LIFE, THE UNIVERSE, AND THE JUDICIAL POWER

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INTRODUCTION

In figuring out the role of the federal courts in the constitutional structure, the obvious place to start is with the Constitution. But what does the Constitution tell us about the federal courts and the judicial power vested in them?

Surprisingly little—perhaps even shockingly little—when one reflects on it. The "judicial Power" is one of the three governmental powers regarded by the founding generation as having "an unalterable foundation in nature."[1] The Constitution, however, does not define that power, instead taking for granted that everyone will simply know what "judicial Power" involves. History has proven that assumption to be false. There remain competing conceptions of what "judicial Power" entails, and those competing conceptions profoundly affect how one views the role of the federal courts in the constitutional structure.

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1. John Adams, A Defence of the Constitutions of Government of the United States of America, Against the Attack of M. Turgot, in His Letter to Dr. Price, Dated the Twenty-Second Day of March, 1778, *in* 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 579 (Charles Francis Adams ed., 1851).

My modest contributions in this short article are twofold. First, I will set out the sparse provisions in the Constitution dealing with the federal courts to illustrate just how little they directly specify about the judicial function. Second, I will explain how that missing specification comes from background norms regarding what courts are and what they do. There are competing models of courts. On one view, courts exist principally to resolve disputes, with law declaration an incident of that principal function. On another view, the case-deciding function of courts is an incident to a more fundamental principal power "to say what the law is."[2] Very different roles for courts emerge from these models. As an illustration of the difference, I will briefly consider the modern controversy over so-called "universal" or "nationwide" injunctions. If, as I argue, the case-deciding function is the principal defining feature of the "judicial Power," with law declaration serving as an incident that helps carry out that principal function, injunctions extending to non-parties to a case look deeply problematic.

I. THE SILENCE OF THE ARTICLES

The Constitution does not say much about the functions of federal judges. Article III vests something called "[t]he judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[3] Those federal judges "shall hold their Offices during good Behaviour" and cannot have their salaries reduced while in office.[4] As civil officers of the United States, they must be commissioned by the President[5] and are subject to impeachment and removal by the House and Senate.[6] Supreme Court justices must be appointed by the President with the advice and consent of the Senate.[7] The same

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
3. U.S. CONST. art. III, § 1.
4. *Id.*
5. *See id.* art. II, § 3.
6. *See id.* art. II, § 4; art. I, § 2, cl. 5.
7. *Id.* art. II, § 2, cl. 2.

is likely true of lower court judges as well, though that depends on potentially tricky questions about what makes an officer "inferior."[8]

The Constitution thus says some important things about who can exercise the "judicial Power." But with respect to the content of that "judicial Power," we are left with the question posed so eloquently by Douglas Adams about the ultimate question of life, the universe, and everything: "Yes . . . but what actually *is* it?"[9]

The Constitution does not say. The subset of the category of "legislative Powers"[10] possessed by Congress are identified with particularity, but the Constitution simply gives the entirety of the "executive Power"[11] to the President and the whole of the "judicial Power" to the federal courts.[12] While the grants of executive and judicial power are naked and categorical, in the case of the executive power there are some clarifications and qualifications to that power that give some clues about what the power involves.[13] With the judicial power, however, all we get is that the power extends to certain "Cases" and "Controversies"[14] that involve questions of "Law and Fact"[15] (though conspicuously not "Policy"), that there shall be such things as "Trial[s],"[16] and that there are certain procedural and substantive constraints on some of those trials.[17] Subsequent amendments add to those procedural and substantive

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8. *See id.* For the Court's latest ramblings on the distinction between superior and inferior officers, see *United States v. Arthrex, Inc.*, 141 S.Ct. 1970 (2021). For my latest ramblings, which suggest that all lower federal court judges are indeed superior officers, see Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 135–49 (2019).

9. DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 136 (1979).

10. U.S. CONST. art. I, § 1.

11. *Id.* art. II, § 1, cl. 1.

12. *Id.* art. III, § 1.

13. *See id.* art. II, §§ 2–3. For an account of those provisions that illustrates how they clarify and qualify but do not directly define the "executive Power," see Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 22–41.

14. U.S. CONST. art. III, § 2., cl. 1.

15. *Id.* art. III, § 2, cl. 2.

16. *Id.* art. III, § 2, cl. 3.

17. *See id.* art. III, § 2, cl. 3 (defining venue for criminal trials); *id.* art. III, § 3, cl. 1 (defining treason and the forms of proof needed for conviction).

constraints[18] but do not further define the "judicial Power." This is all pretty thin stuff.

Perhaps, one might think, the Constitution did not define the judicial power because the concept was so well understood that no definition was necessary. There is one large problem with this hypothesis: It appears to be rather blatantly false. By the time of the founding, there were long traditions regarding the essences of the legislative and executive powers: The powers of the purse and the sword, respectively. [19] These essences were merely starting points for the founders. Congress received only a portion of what might count as legislative powers[20]—but that portion included not only the power of the purse,[21] but also a decent percentage of the power of the sword.[22] The centuries-long tradition of the executive power was more a warning than a model.[23] But at least those traditions provided some analytic content to categories that fundamentally define the constitutional framework. The tradition of the "judicial Power," by contrast, was considerably shorter and less developed. For most of English legal history before the founding, there was no established category of "judicial Power." Judges were arms of the executive, and their power was executive power.[24] English judges did not have tenure beyond the life of the monarch who appointed them until 1701, and they had nothing resembling life tenure until

18. *See id.* amends. 5–8.

19. THE FEDERALIST No. 78 (Alexander Hamilton).

20. *See* U.S. CONST. art. I, § 1 (granting to Congress those legislative powers "herein granted").

21. *See id.* art. I, § 9, cl. 7.

22. *See id.* art. I, § 8, cls. 11–16.

23. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020); SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020).

24. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 103–06 (1995); Suri Ratnapla, *John Locke's Doctrine of the Separation of Powers: A Re-evaluation*, 38 AM. J. JURIS. 189, 204–05 (1993).

1761[25]—barely a quarter-century before the founding. Early courts were akin to what today we would call administrative agencies.

The founding generation was well aware of these problems of defining the governmental powers vested by the Constitution's first three articles. James Madison famously observed:

> Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary . . . . Questions daily occur in the course of practice, which prove the obscurity which reins in these subjects, and which puzzle the greatest adepts in political science.[26]

Nonetheless, by the time one gets to the 1780s, people—including the author of the previous passage—could talk about governmental powers as "*in their nature* . . . legislative, executive, or judiciary."[27] John Adams declared the Constitution's three governmental powers to have "an unalterable foundation in nature."[28] State constitutions routinely divided governmental powers into legislative, executive, and judicial categories, with no attempt at definition.[29] Between 1760 and 1788, judicial power had gone from being an aspect of executive power to being a distinct power with "an unalterable foundation in nature."

The founding generation took that "unalterable foundation" as a given, requiring no explanation:

> Consider the Judiciary Act of 1789. It went into considerable detail about the jurisdiction of the various federal courts that it established but said considerably less about the manner in which

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25. *See* STEVEN G. CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 171–72 (2020).

26. THE FEDERALIST NO. 37 (James Madison).

27. THE FEDERALIST NO. 48 (James Madison) (emphasis added).

28. WORKS OF JOHN ADAMS, *supra* note 1.

29. *See, e.g.*, MASS. CONST. of 1780, pt. 1, art. XXX ("In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.").

> that jurisdiction would be exercised. Rather, it incorporated existing and well-understood practices as part of the background content of the judicial power. Federal courts were authorized to issue writs "agreeable to the principles and usages of law." They could demand the production of evidence "by the ordinary rules of processes in chancery." The forms of proof and evidence were to be "as of actions at common law." And an immediately succeeding statute said that equity and admiralty processes were to be "according to the course of the civil law." In the founding era, there was no need to specify in detail precisely how federal courts were to carry out their constitutionally vested function. Everyone knew what a judicial process looked like.[30]

In other words, as far as the Constitution is concerned, "judicial Power" is just the sorts of things that courts ordinarily do and are expected to do.

If one is looking for a formal definition of "judicial Power" that informs the Constitution, the best is surely James Wilson's account, which is strikingly similar to the account provided earlier in this conference by Justice Sarah Campbell during the panel on "Federalism and the Separation of Powers." Wilson wrote: "The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them."[31] If there is a more detailed account of the "judicial Power" from the founding era, I have never found it.[32]

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30. Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause,* 2017 BYU L. REV. 611, 630 (footnotes omitted).

31. James Wilson, Government, Lectures on Law, *in* 1 THE WORKS OF JAMES WILSON 296 (Robert Green McCloskey ed., 1967).

32. It is not for lack of trying. Thirty years ago, I set out with a terrific student, Christopher D. Moore, to uncover the founding era conception of judicial power. We found so little that we gave up and wrote about executive power instead. *See* Gary Lawson & Christoher D. Moore, *The Executive Power of Constitutional Interpretation,* 81 IOWA L. REV. 1267 (1996). A more or less contemporaneous independent study also did not turn up much. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

If one is to give content to the Constitution's notion of "judicial Power," one must turn to background norms that inform the original understanding of the judicial function. As it happens, those norms are implicit in James Wilson's pithy account of "judicial Power," provided that one looks at that account through the proper lens. There is more than one lens available, so picking the right one makes a difference.

II. A TALE OF TWO MODELS

One possible lens for understanding "judicial Power" was elegantly identified during this conference by Judge Raymond Kethledge during his engaging colloquy with Professor Cass Sunstein on "Why Separate Powers? A Conceptual Introduction." Judge Kethledge posed the key question regarding the judicial power: what are the principal features of such power and what are the incidental features that help carry those principal features into effect? Is the principal feature the resolution of disputes (the last clause of Wilson's account), with the determination of law and fact an incidental aspect necessary for carrying out the principal function, or is deciding matters of law and fact the principal aspect of judicial power, with the resolution of disputes an incidental byproduct?

Judge Kethledge answered with the former, and he had powerful authority to support him: Chief Justice John Marshall. Chief Justice Marshall is oft quoted as saying that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[33] One less often sees the sentence that immediately follows: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[34] For Marshall, the determination of law was an *incident* to the principal judicial function of deciding cases. Courts interpret to decide, not vice versa.[35] This mirrors Wilson's

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

34. *Id.*

35. *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 805 ("any power to answer questions must be incidental to the judicial duty to decide cases"); *id.* at 858 ("No originalist account can simply ignore the

account. Legal and factual issues arise only when and because parties dispute them. Courts must then address those legal and factual matters *in order* to resolve the dispute before them. Dispute resolution is the principal function; interpretation of law and ascertainment of fact are the incidents. I have explained at great length elsewhere why I agree with Judge Kethledge's, and Chief Justice Marshall's and James Wilson's, account of the judicial function.[36]

The fact that Judge Kethledge thought it necessary to set forth and defend a dispute-resolution model of the judicial power indicates that there is a competing model at hand. An alternative account reverses the order of priority: law declaration and fact ascertainment come first, and dispute resolution comes second. Put in the language of principals and incidents, which was a favorite language of the founding generation,[37] one might think that dispute resolution is an incident to the principal judicial function of pronouncing the law. Advocates of this interpretation-as-principal/dispute-resolution-as-incident approach can invoke authority of their own. To some, that authority will be even more formidable than Chief Justice John Marshall, James Wilson, or even Judge Kethledge or myself: Yale Law School Sterling Professor Emeritus Owen Fiss.

More than four decades ago, in two enormously powerful articles published in 1979 and 1984, Professor Fiss clearly and forcefully articulated a view of courts under which "the *function* of the judge . . . is not to resolve disputes, but to give the proper meaning to our public values"[38] and the judge's job "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[39] The first article has garnered more than 1,100 Westlaw citations in secondary sources, while the second

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historical understanding that the power to answer questions is derivative of the obligation to decide cases.").

36. *See* GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 177–92 (2017).

37. *See* GARY S. LAWSON & GUY I. SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

38. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979).

39. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

has generated more than 1,700 such citations. Those raw numbers, as impressive as they are, do not, I believe, reflect the depth of Professor Fiss's influence on legal discourse. Thirty-five years in the academy, and attendance at countless faculty workshops, confirms for me that Professor Fiss's views are widely held, even by people who do not credit him for the idea and who perhaps do not even articulate their position as straightforwardly as he did. One might also suspect (I do) that Professor Fiss accurately describes the views of many judges. Stay tuned on that.

So who has the better of the argument: Chief Justice Marshall et al. or Professor Fiss? That is something that depends to some extent on what exactly the argument concerns. If one is asking which view better reflects the conception of "judicial Power" referenced in Article III, I would choose, as I have already noted,[40] Marshall, Wilson, and Kethledge. Courts did not come into existence to explicate public values. They came into existence to resolve disputes, so that alternatives to court resolution, such as duels, would be left primarily to the stuff of Broadway musicals and episodes of *Firefly* and *Star Trek* rather than everyday life. Courts are keepers of the sovereign's peace, which is why for centuries they were understood to be exercising executive power. Once courts are brought into existence to resolve disputes, they must decide how those disputes will be resolved. Providing, given the constraints of time and resources, as accurate an account as possible of the law and facts seems in hindsight a better method than trials by ordeal or ruling for which party offers the largest bribe or has the largest private army. But providing that hopefully accurate account of law and fact is an incident. The principal component of the "judicial Power" is the resolution of disputes. That is why the Constitution extends the judicial power only to "Cases" and "Controversies." Absent a case or controversy, there is no occasion for the judicial power to act. A judge cannot just wake up in the morning with an insight—even a brilliant one—about the meaning of the Fourth Amendment and fire off an

40. *See supra* note 36; Gary Lawson, *"The Game" (or How I Learned to Stop Worrying and Love the Major Questions Doctrine)*, 2024 HARV. J.L. & PUB. POL'Y PER CURIAM 14.

opinion. The judge has to wait for a case that presents the issue and then resolve that case using the brilliant insight.

On the other hand, if the question is which view of the judicial function better describes the mainstream of actual legal practice, Professor Fiss could be forgiven for taking a few victory laps, as his interpret-first/decide-second approach has enormous descriptive power. It is so descriptively accurate that people may be adopting it without realizing it. A prime example from the October 2023 Supreme Court term makes this clear.

One of the most anticipated decisions of the term concerned the consolidated cases of *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*.[41] As far as the parties were concerned, the cases involved the rather important question whether the federal government could make owners of fishing boats pay for government monitors who would check compliance with federal fishery management plans. The livelihoods of any number of fishermen were on the line here. Two circuit courts ruled for the government,[42] two sets of fishermen filed petitions for certiorari, and the Supreme Court agreed to hear the cases.

The chief question presented by Loper Bright was, unsurprisingly, "Whether, under a proper application of *Chevron*, the MSA [Magnuson–Stevens Act] implicitly grants NMFS [National Marine Fisheries Service] the power to force domestic vessels to pay the salaries of the monitors they must carry."[43] Loper Bright wanted to make sure that it did not have to fork over twenty percent of its net income for government monitors, so it asked the Court to resolve the dispute with the government in Loper Bright's favor. But just in case the *Chevron* doctrine, which the lower court relied on in ruling for the government, was going to hurt its case, Loper Bright added as a second question: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial

41. 144 S. Ct. 2244 (2024).

42. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022); Relentless, Inc. v. Dep't of Com., 62 F.4th 621 (1st Cir. 2023).

43. Petition for Writ of Certiorari at i, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[44] In the language of principals and incidents, Loper Bright urged the Court principally to resolve the dispute and incidentally to select a decision process that would help resolve that dispute in Loper Bright's favor.

Relentless, in its parallel petition for certiorari, presented essentially the same two questions to the Court, but in reverse order:

> 1. Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.
>
> 2. Whether the phrase "necessary and appropriate" in the MSA augments agency power to force domestic fishing vessels to contract with and pay the salaries of federal observers they must carry.[45]

Obviously, it is Queston 2 that determines whether Relentless has to pay the money. As Relentless framed the case, the decision process was the principal concern and case resolution was the incident.

The Court took the cases, but only with respect to Loper Bright's second question[46] and Relentless's first question.[47] To put it simply, the Court agreed to decide only an abstract legal question about interpretative methodology. It did not agree to decide whether the government could force fishermen to pay for federal monitors; that issue remains to be decided by the lower courts. As far as it concerns the matter on which the Court granted certiorari, the Court could have been deciding whether Cass Sunstein or Jack Beermann had made

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44. *Id.* at i–ii.

45. Petition for Writ of Certiorari at i–ii, Relentless Inc., v. Dep't of Com., 144 S. Ct. 2244 (2024) (No. 22-1219).

46. Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) ("Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted limited to Question 2 presented by the petition.").

47. Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023) (mem.) ("Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to Question 1 presented by the petition.").

better cases for and against *Chevron,* respectively.[48] Loper Bright and Relentless, and their particular disputes with the government, were no more legally relevant to the Court than were either of those esteemed law professors.

The very routineness of this practice, in which the appellate court decides only an abstract legal question and does not actually decide anything about the application of that legal question to the case, shows how deeply the Fissian conception of judicial power penetrates the legal system.[49] It is one thing if the application of a legal standard requires fact-finding in order to resolve a dispute. Appellate courts are not equipped to find facts, so it makes sense to return cases to trial courts to ascertain the facts and, at least in the first instance, how those facts map onto the relevant law. But Loper Bright and Relentless were not arguing with the federal government about facts. They were arguing about whether statutes did or did not authorize the government to charge them money. The Supreme Court said nothing about that ultimate question. It merely gave instructions to the lower courts about how to go about solving that ultimate question. I have a hard time seeing how that is consistent with a dispute-resolution conception of judicial power. Once the Court says that the proper method is to figure out the best meaning of the relevant statutes, why not figure out the best meaning of the relevant statutes and declare a winner? Unless the Court plans to defer to the views of lower courts on statutory meaning, there is no obvious reason not to decide the cases before it, except perhaps for a conception of the Court's role as a law declarer first and dispute resolver second.

To be sure, matters are (unsurprisingly) more complicated than I have let on thus far. Article III vests power in *all* of the judges who are properly appointed to the federal judiciary. In essence, it vests

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48. *Compare* Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565 (2021), *with* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

49. For the history of how this practice evolved, often in direct contravention of established traditions and statutory provisions contemplating full appellate review of all aspects of lower-court decisions, see Johnson, *supra* note 35.

the "judicial Power" in the Article III judiciary as a whole.[50] It is less clear that it speaks to how that power must be allocated among the various Article III judges. Perhaps the notion of a "case" or "controversy" can include a multi-layered decision process in which one segment of the Article III judiciary handles facts and another handles law, and as long as the Article III judiciary as a whole resolves the entire case, it does not really matter how that machinery operates before the judgment emerges from the black box. Perhaps structuring that internal decision process is precisely what Congress is authorized to do via laws "necessary and proper for carrying into Execution"[51] the judicial power.[52]

On the other hand, Article III does not, by its literal text, vest power in the federal judiciary as a whole. It vests power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The relevant objects are *courts*, not a unitary *judiciary*. Perhaps that means that each distinct *court* – each level of a judicial hierarchy if Congress chooses to construct one – must resolve cases rather than proclaim law. That is something that I leave to federal courts scholars, of whom I am not one.[53]

It is almost anticlimactic to note that it is not clear where the Court thinks it gets the power to give orders to lower courts about how to decide cases.[54] The Court can reverse or vacate any decision by a lower court that it does not like or that employs an interpretative methodology that differs from that favored by the Court, but that does not translate into a power to prescribe, as a binding legal matter, interpretative methodologies. Could the Court order all lower courts

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50. *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution,* 102 YALE L.J. 255, 273 (1992) ("the judicial power is plurally possessed by the judges of the Supreme and inferior federal courts").

51. U.S. CONST. art. I, § 8, cl. 18.

52. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 210 (2005).

53. For an interesting take on the problem, which suggests, based on historical practice, that pure law resolution can sometimes be appropriate for lower federal courts, but only when it helps another federal court resolve a case *and* the other federal court has asked for the help, see Benjamin B. Johnson, *May Federal Courts Answer Questions When Not Deciding Cases?* (manuscript on file with author).

54. *See generally* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101 (2020).

to decide constitutional cases using Lawson's version of originalism? I don't see how. Being "inferior" obliges a lower court to obey the precedents of the Supreme Court,[55] but those precedents consist of judgments that fix the meanings of statutes or constitutional provisions. They do not include the methodologies used to reach those judgments. As proof, consider what happens if the Supreme Court decides a case without issuing any opinions. The judgment will still stand as a precedent binding on lower courts, even if no one knows what methodology produced that precedent. The judgment and the reasoning process that yielded the judgment are quite different things.

In any event, even if the Court somehow has the power to prescribe methodologies, it is noteworthy that is *all* that the Court purported to do in *Loper Bright/Relentless*. In Fissian language, it announced public values but did not actually resolve a dispute. The dispute was simply a vehicle for performance of what the Court clearly regarded as its primary function: Declaring the law.

Fiss 1, Marshall/Wilson/Kethledge/Lawson 0. And that score will get lopsided in a hurry as one looks at more cases. Many things about *Loper Bright/Relentless* have been and will prove to be controversial, but the resolution of an abstract legal question apart from the case(s) that generated it is so routine that it generally escapes notice. The Constitution may be Marshallian, but contemporary legal practice is decidedly Fissian.

There are additional, if not necessarily deeper, consequences to treating law declaration as the primary function of courts and dispute resolution as a secondary incident. I have elsewhere traced at some length some of those consequences for things like stipulations of law.[56] There are many other consequences of this debate for both legal theory and legal practice. I have space here only to identify one such consequence—and to treat it much more superficially than it deserves.

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55. *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1015–25 (2007).

56. *See* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011).

A hot issue has become the propriety of what are sometimes called "nationwide" or "universal" injunctions, in which a district judge enters an order that purports to bind government officials in all cases similar to the case before the court. The consequence of such an injunction is sometimes to order a government-wide shutdown of a program. A number of Supreme Court justices have expressed doubts about the practice.[57] The terminology used to describe it is in some respects unfortunate, because terms like "nationwide" and "universal" draw focus to the *geographic scope* of judicial orders—the wrong object of focus.[58] The geographic scope of the order is not the real issue. The real issue is whether a court can decide more than the case before it. Can a court issue an injunction that extends beyond the parties to the case? So that a government defendant in Case A can be held in criminal contempt for enforcing the same statute in Case B? After all, the penalty for violating an injunction is possible prosecution for contempt. The possible effect of a universal injunction (since I presently have no better term for it) is to make it a criminal offense to enforce a statute in the face of such an order.

Under a law-declaration theory of courts, the answer is probably yes, courts can do this. After all, once the law is declared, what does it matter whether the occasion for law declaration involved one party or one million parties? The declaration of law stands, and if it is the principal item and the dispute in which the declaration was made is just the incident, it is hard to see why the court should not be able to enforce its declaration wherever and whenever it is relevant.

Under a dispute resolution model of courts, however, the problems with injunctions that go beyond the immediate parties seem just as great as awarding damages remedies to or against non-parties. Non-

57. *See, e.g.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2415 (2024) (Thomas, J., concurring); Labrador v. Poe *ex rel*. Poe, 144 S. Ct. 921, 921–23, 926–27 (2024) (Gorsuch, J., concurring in the grant of stay); United States v. Texas, 143 S. Ct. 1964, 1980–81 (2023) (Gorsuch, J. concurring in judgment). Justices Alito and Barrett joined at least some of these opinions, making four justices who have expressed some measure of concern over so-called universal injunctions.

58. *See* Portia Pedro, *The Myth of the "Nationwide Injunction"*, 84 OHIO ST. L.J. 677 (2023); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions"*, 91 U. COLO. L. REV. 847 (2010).

parties are non-parties, and while non-parties can gain certain procedural benefits from the litigation efforts of others, in the form of precedent, preclusion, or estoppel, the court's judgment still extends only to the case before it. The *reasons* for that judgment may have broader applications, but the judgment itself does not. Accordingly, some scholars who share the dispute-resolution model of courts have said that the "judicial Power" is fundamentally "a power to decide a case for a particular claimant"[59] or "[the] power to decide cases or controversies for particular parties to a particular legal dispute."[60] The judicial power expires once the case is resolved.

Perhaps the court issuing a universal injunction in a case involving X and Y is convinced that Y, the defendant, is sure to lose in any future case that comes up. That still does not justify granting an injunction that purports to bind Y, on pain of criminal penalties, in future cases involving other parties. Perhaps the next case involving Y will be a spectacularly easy case and Y will lose. Y might even have most of its arguments wiped out by preclusion. But on a dispute resolution model, there must be a next case.[61]

Nor is it obvious that the next case will always be easy or a foregone conclusion, even if the case involves the same defendant who the judge just enjoined. A different judge might disagree with the first judge who issued the "universal" injunction. The same judge might even change his or her mind. Perhaps the second case presents different and better arguments than did the first one. Maybe not. But in any event, the second case is a case, and it has to be decided. The judge cannot decide the case in advance.[62] Deciding cases that have

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59. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 471 (2017).

60. Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 359 (2018).

61. Hence, it is irrelevant (even though true) that "[a] nationwide injunction essentially accomplishes the same end," Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 73 (2019), as preclusion doctrines. Preclusion requires that a case be brought and decided. Preclusion makes the decision easier, but there must still be a case brought.

62. Does this mean that there cannot be "facial" challenges to statutes? Justice Thomas thinks so. *See Moody*, 144 S. Ct. at 2415 (Thomas, J., concurring). And on a dispute resolution model, he is right.

not yet been presented is more akin to legislative power than judicial power.[63]

The modern practice, of course, does not follow the dispute-resolution model in the context of injunctions any more than it follows the model more generally. Huge swathes of practice demonstrate, as Alan Trammell aptly puts it, that "the Supreme Court no longer adheres slavishly to the dispute-resolution model."[64] Or as Professor Ben Johnson even more bluntly observes: "The Supreme Court no longer decides cases."[65] Professor Fiss smiles.

In a conference devoted to separation of powers, the choice between models of judicial power is crucial. On a dispute resolution model, the "judicial Power" is not a power to decide what powers other governmental actors have or do not have. It is a power to decide cases and resolve disputes. If resolving the dispute requires making judgments about the powers of other actors, so be it. But it is not the *job* of courts to police other actors. It is the job of courts to decide cases in accordance with governing law. To borrow a phrase from another participant at this conference, the judicial power is to decide one case at a time.[66] A court committed to constitutionalism should consider acting like a court.[67]

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63. Mila Sohoni has valiantly tried to defend universal injunctions on originalist grounds. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020). She would be correct if the original meaning of the Constitution was fixed in the early 1900s. Apart from the conceptual problems involved in such a notion, the early 1900s was not an era noted for its fidelity to original meaning.

64. Trammell, *supra* note 61, at 82. For a catalogue of ways in which modern judicial practice does not conform to the dispute-resolution model, see *id.* at 89–90; Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 987–89 (2020).

65. Johnson, *supra* note 35, at 864.

66. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

67. *See* Benjamin B. Johnson, *The Supreme Court, Question-Selection, Legitimacy, and Reform: Three Theorems and One Suggestion,* 67 ST. LOUIS U. L.J. 625, 633 (2023).