use bonds to determine whether to issue stays pending appeal and, thus, to alter the incentives of litigants to request broader relief.[70] Appellate courts could, for example, automatically grant a stay pending appeal unless the plaintiff posts an injunction bond that scales with the scope of relief. Alternatively, if the concern is that states will abuse presumptive stays by filing frivolous appeals, the courts of appeals could make the issuance of a presumptive stay conditional on the State's posting of a security bond.

2. Certification. — The courts of appeals could also refer some matters to the Supreme Court by way of certification.[71] Under current law, the Supreme Court may review a case "[b]y certification at any time by a court of appeals of any question of law in any civil or criminal case."[72] That avenue to review by the Court has not been in common use for

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[68] *E.g.*, 1ST CIR. R. 18.0 (amended Dec. 1, 2025); Ninth Circuit General Order 6.4(c)(1) (revised Mar. 25, 2026); *see* AM. IMMIGR. COUNCIL & NAT'L IMMIGR. PROJECT, PRACTICE ADVISORY: STAYS OF REMOVAL 14 (Mar. 13, 2026), https://nipnlg.org/sites/default/files/2025-01/stays-of-removal-advisory.pdf [https://perma.cc/57L6-YNNC].

[69] For the current rule governing stays pending appeal, see FED. R. APP. P. 8(a)(2)(E).

[70] *See, e.g.*, FED. R. APP. P. 8(a)(2)(E), 8(b).

[71] *See* Amanda L. Tyler, Essay, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1311 (2010). Some European systems have similar procedural mechanisms by which ordinary judges ask the constitutional court to resolve an issue. *See, e.g.*, John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication, Italian Style*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 294, 306 (Tom Ginsburg ed., 2012) ("[O]rdinary judges . . . have been active in sending questions to the Constitutional Court in Rome.").

[72] 28 U.S.C. 1254(2).

decades, but it could be used again.[73] The appellate courts could exercise discretion in individual cases or even develop local rules that automatically provide for certification. The Supreme Court would retain discretion, but with a right of first refusal on the resolution of substantial questions.

Certification could work with presumptive stays to escalate important questions for the Supreme Court's review. Imagine, for example, a practice under which courts of appeals presumptively certify certain categories of questions to the Supreme Court and stay the district court's order pending the Court's decision. A case filed in district court could have an expedited briefing schedule at the Supreme Court within, say, a few weeks. By contrast, in the challenges to President Trump's April 2025 tariffs, the Court expedited considerations of those challenges only after the Court of International Trade and the Federal Circuit spent months adjudicating them.[74] A stay-and-certify procedure could avoid months of uncertainty.

3. Political triggers to review. — A mechanism that could be used with several of the other centralization tools would be the formal integration of political actors into the procedural rules governing judicial review. European systems sometimes require abstract review to be instigated by political actors.[75] A rational system of abstract review in Article III courts might likewise allow political actors to trigger special review proceedings for high-salience issues.

Specialized provisions for abstract review might include any number of political triggers. First, in cases challenging state or federal policies, a presumptive stay or presumptive certification might require the government seeking that stay to acquire the support of some number of other states. The supporting states could be required to file declarations that the matter is of substantial importance and that the injunction will interfere with important governmental policies, or the supporting states could be required to post a bond that would be forfeited if the appeal fails. Second, the triggers could involve Congress. Perhaps the trigger would be declarations from some percentage of the members of either or both chambers or declarations from party leadership.[76] Political triggers could formalize the relevance of political demand for the resolution of legal issues in determining how to proceed with abstract review. And the approach is not so different from a system in which political actors signal their views on or interest in legal issues by filing amicus briefs.

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[73] *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 2.6 (11th ed. 2019).

[74] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 636–37 (2026).

[75] SADURSKI, *supra* note 21, at 93 (abstract review is "initiated by parliamentarians or other political officials"); *see* STONE SWEET, *supra* note 10, at 50–51.

[76] Members of Congress sometimes formally participate in litigation. *See, e.g.,* United States v. Windsor, 570 U.S. 744, 754 (2013) (noting intervention by the Bipartisan Legal Advisory Group of the House of Representatives as an interested party).

4. The Supreme Court's original jurisdiction. — An aggressive centralization technique would shift cases from the lower courts to the Supreme Court's original jurisdiction. The Court's original jurisdiction is not commonly used today, but the Court has used the docket to resolve substantial national questions of policy, including cases about the constitutionality of the Voting Rights Act.[77] The Court resolved these disputes in its original jurisdiction because they raised important questions of law, even though the basis for jurisdiction (a "controversy between a State and a citizen of another State"[78]) had little to do with the reasons to adjudicate the case.[79]

The Court's original jurisdiction could — with some important caveats — comprehend many cases of abstract review. Suits brought by the United States against any state would (probably) satisfy the constitutional and statutory requirements.[80] Suits by a state against a federal official would also satisfy the requirements if the federal official is a citizen of a different state.[81] And suits by individual plaintiffs from one state against another state's officials would almost satisfy the requirements, except that the suit against a state official is probably not a suit against the state for purposes of original jurisdiction, just as it is not against the state under the Eleventh Amendment.[82] A category that would certainly not fall under the original jurisdiction would be suits by non-states against federal officials or the United States.

A substitution-and-transfer mechanism could expand the Court's original jurisdiction to capture more of these instances of abstract review. "Substitution" could allow a state or the United States to certify that a suit against an official is substantially against the government and

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[77] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966); Oregon v. Mitchell, 400 U.S. 112, 230 (1970); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 557 & n.8 (1994).

[78] *Katzenbach*, 383 U.S. at 307.

[79] In *Katzenbach*, the Court addressed the constitutionality of the Voting Rights Act because the case presented questions "of urgent concern to the entire country," but the diversity justification for the suit was that the Attorney General was "a citizen of another State." 383 U.S. at 307. *See* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 85 (explaining that the Attorney General's citizenship was "not . . . the most relevant fact about [him].").

[80] *See* U.S. CONST. art. III, § 2 (referring to cases "in which a State shall be Party"); 28 U.S.C. § 1251(b)(2); United States v. Texas, 143 U.S. 621, 643 (1892). *But see* Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court,* 56 U. CHI. L. REV. 443, 491 n.217 (1989).

[81] *See* 28 U.S.C. § 1251(b)(3); *Katzenbach*, 383 U.S. at 307.

[82] *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 847 (1824). Another hurdle to suits against state officials is that the statute confers jurisdiction only for suits "*by* a State against the citizens of another State," 28 U.S.C. § 1251(b)(3) (emphasis added), while the Constitution refers to cases "in which a state shall *be Party*." U.S. CONST. art. III, § 2 (emphasis added). But that constitutional language is generally thought to be self-executing. *See* Pfander, *supra* note 77, at 558 & n.12 (collecting scholarship supporting and critiquing that view). Even if that constitutional language is limited to categories listed in section 2 of Article III, *see* Amar, *supra* note 80, at 488–89, the Court's original jurisdiction would still extend to "Controversies . . . *between* a State and Citizens of another State." U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

to substitute itself as the defendant. "Transfer" could allow the government to move a suit from a district court to the Court's original jurisdiction, much as parties now transfer between federal district courts or remove a case from state court.[83] The model for a substitution-and-transfer process is the Federal Tort Claims Act (FTCA),[84] which permits the United States to substitute itself as the defendant in some suits against federal employees and simultaneously to remove a case to federal court.[85]

Congress could use something like that FTCA substitution-and-transfer procedure to expand the Court's original jurisdiction. Many cases of abstract review involve suits against state officials.[86] These claims are not filed against the states for purposes of the Eleventh Amendment, but a dominant view of *Ex parte Young* is that this is a convenient fiction to circumvent sovereign immunity when the government is the real defendant.[87] In such cases, Congress could provide that the state may certify that the official acted on its behalf, that such certification substitutes the government as the defendant, and that the substitution transfers the case to the Court's original jurisdiction. The approach would bring suits against state officials into the Court's original jurisdiction over cases in which the state is a party, and by invoking the substitution-and-transfer provision the state would be consenting to suit.[88]

The point would be to centralize abstract review in the Supreme Court while leaving concrete disputes in the lower courts. To tailor the substitution-and-transfer provision, Congress could impose certain conditions on its use. For example, Congress could forbid transfer if the plaintiffs are natural persons proceeding as individual plaintiffs, rather than class actions, associational claims, or claims by states. Or Congress could require the government seeking a transfer to post a bond, to secure declarations from other states about the importance of the issue, or to secure the support of members of Congress.[89] These suggestions are illustrative, but they show that a jurisdictional regime could channel some abstract disputes to the Court's original jurisdiction while leaving concrete adjudication to the ordinary course of litigation.

Finally, whether Congress could or should compel the Court to resolve any questions is another question. The Court has sometimes

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[83] *See* 28 U.S.C. §§ 1404, 1441, 1631.

[84] *Id.* §§ 1346(b), 2671–2680.

[85] *Id.* § 2679(d).

[86] *See supra* notes 47–49 and accompanying text.

[87] *See* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 990 (2008). *But see* Trump v. CASA, Inc., 145 S. Ct. 2540, 2554 n.9 (2025) (characterizing *Ex parte Young* as an "antisuit injunction to prevent an officer from engaging in tortious conduct").

[88] *See, e.g.*, Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 616 (2002). Under one theory of the Original Jurisdiction Clause, the State and the plaintiff would need to be diverse. *See* Amar, *supra* note 80, at 489.

[89] *See supra* section III.3, p. 1903.

declined to resolve even cases in its original and exclusive jurisdiction — that is, cases between two or more states.[90] So while Congress could instruct the Court that the exercise of jurisdiction is mandatory, the Court might decline to resolve cases transferred to the Court's original jurisdiction. But that discretion is compatible with this approach. The Court has long acted in ways that preserve its discretionary power to set its agenda,[91] but it also seems to feel compelled to resolve important issues.[92] Given that these disputes are likely to raise significant questions of law, it may be desirable for the Court to exercise its discretion to avoid political controversies or to leave some matters to the lower courts.[93]

5. A Court of Abstract Review? — A final possibility could involve constructing a specialized inferior court to resolve such issues in the first instance. Congress has sometimes created specialized courts with judges drawn from other district and appellate courts,[94] and at one point a "National Court of Appeals" was proposed.[95] The new "Court of Abstract Review" could include many of the mechanisms already identified to centralize abstract review. Cases might be transferred to the specialized court from federal district courts, and the transfer provisions could include some of the political triggers discussed above. The specialized court could resolve cases as three-judge district courts, with a mix of trial and appellate judges.[96] The decisions could be immediately reviewable by the Supreme Court, just like the decisions of other three-judge district courts.[97] And the judges might be selected randomly from the district courts and courts of appeals; be appointed by the Chief Judge of each Circuit; or be appointed by the Chief Justice, by the Supreme

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[90] *E.g.*, Texas v. California, 141 S. Ct. 1469, 1469 (2021) (Alito, J., dissenting from denial of motion for leave to file complaint) (critiquing the practice).

[91] *See* Hartnett, *supra* note 58, at 1738.

[92] *See, e.g.*, Taraleigh Davis & Sara C. Benesh, *Procedural Justice and the Shadow Docket*, 73 EMORY L.J. 443, 454 (2023); *CASA,* 145 S. Ct. at 2571 (Kavanaugh, J., concurring).

[93] For an argument that the Court should sometimes refuse to consider politically controversial cases, see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

[94] *See* BAUDE ET AL., *supra* note 6, at 48–49; Andrew Hammond, *The D.C. Circuit as a Conseil d'État*, 61 HARV. J. ON LEGIS. 81, 107–08 (2024); Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 118 (2014).

[95] *See* Paul A. Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247, 247 (1973); William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973).

[96] *See* 28 U.S.C. § 2284(b)(1); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 3 (1964); James E. Pfander, *The Supreme Court, Article III, and Jurisdiction Stuffing*, 51 PEPP. L. REV. 433, 466–69 (2024).

[97] *See* 28 U.S.C. § 1253.

Court as a whole, or by each of the Justices.[98] This reform could centralize abstract review without burdening the Court's original jurisdiction.[99]

CONCLUSION

Returning to the question of the Symposium: Is judicial review in jeopardy? Let me suggest two possible crises before rejecting both and suggesting a third. A first crisis of judicial review would be a failure of efficacy. The crisis of efficacy would be that the courts have failed to ensure that the government is acting generally within the bounds of the law. Judicial review aims, on this view, to ensure that the political branches comply with the constraints of law,[100] and the systematic failure to obtain compliance generates a crisis because political actors have rendered judicial review inefficacious. A second crisis would be a failure of excessive review. The crisis of excess would arise because the judiciary is itself subject to the law, because the judiciary must check the political branches only within those constraints on the courts, and because there has been a systematic failure to comply with these constraints. The crises of efficacy and excess are, of course, two dominant interpretations of the current conflict between the federal courts and the executive branch.

But the crises of efficacy and excess might flow from the same underlying causes. If judicial review checks the political branches but depends on political actors for its efficacy,[101] the judiciary moderates the political branches because political actors view its judgments as legitimate. The constraints on the judiciary thus ensure that it does not squander the reserves of legitimacy. If so, a third crisis of judicial review is that decentralized abstract review produces an excess of judicial review that erodes the efficacy of the system. The judges in a decentralized system of judicial review, asked by each plaintiff to resolve abstract questions of legality, answer those questions by their own best lights. But the plaintiff-picked courts in a decentralized regime are systemically likely to block government policies, thus drawing down the reserves of political support for judicial review. A centralized system of judicial review, by contrast, could allow the Court to observe the full set of alleged illegality, identify the most egregious, and block those while permitting others to go into effect. And if abstract review is centralized while concrete review is not, the lower federal courts might ensure

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[98] *Cf.* 50 U.S.C. §§ 1803(a)(1), 1821(3) (permitting the Chief Justice to appoint judges to the Foreign Intelligence Surveillance Court).

[99] These proposals would prevent issues from "percolating" through the lower courts, but for an argument that the costs of percolation often outweigh benefits, see Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 366–67 (2021).

[100] *See* Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787–88 (1991).

[101] *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007) (defending this view).

legality in cases that pose substantial harm to individuals but do not concern the legality of government policies in general and for everyone. Restraint might optimize legality.

If that is an accurate assessment of the conflict between the judiciary and political actors, then the future of judicial review might require creative thinking about how to redesign the interaction between the courts and the executive branch. With concentrated power in the executive branch, the Supreme Court may be the only institution with the political reserves to check illegality.[102] And if so, centralizing abstract review might preserve the capacity of all courts to engage in concrete review, align the system of review in the lower courts with the functional aims of Article III, and ensure that judicial review of the actions of the political branches is as efficacious as reasonably possible.

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[102] *Cf.* 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 4), https://ssrn.com/abstract=5259367 [https://perma.cc/7TFP-6R5A].