

A PROCESS PERSPECTIVE ON JUDICIAL REVIEW: THE RIGHTS OF PARTY-LITIGANTS TO MEANINGFUL PARTICIPATION

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INTRODUCTION

Given that judicial review involves the unelected branch of government overturning lawmaking by the elected branches, it is understandable that scholars see the problem primarily as one of determining the appropriate allocations of governmental power. However, in emphasizing the political implications of judicial review, scholars have largely overlooked an important process consideration—the extent to which enlarging aggrieved persons’

access to courts simultaneously diminishes the meaningfulness of their participation as litigants. As this analysis makes clear, robust judicial review threatens not only to tip the political balance of power too far in favor of courts over the other governmental branches, but also to tip the balance of power within judicial decision making too far in favor of judges over party-litigants. Thus, even as greater numbers of controversies reach the courthouse under a more expansive regime of justiciable review, the meaningfulness of the party-litigants' participation, once there, may be significantly diminished. This Article explains the nature and sources of this threatened diminishment and the ways that the rules governing justiciability and the application of different levels of judicial scrutiny help to check these tendencies.

To understand how justiciability requirements and different levels of scrutiny enhance party-litigants' opportunities to participate in the process of judicial review, it will be necessary to start with the basics. The American justice system assures party-litigants not only fair access to the courthouse, but also the opportunity, once there, to participate in the decision process of a disinterested tribunal by making factual proofs, invoking legal norms, and insisting on favorable outcomes as matters of right.¹ For such participation to be meaningful, litigants must be able to rely on legal norms that are sufficiently specific to require courts, depending on relevant findings of fact, to reach particular outcomes. Thus, courts must generally avoid trying to solve complex social coordination problems under vague fairness and reasonableness standards. Solving such problems on a case-by-case basis threatens to leave too much to the discretion of judges in the sense that the norms do not require—or sometimes even suggest—particular outcomes, thereby diminishing the notion that party-litigants are entitled to favorable outcomes as a matter of right and transforming them into supplicants begging for judicial

1. On the right of access, see *Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876) (stating that the right to be heard is “founded in the first principles of natural justice” (internal quotation marks omitted)). See also *Bounds v. Smith*, 430 U.S. 817, 828 (1977); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 10.9, at 931-32 (4th ed. 2011). On the right to participate, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (“[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”). While both sides argue they are entitled to favorable outcomes, obviously both sides cannot prevail. Who prevails is a function of which side’s proofs and norms are embraced by the tribunal. See *id.* at 369.

empathy.² The objective, of course, is to strike the proper balance. Even a fairly specific rule requires courts to exercise some discretion, and even a fairly vague standard can serve to point courts in the appropriate general direction.³

In connection with robust judicial review, which tempts courts to rely on vague reasonableness standards, the requirements of justiciability and the different levels of scrutiny help to curb tendencies for courts to exercise broad discretion by introducing relative specificity into the applicable legal norms. Of course, in those instances in which rule formality threatens to bar recovery, plaintiffs would understandably prefer being heard as beggars under vague standards to not being heard at all. In those contexts it is defendants who benefit as a practical matter from receiving meaningful opportunities to raise principled defenses. However, in other circumstances the tables will be turned—rule formality helps plaintiffs to avoid frivolous defenses that might be available in a more discretion-based system of judicial review.⁴ And from a broader perspective, the formality introduced by rules such as those governing justiciability and the different levels of scrutiny avoids the transparent sham of judges listening to arguments that they do not feel bound to take seriously, thus helping the judicial system fulfill

2. In this context, Lon Fuller invokes the hypothetical of an employee asking for an increase in pay. Fuller, *supra* note 1, at 369-70. In the absence of any specific normative basis to assert a right to the increase and needing the boss to exercise his discretion favorably, the employee is left to “merely beg for generosity, urging the needs of his family.” *Id.* at 369. It will be observed that the concept of entitlement invoked here is not synonymous with being entitled to an outcome *as a matter of law*. This Article and Fuller’s analysis use “entitlement” with respect to substantive rights, which may or may not necessitate an argument to the trier(s) of fact. *Id.* at 369-70. The “matter of law” notion is a narrower subset, indicating that the party in question is procedurally entitled to a favorable ruling on assumed, admitted, determined, or undisputed facts, without any assistance from the trier(s) of fact.

3. The objective reflected in the case law governing judicial review is not to reduce the exercise of judicial discretion at all costs. A general rule barring judicial review altogether would prevent plaintiffs from participating as beggars, but such a bar would be unacceptable according to traditional thinking. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); *see also* CHEMERINSKY, *supra* note 1, §§ 2.1-2.2, at 32-48.

4. For example, when the claim rests on allegations of race-based governmental discrimination to which strict scrutiny applies, traditionally the plaintiff enjoys a strong presumption in his favor. *See infra* text accompanying note 191; *see also infra* text accompanying notes 248-54 (referring to the possibility of strict scrutiny in connection with gender-based classifications).

its high-profile commitment to delivering principled, impartial justice.⁵

This Article is mainly descriptive and analytical. It does not argue, based on first principles, that a legal system must allow litigants to participate in the manner described or that there must be litigants, or courts for that matter,⁶ or that all of these constraining features are necessarily part of what is meant by “procedural due process” in Article III.⁷ Instead, the analysis begins by observing that the American system does in fact provide for courts⁸ and does in fact make assurances of party-litigant participation of the sort just described.⁹ Given these commitments, internal logic requires that courts craft the instrumental means by which to deliver on them.¹⁰ Working from a perspective largely overlooked by constitutional scholars, this Article examines two important doctrines by which the judicial review process endeavors to accomplish this task. Anyone prescribing reform in connection with these doctrines—the analysis

5. As the discussions that follow make clear, this is the way judges most often refer to the process concerns that lie at the heart of this Article’s analysis. However, because “principled, impartial justice” necessarily involves litigants’ meaningful participation in the decision process, see *supra* text accompanying note 1, and judges may reasonably be assumed to appreciate that reality, this Article will continue to refer to “litigants’ opportunities to participate” and “principled adjudication” interchangeably.

6. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1-9 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Every complex society must have institutionalized procedures for resolving issues of general concern, but “[t]he institutions which can be devised for the settlement of social questions vary endlessly.” *Id.* at 5.

7. U.S. CONST. art. III. The Supreme Court has held that some of the constraining features discussed in this Article are rooted in Article III. See *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (holding that the rule against advisory opinions is required by Article III); see also CHEMERINSKY, *supra* note 1, § 2.3, at 48-49. Regarding the requirements of procedural due process, see generally *id.* §§ 7.1-7.4, at 557-619.

8. See U.S. CONST. art. III, § 1. Whether Section 1 requires some lower federal courts is controversial. See Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 532-33 (1974) (arguing lower courts are constitutionally required); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 916 (1984).

9. See *supra* text accompanying note 1.

10. See, e.g., Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 630 (2002) (arguing that instrumental means are compatible with noninstrumental ends as long as they are conceptually sequenced so that the former give way when the two come into conflict).

uses affirmative action and gender classification, among others, as specific examples—should take into account the realities described in this Article.

Justiciability and different levels of scrutiny, the main foci of this analysis, are not the only features of judicial review that aim to ensure meaningful party-litigant participation. Recent Supreme Court decisions recognize infringements of parties' rights to participate in the contexts of class actions and arbitration agreements,¹¹ and reflect concern over the unfairness generated by severe asymmetries in litigants' resources.¹² To be sure, normative considerations related to law's ultimate ends may overcome the means-to-the-ends process considerations identified here. For example, if a formal rule of equal protection condemning all forms of race-based classification were to threaten to invalidate important affirmative action initiatives, then the formal strict scrutiny rule might be required to give way to a more flexible standard of equality.¹³ The important point, largely overlooked by constitutional scholars, is that moving to general reasonableness standards and choosing to address many-centered social design problems on a case-by-case basis to some extent reneges on the traditional promises of principled decision making and meaningful litigant participation. The burden should be on those who advocate judicial review under vague standards to explain why the accompanying diminishment of litigants' opportunities to participate are warranted. For all the attention that topics like standing to sue and levels of scrutiny have received in the law

11. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750-52 (2011) (holding class arbitrations unfair); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556-58 (2011) (holding class action procedures unfair to both sides). See generally Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

12. See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (holding that it may be unfair to incarcerate a person for civil contempt without the government providing a lawyer).

13. For arguments to this effect, see generally Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683 (2004); Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and United Steelworkers v. Weber*, 95 ETHICS 86 (1984). Engaging in this balancing would require courts to exercise the sort of discretion that diminishes litigants' rights to participate. But these would be special instances and many of them would, by means of the incremental common-law process, eventually produce relatively specific rules of decision. See *infra* text accompanying notes 58-62.

journals,¹⁴ this Article is the first to examine them from the perspective of preserving litigants' opportunities for meaningful participation in the process of judicial review.

Part I provides an overview of law as a problem-solving enterprise and describes how adjudication affords party-litigants the opportunity to offer proofs and to invoke norms that enable them to insist on, not simply to beg for, favorable outcomes. Drawing analogies from traditional tort and contract law, Part I shows how courts have traditionally relied on two overlapping methodologies: first, excluding from review formally identified categories of complex, many-centered social design problems that are institutionally unsuitable for courts to solve; and second, regarding design problems that courts agree to review, relying on relatively specific legal norms that support meaningful litigant participation. Turning to examine the law governing judicial review, Part II considers the first of these methodologies, reflected in the requirements of justiciability—formal rules that exclude certain categories of complex design problems that, if courts engaged in reasonableness-based review, would not only intrude on the political prerogatives of the other branches, but also interfere with the opportunities of litigants to engage in the decision process. Critics who favor expansion of aggrieved persons' access to courts have attacked these curbs on expansive judicial review. This Article sheds new light on the debate. Part III examines limitations on judicial review within the second methodology—limitations that aim to ensure meaningful litigant participation in judicial review by maintaining sufficient rule-specificity through the application of different levels of judicial scrutiny. This analysis includes two subject areas—affirmative action and gender-based classification—that are particularly confusing and controversial, explaining how the system got to its present state and where it may be going from here.

14. See generally, e.g., Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) (standing); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (standing); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984) (standing); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (levels of scrutiny); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984) (levels of scrutiny).

I. EXCLUDING COMPLEX, MANY-CENTERED CONTROVERSIES AND
MAINTAINING RULE-SPECIFICITY HELP PRESERVE
PARTY-LITIGANTS' RIGHTS TO PARTICIPATE

A. A Legal System Is Usefully Conceived as a Problem-Solving
Enterprise

Whether or not one characterizes the ends sought to be achieved by a legal system in instrumental terms, the means by which the system sets about to achieve these ends have an instrumental, problem-solving character.¹⁵ For example, if a system's noninstrumental objective of achieving justice requires that convicted criminals suffer governmentally inflicted punishment, establishing the means of carrying out officially sanctioned criminal sentences requires that practical problems be solved instrumentally and that solutions be implemented. The noninstrumental goal of achieving justice guides that process and is the ultimate arbiter, but instrumental problem solving is unavoidable.¹⁶ Thus, preliminary questions regarding problem solving must be answered in connection with every legal system: What, exactly, are problems? What constitute solutions? What sorts of actors, using what sorts of methodologies, are the most effective problem solvers?

A problem exists when an actor, including a legal institution, "realizes that an obstacle is preventing [the attainment of an] objective and that an effective response strategy, [although presumably possible,] is not immediately apparent."¹⁷ The problem resides not in the obstacle, as such, but in the perceived lack of an effective response strategy. One solves a problem by designing an effective strategy or "game plan" by which to remove the obstacle.¹⁸

15. Two recent articles, both focusing on private-law subjects, develop the basic principles that support this Article's public-law application of limits-of-adjudication theory. See generally James A. Henderson, Jr., *Contract's Constitutive Core: Solving Problems by Making Deals*, 2012 U. ILL. L. REV. 89 [hereinafter Henderson, *Contract's Constitutive Core*]; James A. Henderson, Jr., *The Constitutive Dimensions of Tort: Promoting Private Solutions to Risk-Management Problems*, 40 FLA. ST. U. L. REV. 221 (2013) [hereinafter Henderson, *The Constitutive Dimensions of Tort*].

16. Cf. *supra* note 10 and accompanying text.

17. Henderson, *The Constitutive Dimensions of Tort*, *supra* note 15, at 224.

18. One implements a solution by using it to eliminate the obstacle or by persuading a more effective implementer to adopt the solution as its own. Henderson, *Contract's Constitutive Core*, *supra* note 15, at 102. For development of

A problem's difficulty is a function of the number of variables that must be considered in achieving a solution and their mutual interdependence.¹⁹ Variables are interdependent to the extent that considering any one requires the concurrent consideration of many, or most, of the others. For example, designing the appropriate capacity of an automobile's gas tank depends on the designs of other relevant variables, including (to name a few) the gas mileage of the vehicle, its overall weight and weight-distribution, the space available for the tank, and safety considerations. And each of these variables depends on all the others—redesigning the gas tank to make it larger in order to compensate for low gas mileage lowers the mileage still further by adding weight to the vehicle, which affects handling and thus safety, and so on. Problems that require consideration of interdependent variables are often referred to as many-centered or polycentric.²⁰ Examples include designing a complicated machine,²¹ a complex of buildings,²² or a governmental institution.²³ Regarding the last of these examples, problems requiring governmental planning and design are commonly referred to as social coordination problems.²⁴

By contrast to polycentric problems, unicentric problems present more-versus-less judgmental tasks—typically, determining the magnitude of sequential variables arranged along linear axes. Although assessment of subsequent variables may depend on assessments of previous variables, one may consider each as a separate subproblem, solving each before moving to the next. Thus, if a problem consists of calculating the load-bearing capacity of a structure and a number of components contribute to the overall capacity, the problem is unicentric if each component's capacity may

the thesis that legal activity is social planning, see SCOTT J. SHAPIRO, *LEGALITY* 195-204 (2011).

19. Henderson, *Contract's Constitutive Core*, *supra* note 15, at 100.

20. See Fuller, *supra* note 1, at 394-404.

21. For an application of the concept of polycentricity to a complex product design, see Henderson, *The Constitutive Dimensions of Tort*, *supra* note 15, at 224.

22. For an application of the concept of polycentricity to an architect designing a school building complex, see Henderson, *Contract's Constitutive Core*, *supra* note 15, at 106-07 (citing DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 79-104 (1983)).

23. For applications of the concept of polycentricity to governmental welfare and school funding programs, see *infra* text accompanying notes 170-182.

24. See Henderson, *Contract's Constitutive Core*, *supra* note 15, at 91 (“[L]aw consists of officially derived solutions to the persistent problem of coordinating human conduct . . .”).

be determined. Such a problem may be difficult to solve, but is not polycentric.²⁵

Because solving a complex, many-centered problem in the absence of specific design standards forces the decision maker to rely on experience-based intuition and to perform creative leaps of judgment that simultaneously bring all of the interconnected elements into consideration,²⁶ only single individuals or small handfuls of like-minded collaborators are capable of solving highly polycentric problems.²⁷ The paradigm here is the architect who, acting alone, creates complex designs “of a whole,” relying on instinct informed by experience. Larger groups of individuals, when they attempt to collaborate to solve such problems, usually cannot combine effectively to make the necessary intuitive leaps, and therefore must delegate such problem-solving tasks to single individuals or very small groups.²⁸ Lest the misimpression be created that a problem is either unicentric or polycentric, it must be understood that polycentricity is “a matter of degree.”²⁹ Most problems of any complexity present a combination of unicentric and polycentric aspects.

Each branch of the federal government, including the judiciary upon which this Article focuses, possesses unique problem-solving and solution-implementing capabilities. In this regard, the capabilities of the federal executive office are substantial. The President exercises executive power individually, and the problem-solving groups comprised of White House advisers are small and like-minded.³⁰ The extrinsic normative constraints on the executive’s capabilities chiefly take the form of explicit constitutional limits on

25. See James A. Henderson, Jr., *Judicial Review of Manufacturers’ Conscious Design Choices: The Limit of Adjudication*, 73 COLUM. L. REV. 1531, 1535 (1973).

26. When the applicable law consists of specific design standards, the standards contain the solution. In that event the court does not solve the problem but rather implements the pre-existing solutions reflected in the legal standards. See *infra* text accompanying note 50.

27. Henderson, *Contract’s Constitutive Core*, *supra* note 15, at 103; see also Gary Klein, *Insight*, in THINKING: THE NEW SCIENCE OF DECISION-MAKING, PROBLEM-SOLVING, AND PREDICTION 193, 207 (John Brockman ed., 2013).

28. Cf. *supra* note 18 and accompanying text (suggesting that individuals who have reached solutions often seek help from larger actors for implementation). In mirror image fashion, here larger actors seek help from individuals to reach solutions.

29. See Fuller, *supra* note 1, at 397.

30. For a brief overview of the problem-solving capacities of the federal executive, see Henderson, *Contract’s Constitutive Core*, *supra* note 15, at 113-14.

the President's power to make law.³¹ Article II grants the President authority to act officially only in defined areas³² and authorizes the President to implement solutions by issuing executive orders and other edicts that carry the force of law.³³ No doubt reflecting the executive's inherent capability to solve many-centered problems, the trend has been for Presidents to exercise their direct-action powers expansively.³⁴ By contrast to Article II's limitations on the executive, Article I authorizes Congress to make law in sweeping fashion on an almost limitless range of subjects.³⁵ Thus, the chief limitations on Congress are intrinsic—Congress and its committees are too large to act effectively as problem solvers. As a consequence, Congress delegates to individuals (including its members) and small groups the tasks of formulating proposed legislation and then acts collectively (and often ineptly) to implement the proposed solutions by enacting some of them into law.³⁶ It follows that, in mirror-opposite fashion to the federal executive, Congress is free to make law on almost any subject, but is structured to be inherently incapable of doing so very effectively.

This Article focuses mainly on the courts and the process of judicial review. When assessing the inherent problem-solving capabilities of the judiciary, it is important to distinguish between the sorts of procedural and evidentiary problems that trial judges solve routinely and that only rarely present issues of broad social significance, and substantive problems that, when the relevant

31. *Id.* at 113.

32. See PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 87-89 (2d ed. 2002). These areas include international affairs, appointments, pardons, and vetoes.

33. See PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 21 (2002).

34. See Editorial, *Obama Rewrites Obamacare*, *WALL ST. J.*, Feb. 11, 2014, at A14 (“[T]he Affordable Care Act . . . means whatever President Obama says it does [T]he law is whatever he says it is.”). See generally Kevin Sholette, Note, *The American Czars*, 20 *CORNELL J.L. & PUB. POL’Y* 219 (2010).

35. U.S. CONST. art. I, § 8. One of the important limits, of course, reflects civil rights of the sort reviewed in this Article. Another limit, until recently believed to be moribund, is the Commerce Clause. See CHEMERINSKY, *supra* note 1, § 3.3.5, at 269-78.

36. The federal legislature seems to have been designed by the framers to be clumsily inept. For example, Congress is comprised of two redundant houses, both of which must adopt identical versions of proposed legislative solutions. And both houses are structured horizontally rather than vertically, empowering individual members to impede progress toward implementation by enactment. See RANDALL B. RIPLEY, *CONGRESS: PROCESS AND POLICY* 4-10, 141 (3d ed. 1983).

existing law is inadequate and courts must make new law, present complex social coordination problems. The first sort of problems are not important to this analysis.³⁷ Regarding the second sort, one may assume individuals who serve as federal judges are as inherently capable of solving such problems as are the individuals who serve as President and White House advisers. To be sure, courts may not seek out social problems to solve on their own initiative, and courts typically lack the resources to receive and process large quantities of data on broad social issues.³⁸ But even with these caveats, federal judges as individuals compare favorably with individuals serving in the federal executive concerning their problem solving capabilities.³⁹ In any event, even if individual judges are inherently capable problem-solvers, Article III imposes significant external constraints on the federal judiciary's lawmaking authority.⁴⁰ The concerns traditionally reflected in debates over the extent to which courts should make law fall into two related categories: first, whether, because federal judges are not elected, they are adequately accountable to the voting public; and second, whether, when courts do make law, they intrude excessively on the lawmaking prerogatives of the other two branches. The analysis that follows delves further into the subject of courts as problem solvers and solution implementers, employing both the justiciability doctrines and the different levels of scrutiny to show how these external constraints on judicial review help not only to achieve substantive objectives, but also to ensure litigants' meaningful participation in the judicial review process.

37. Although these problems are often somewhat polycentric and may be important to the outcome, given their sheer numbers and the need to achieve rapid closure, judges may traditionally exercise broad discretion in solving them. See KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE §§ 184-85 (6th ed. 2006).

38. See Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 935-51 (2006). By contrast to the conceptual limits of adjudication emphasized in the instant analysis, the limits to which Rachlinski refers may be said to be "mechanical" in nature.

39. See Henderson, *Contract's Constitutive Core*, *supra* note 15, at 116 & n.137.

40. One writer has grouped these substantive constraints into two major categories: one group authorizes (and, by implication, limits) the federal courts regarding the enforcement of the power of the federal government; and the other group authorizes federal courts to serve an interstate umpiring function. See CHEMERINSKY, *supra* note 1, § 2.1, at 34-35.

B. The American Legal System Traditionally Affords Persons Directly Affected by Governmentally Sanctioned Problem-Solving Processes Opportunities to Participate

The assurance that party-litigants will be allowed to participate in the judicial review process is part of a broader pattern that permeates the American legal system.⁴¹ Thus, members of the public affected by the decisions of the federal executive and legislature participate through the ballot box⁴² and lobbying efforts.⁴³ And those affected by judicially enforced contracts either participate directly or their interests are protected by externally imposed norms.⁴⁴ Moreover, tort law extends protections to third persons by means of liability rules that, while not mandating that would-be victims be allowed to participate in the decisions that create risks, force problem solvers to take into account the interests of uninvolved bystanders.⁴⁵ Regarding problem solving and solution implementing by the federal judiciary, the opportunity of those most directly affected to participate in the decision process comes not through the ballot box or the bargaining table, but through involvement as party-litigants.⁴⁶ Traditionally, the American legal system assures litigants the opportunity to participate in the decision process by presenting proofs, invoking established norms, and insisting before an impartial

41. See Fuller, *supra* note 1, at 363-64.

42. Voters at the federal level do not ordinarily cast ballots for or against particular solutions, but rather they vote for candidates who run on platforms partly comprised of proposed solutions to problems that the candidates promise, if elected, to implement. By contrast, at the state level, one often encounters direct popular lawmaking in the form of referenda, recalls, propositions, initiative petitions, and the like. See HART & SACKS, *supra* note 6, at 657. See generally EDWIN M. BACON & MORRILL WYMAN, DIRECT ELECTIONS AND LAW-MAKING BY POPULAR VOTE (1912).

43. See BRUCE C. WOLPE & BERTRAM J. LEVINE, LOBBYING CONGRESS: HOW THE SYSTEM WORKS 1-4 (2d ed. 1996).

44. See generally ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 17-90, 373-98 (3d ed. 2014).

45. See, e.g., RESTATEMENT (SECOND) OF TORTS § 291 (1965) (stating that under negligence law, actors must consider risks of harm to others); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (expressing algebraically the requirement that an actor must consider risks to others in a landmark decision). Interestingly, to avoid liability for intentional torts, an actor often must receive the informed consent of his would-be victim—that is, actually involve the other in the relevant problem-solving activity. See DAN B. DOBBS, THE LAW OF TORTS § 95, at 216-17 (2001).

46. The requirement that only those directly affected—personally injured—have the requisite standing to bring action is considered as one of the important justiciability doctrines. *Cf. infra* text accompanying note 109.

tribunal that the norms entitle them to a favorable outcome.⁴⁷ Section I.C, below, examines the manner in which litigants participate, identifying the chief obstacles to meaningful participation and the ways the American system has traditionally attempted to eliminate those obstacles.

C. A Closer Look at Adjudication: Assuring Party-Litigants the Right to Participate Requires Courts to Avoid Complex, Many-Centered Design Problems

1. *Many-Centered Design Problems Present Significant Obstacles to Meaningful Litigant Participation*

Given that individuals and very small groups are inherently capable of solving many-centered design problems by relying on experienced-based intuition one might expect, as noted earlier, that individual judges or small judicial panels would make competent problem solvers.⁴⁸ However, reflecting the fact that federal judges are not elected, Article III and long tradition place external normative constraints on judicial lawmaking.⁴⁹ In addition, the adjudicative process employed by courts has internal, institutional limits that, perhaps even more than the external political constraints, curtail the capabilities of courts to solve problems by making law. When courts attempt to solve complex, many-centered problems under vague general standards of reasonableness or fairness, they must exercise broad discretion in making the necessary leaps of creative, integrative judgment. In those circumstances, all that party-litigants can do by way of “argument” is to suggest how their outcomes are generally appropriate and then to entreat judges to empathize.

By contrast, for litigants actually to participate in judicial decision making, they must be able to invoke norms that to some extent constrain rather than merely empower judges to reach appropriate outcomes. For this to be possible, the law must disaggregate the interdependent elements of social design problems ahead of time and arrange them into logical sequences of essentially unicentric issues that allow the litigants to guide tribunals through

47. See *supra* text accompanying note 1.

48. See *supra* text accompanying note 39. See generally WILLIAM DOMNARSKI, *FEDERAL JUDGES REVEALED* (2009).

49. See U.S. CONST. art. III, § 2; see also *supra* text accompanying note 40.

linear chains of reasoning to the appropriate conclusions.⁵⁰ Thus, lawmakers (including courts themselves) must solve major portions of complex social coordination problems prior to the litigation that relates to such problems, reducing the solutions to unicentric sequences of relatively specific references to facts that party-litigants must prove at trial.⁵¹ If lawmakers have failed to perform this disaggregation function in advance, many-centered social design problems will remain to be solved under a vague default standard of fairness or reasonableness.⁵² In that event, given the broad discretion left to the law applier, litigants will be unable to participate in the decision process except by presenting proofs and then entreating the tribunals to empathize with them in exercising essentially arbitrary powers in their favor. Playing the role of supplicant may constitute participation to a limited extent, but it is not meaningful in the sense employed in this analysis.⁵³

It might appear that the circumstances confronting a court when retrospectively reviewing the reasonableness of an existing design are significantly different from those that confront designers in the first instance. After all, a designer often must start more or less from scratch, whereas the court's task is the inherently more focused one of deciding, *ex-post* on a yes–no basis, whether or not the designer's choices are reasonable.⁵⁴ However, for a court to engage sensibly in *ex-post* design review, it must consider and evaluate the

50. See *supra* Section I.A.

51. Suppose that a long-standing civil liability rule requires that an actor act “reasonably” in defending his home and family from apparent forcible attack. That rule would be “depolycentered” to some degree if, over time, such actions were deemed reasonable if, but only if, the attacker reasonably appears to be threatening deadly force, the defender actually believes such to be the case, and the defensive force used does not exceed what appears to be necessary to stop the attack.

52. For an example of one way that such norms might be particularized at trial to fit the facts of a given case, see *infra* text accompanying notes 84–86. In the alternative, the tribunal could simply decide by exercising discretion to reach a conclusion one way or the other under the vague reasonableness standard. If the court takes this second path, the party-litigants are transformed into supplicants seeking empathy instead of advocates demanding outcomes required by the law.

53. See *supra* text accompanying note 2. In his hypothetical, Fuller refers to the absence of a specific rule of entitlement, leaving the employee to “merely beg for generosity.” Fuller, *supra* note 1, at 369; *cf. infra* text accompanying note 187.

54. Behavioral researchers have shown that no problem solver works “from scratch” entirely—individual problem solvers rely on long-term memory for models and analogies to previously derived solutions with which to solve seemingly “new” design problems. Having drawn from the past, the designer must make a leap into the future, but the designer uses past experience as a guide. See Henderson, *Contract's Constitutive Core*, *supra* note 15, at 105–07.

elements of the design much as it might if it were designing a course of action ex-ante, and the litigants must address the issues in similar fashion.⁵⁵ The fact that the outcome at trial is expressed in a binary format somewhat reduces, but certainly does not eliminate, many-centeredness.⁵⁶ As will be explained, doctrinal techniques are available that, by marginally comparing actual designs with hypothetical alternatives proposed by plaintiffs, reduce the difficulties.⁵⁷ But the fact remains that judging the reasonableness of complex designs pushes courts to the limits of their institutional capabilities, thereby jeopardizing party-litigants' opportunities to participate meaningfully in the decision process.

To some extent, the foregoing analysis begs the question of how, to begin with, courts develop the sorts of formal common law rules that subsequently enable litigants to participate meaningfully in the process of rule application. One part of an appropriate response is that courts do not develop common law "of a whole," as when an experienced individual makes intuitive leaps to solve a many-centered design problem.⁵⁸ Instead, courts develop common law doctrine gradually and marginally by applying emerging, relatively vague legal norms to new fact patterns that typically differ from earlier patterns only incrementally.⁵⁹ Of course, to some extent this begs the further question of how common law doctrine ever got started to begin with. The writ system that developed in England after the Conquest presented the king's courts with crude (by modern

55. For a good example of a Supreme Court opinion reflecting an understanding of this point, see *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-44 (1973) (upholding Texas public school funding plan against equal protection attack). Justice Powell, writing for the Court, clearly recognizes that to decide whether or not the existing Texas school funding plan is acceptable, the Court would be required independently to solve the same many-centered planning problem that the Texas authorities were required to solve in the first instance. *Id.*; see also *infra* text accompanying notes 178-82.

56. The yes-no format reduces the difficulties compared with the difficulties of actually coming up with an alternative design in all its details, as courts are required to do when drafting injunctive remedies in school desegregation litigation. See *infra* text accompanying notes 197-98. But requiring a yes-no outcome still leaves the Court with the task of independently reviewing the reasonableness of the existing design.

57. See *infra* notes 85-86 and accompanying text.

58. See *supra* note 28 and accompanying text.

59. Fuller, *supra* note 1, at 373; see also *Rodriguez*, 411 U.S. at 55 (describing another example of marginal decision making); Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139, 151-53 (1989) (describing another process of marginal decision-making).

standards) unicentric issues, such as whether a debt had been incurred, a formal promise had been made, or a delineated boundary had been crossed.⁶⁰ The development of more nuanced doctrinal solutions to the underlying problems of social coordination came later, mainly through the incremental common law process alluded to above. Influential jurists and legal scholars helped to conceptualize and rationalize emerging doctrinal trends at critical junctures.⁶¹ But at virtually no point in the development of the common law did single judicial decisions come close to creating complex legal doctrine out of whole cloth. Historically notable doctrinal leaps are almost always seen, upon closer inspection, to have been premised on pre-existing lines of incremental doctrinal development.⁶²

2. *The American Legal System Generally Avoids Presenting Courts with Many-Centered Design Problems*

American courts enlist two primary methodologies to avoid being required to judge the reasonableness of many-centered design problems that arise in “real life,” outside the judicial boundaries. The first consists of refusals to review the reasonableness of formally identified categories of social and regulatory activity that have a high potential of presenting courts with polycentric problems; the second methodology, relating to problems that reach courts for decision, consists of adopting substantive rules that are sufficiently specific that they present mostly unicentric issues to be decided at trial. The first, resting on categorical refusals to review, permeates both the private and the public-law systems. Within tort law, for example, courts apply a number of no-duty rules that reject attempts to review, *inter alia*, the reasonableness of intrafamily relationships and interactions,⁶³ discretionary governmental decisions regarding the management of risk,⁶⁴ claims based on a general duty to rescue,⁶⁵ and generic risks presented by categories of commercially distributed

60. For a description of this process in the context of tort law, see Henderson, *The Constitutive Dimensions of Tort*, *supra* note 15, at 233.

61. *Id.* at 233 & nn.58 & 60.

62. *See, e.g.*, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053-54 (N.Y. 1916).

63. *See* DOBBS, *supra* note 45, §§ 279-81, at 751-60.

64. *See* 28 U.S.C. § 2680(a) (2006).

65. *See* DOBBS, *supra* note 45, §§ 314-15, at 853-56. For an explanation of why a general duty to rescue would present courts with polycentric problems, see James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 938-40 (1982).

products.⁶⁶ In similar fashion within contract law, courts categorically refuse to review the reasonableness of fairly-arrived-at bargains.⁶⁷ And this same pattern is observable in virtually every other area of American private-law. For example, within the law governing business organizations, courts refuse to review the reasonableness of management decisions under the business judgment rule.⁶⁸ In each of these private-law contexts, categorical refusals to review shield courts from many-centered problems by delegating the relevant problem-solving responsibilities to nonjudicial, and often nongovernmental, actors.⁶⁹

Categorical refusals to review also permeate public-law. Examples include the justiciability doctrines to be explored in Part II. Another example is the refusal to apply constitutional standards and requirements to private conduct.⁷⁰ As reflected in an earlier discussion, the lion's share of problem solving is accomplished by individuals and small groups acting privately in a nongovernmental capacity.⁷¹ Although this private problem solving is subject to limited review under common law principles of tort and contract,⁷² it is not subject to the same constitutional review as are governmental problem-solving efforts. Were this broad categorical exclusion not in place, virtually all private conduct that intrudes to any significant measure on the speech, privacy, or equality interests of others would present courts with highly polycentric issues. Courts applying traditional fault-based tort law already have their hands full in these areas, even limited as the issues are in the tort context by the

66. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998). For an explanation of why categorical products liability would exceed the limits of adjudication, see James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

67. See Henderson, *Contract's Constitutive Core*, *supra* note 15, at 128-29.

68. See, e.g., *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 722 (Del. 1971). See generally S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93 (1979).

69. For a general treatment of this pattern of delegation in America tort law, see generally Henderson, *The Constitutive Dimensions of Tort*, *supra* note 15.

70. See CHEMERINSKY, *supra* note 1, § 6.4.1, at 519 ("The Constitution's protections of individual liberties and its requirement for equal protection apply only to the government. Private conduct generally does not have to comply with the Constitution."). Two major exceptions apply, but they do not present polycentric problems. *Id.* § 6.4.4, at 529.

71. Cf. *supra* text accompanying note 28. See generally HART & SACKS, *supra* note 6, at 158-63.

72. See sources cited *supra* note 15.

requirement that plaintiffs asserting negligence claims show they have suffered tangible harm.⁷³ Reviewing private problem solving efforts that cause no tangible harm on the same basis as governmental regulations are reviewed would threaten to drown both courts and party-litigants in a flood tide of polycentricity.⁷⁴

Another public-law example of courts categorically refusing to review the reasonableness of many-centered problems relates to the concept of sovereign immunity.⁷⁵ Nonjudicial governmental agencies—primarily the executive and legislative branches—are significant problem solvers notwithstanding limitations on their lawmaking capabilities.⁷⁶ Many of the solutions to social coordination problems that these agencies promulgate are highly polycentric. Were courts generally to entertain tort claims against the government on behalf of persons adversely affected by these solutions, forcing courts to review them based on vague standards of reasonableness, litigants' rights to participate would be significantly compromised. Courts might rely on the same doctrinal devices as employed in tort to avoid polycentricity and thus protect litigants' participatory rights.⁷⁷ But sovereign immunity, supported by a time-honored historical pedigree and fairly persuasive substantive rationales,⁷⁸ provides a more straightforward, categorical method of accomplishing the same objective. American courts recognize two versions of the basic principle that the sovereign can do no wrong. The first, which bars claims against the states in federal courts, is anchored in the Eleventh Amendment.⁷⁹ The second, which traces its roots to English common law, bars actions against the states in state

73. See, e.g., *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 53 (1st Cir. 1985) (holding that there is no recovery in negligence for economic loss unless caused by tangible harm to persons or property).

74. A leading treatise writer overlooks this consideration entirely when he explains the persistence of the state action doctrine in terms of constitutional text, history, and public policy. CHEMERINSKY, *supra* note 1, § 6.4.2, at 524-25. Interestingly, the author offers two patently circular reasons why the Supreme Court has shielded private, autonomous conduct from federal constitutional review and left it to the sovereignty of the states to regulate in those areas: preserving private autonomy and promoting state sovereignty. *Id.* At least the rationale of avoiding polycentricity is not so patently circular.

75. See *id.* § 2.10, at 184-86.

76. For a discussion of the problem-solving capabilities of, and limits on, the nonjudicial branches, see *supra* notes 30-36 and accompanying text.

77. Cf. *supra* notes 63-69 and accompanying text; *infra* notes 84-86 and accompanying text.

78. CHEMERINSKY, *supra* note 1, § 2.10, at 184-86.

79. *Id.* § 2.10, at 184.

courts and actions against the federal government in both state and federal courts.⁸⁰ Both versions of sovereign immunity are subject to exceptions and qualifications, none of which introduces many-centered issues.⁸¹

The foregoing examples reflect a judicial methodology of categorical refusals to review. The other basic methodology by which courts avoid many-centered design problems is rule-specificity—solving sufficient portions of those problems ahead of time, leaving only specifically identified constituent elements to be the subject of proofs and arguments at trial.⁸² Rule-specificity allows potentially difficult problem categories to reach court, but adjusts the applicable doctrine so that it supports meaningful participation by party-litigants. Examples of private-law doctrine “depolycentrizing” problems in this manner abound in contract and tort.⁸³ Regarding tort law, lawmakers adopt specific standards either ex-ante of the injury-causing events, as when courts reviewing harm-causing professional conduct apply specific patterns of customary professional behavior rather than a general reasonableness standard,⁸⁴ or ex-post of injury, as when courts require plaintiffs in negligence cases to identify and prove the feasibility of one or more specific precautions that the defendant should have taken but did not take.⁸⁵ Regarding the latter alternative, when the court decides ex-post whether or not to adopt and apply the plaintiff’s proposed untaken precaution, to some extent the court must solve the underlying problem on its own; but the question for the court is not whether the alternative course of conduct is reasonable “of a whole, all things considered” but whether it

80. See *Alden v. Maine*, 527 U.S. 706, 728 (1999) (“[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.”). See generally DOBBS, *supra* note 45, §§ 268-72, at 716-32.

81. See CHEMERINSKY, *supra* note 1, § 2.10, at 185 (“The Supreme Court has . . . allowed suits against state officers, permitted states to waive their Eleventh Amendment immunity[,] . . . and sanctioned litigation against the states pursuant to statutes adopted under the Fourteenth Amendment.”). The Federal Tort Claims Act, by which the federal government consents to be sued, excludes claims based on the exercise of discretionary judgment, thereby excluding tort claims based on the many-centered designs of governmental programs. See 28 U.S.C. § 2680(a) (2012).

82. See *supra* note 51 and accompanying text.

83. See generally Henderson, *Contract’s Constitutive Core*, *supra* note 15; Henderson, *The Constitutive Dimensions of Tort*, *supra* note 15.

84. See DOBBS, *supra* note 45, § 242, at 632-34.

85. See Grady, *supra* note 59, at 139.

represents a marginal improvement compared with the defendant's actual conduct.⁸⁶

Courts employ the same rule-specificity methodology in public-law litigation. One important example resides in the levels-of-scrutiny approach in equal protection analysis to be examined in Part III. Among other examples, judicial review of federal administrative agency rulings and regulations is most prominent. Rather than deferring categorically to the agency's judgment, thereby threatening the legitimacy and possibly the legality of such agency actions,⁸⁷ federal courts assume the legitimacy of agency problem solving and then undertake a limited review based on formal, essentially unicentric rules and standards that support meaningful participation by the party-litigants.⁸⁸ Although a leading authority once observed that courts exercise nearly unbounded discretion in applying the standards of administrative review,⁸⁹ thereby implying that the issues at trial are unmanageably polycentric,⁹⁰ a careful, respected scholar currently embraces "a more pragmatic, perhaps less despairing [view] that detects certain regularities in judicial practice" that

86. For a decision by the Supreme Court recognizing the relevance of the untaken precaution approach in equal protection analysis—and rejecting the plaintiffs' proposed alternative plan for public school funding—see Justice Powell's opinion for the Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55-56 (1973).

87. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) ("The availability of judicial review is the necessary condition . . . of a system of administrative power which purports to be legitimate, or legally valid."). For the view that current patterns of judicial review are too lax, see PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 316 (2014) (claiming that judges' deference to administrators' interpretations of statutes "is an abandonment of judicial office").

88. See generally STRAUSS, *supra* note 32, at 297-336. The author summarizes: "[T]he general framework . . . assumes the general legitimacy of agency action and [undertakes] a judicial role of supervision or oversight rather than [substitution of] responsibility." *Id.* at 336. Section 706 of the Administrative Procedure Act lists six grounds for reversal, the first of which refers to "action, findings, and conclusions found to be—*arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*" and the next five of which incorporate specific sources of law outside the Act itself. 5 U.S.C. § 706(2)(A) (2012) (emphasis added). These grounds for reversal have proven to be specific enough to allow litigants to participate meaningfully in the review process. It will be observed that the emphasized language in § 706 constitutes extreme modifiers that, in the same manner as specificity, provides both sides with rhetorical anchors to which they may attach their demands for favorable outcomes as matters of right. *Id.*

89. See 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.6, at 33 (2d ed. 1979).

90. Cf. *supra* notes 52-53 and accompanying text.

support this Article's analysis.⁹¹ Other examples of how public-law doctrines protecting important civil rights are couched so as to avoid presenting courts with highly polycentric problems include the rules and standards governing First Amendment privileges relating to free expression⁹² and the free exercise of religious beliefs,⁹³ doctrines protecting economic liberties under substantive due process,⁹⁴ and case law vindicating the so-called "fundamental rights" of individuals.⁹⁵ While in all of these areas the overarching substantive goal is to protect individuals against unreasonable, intrusive, and coercive governmental regulation, from the perspective of this analysis, courts have developed regimes of rule formality presenting essentially unicentric issues for decision at trial.

II. THE JUSTICIABILITY REQUIREMENTS EXCLUDE HIGHLY POLYCENTRIC PROBLEM CATEGORIES FROM THE JUDICIAL REVIEW PROCESS

Enhancing party-litigant participation by avoiding many-centered design problems is certainly not the only explanation for why the justiciability doctrines retain their vitality. As observed at the outset, maintaining a proper political balance among the branches

91. See STRAUSS, *supra* note 32, at 336.

92. For a thorough description of the complex but essentially unicentric system of rules involved, see CHEMERINSKY, *supra* note 1, §§ 11.1-11.6, at 950-1224. The major components are summarized at *id.* § 11.1.2, at 953-54. It will be recalled, however, that complexity is polycentric only when the elements are interdependent as they are not in this context. See *supra* notes 20-23 and accompanying text.

93. For a description of the rule system involved in protecting the establishment and free exercise of religion, see generally CHEMERINSKY, *supra* note 1, §§ 12.1-12.3, at 1225-1312. Once again, courts encounter difficulties in defining the basis terms, including what are, and are not, "religions." See *id.* § 12.1.2, at 1231-36. But these difficulties are essentially unicentric in nature.

94. See generally *id.* §§ 8.1-8.4, at 621-82. The interesting aspect here is that, during the so-called "Lochner Era," courts attempted to address polycentric design and planning problems under a general reasonableness standard. See *Lochner v. New York*, 198 U.S. 45, 56 (1905). This era ended, not surprisingly from this Article's perspective, thirty-plus years later. See CHEMERINSKY, *supra* note 1, § 8.2, at 639-41.

95. See generally *id.* §§ 10.1-10.11, at 812-948. The author provides a framework for analyzing fundamental rights that reveals the essentially unicentric nature of the issues to be decided. *Id.* § 10.1.2, at 814-18. Once a court determines that a fundamental right has been infringed, the government must show that the interest thereby served is compelling. See *id.* § 10.1.2, at 817; *cf. infra* Section III.D.

of the federal government is an important factor, as are others.⁹⁶ The more modest claim here, largely overlooked by constitutional scholars,⁹⁷ is that the problems of institutional design and social coordination that the justiciability doctrines keep out of court tend to be the sorts of complex, many-centered problems that, were courts to review them under a general reasonableness standard, would frustrate litigants' opportunities to participate meaningfully in the review process. Moreover, the justiciability doctrines, themselves, do not present highly polycentric problems in their applications. Thus, they accomplish significant net reductions in the many-centeredness of the problems that federal courts are called upon to solve.

A. The Social-Planning Problems Excluded by the Justiciability Requirements Tend to Be Highly Polycentric

1. *The Prohibition Against Advisory Opinions and the Requirements of Standing and Ripeness Exclude Polycentric Problems from Judicial Review*

The claims that the justiciability requirements exclude from judicial review typically involve regulatory solutions to many-centered social coordination problems. The controversies excluded by the prohibition against advisory opinions and the requirements of standing and ripeness typically involve questions of timing. For example, a person who is interested in, but not yet directly affected by, a particular statute or regulation may understandably desire an authoritative ruling on the meaning and validity of the law to help him plan his future conduct. He will certainly be allowed to raise issues regarding meaning and validity later, if and when enforcement proceedings are brought against him alleging violation of the statutory or regulatory mandate. In that context, the prohibition against advisory opinions and the requirements of standing and ripeness will not prevent the enforcement court from reviewing the

96. See CHEMERINSKY, *supra* note 1, § 2.3, at 49-50.

97. Scholars frequently express awareness of the limits on judicial competence, but in doing so they invariably refer to mechanical limits such as courts' "limited ability to conduct independent investigations" and the like. See *id.* § 2.3, at 50; see also *supra* note 38 and accompanying text. The closest any writer has come to recognizing the sorts of systemic, nonmechanical limits on problem-solving capacity focused on in this Article is Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 23-24 (1972). For further discussion of Gunther's analysis, see *infra* notes 145-52 and accompanying text.

merits, including statutory meaning and validity.⁹⁸ But if the interested party attempts to obtain a judicial ruling ahead of that time, one or more of the just-mentioned justiciability doctrines will almost certainly prevent him from doing so.⁹⁹ For the avoidance of polycentricity to help explain why the justiciability doctrines apply when the actor “jumps the gun” ex-ante, but not when he seeks to avoid an enforcement penalty ex-post, there would have to be reasons to believe that questions of regulatory meaning and validity are more likely to be polycentric when raised ex-ante in an advisory-type proceeding than when raised ex-post in the context of enforcement.

Such reasons are available. First of all, when a court refuses to make an advisory ruling ex-ante, enforcement proceedings may never take place ex-post, in which event refusing the advisory opinion allows the courts to avoid the polycentric problems altogether. More significantly, even when enforcement does occur ex-post, in that context the issues of meaning and validity typically arise in a context of specific factual circumstances that afford the court with the opportunity either to decide the case on narrow grounds that avoid the many-centered design issues¹⁰⁰ or to extend a previous statutory interpretation incrementally by employing the methodology of marginal comparison described earlier.¹⁰¹ For example, the court in the enforcement context may be able to narrow its focus by determining the meaning or validity of a regulation only as applied to the specific facts surrounding the alleged violation. By contrast, when these issues are presented ex-ante by a party-litigant seeking an advisory opinion, the court is more likely to confront the issues in the abstract and to review the design of the statute or regulation “of a whole,” without the narrowing focus of a detailed

98. Of course, other means of reducing polycentricity might come into play, including rule formality of the sort considered in Part III. But presumably the alleged violator’s equal protection-based claim would be justiciable.

99. The two criteria that must be satisfied to render a claim justiciable under the advisory opinion doctrine are, first, an actual dispute must exist between adverse parties and, second, a substantial likelihood must exist that a court ruling in the claimant’s favor will actually bring about a change in the relevant circumstances. See CHEMERINSKY, *supra* note 1, § 2.4, at 52-57. Clearly, these criteria would not be satisfied in the “jump the gun” hypothetical posed in the text.

100. The court may be able to resolve the case on the facts by concluding that, on any reasonable view of the law and assuming that the regulation is valid, no violation occurred, or any violation that may have occurred was excused under the particular factual circumstances revealed in the record.

101. See *supra* notes 59, 84-86 and accompanying text.

factual record.¹⁰² It follows that not only do the justiciability doctrines prohibiting advisory opinions exclude complex design problems from judicial review when raised *ex-ante*, but also those issues typically do not come to court *ex-post*, at time of subsequent enforcement, in nearly so polycentric an incarnation.

In the circumstances considered thus far, the rulings sought are advisory in the sense that the plaintiffs seek judicial responses prematurely, ahead of the time when such assessments would normally accompany dispositive rulings on developed records in adversarial enforcement proceedings.¹⁰³ Courts have extended the concept of advisory opinions to cases in which the parties are clearly involved in an adversarial controversy—the issues often arise in the context of enforcement proceedings—but in which what purports to be a dispositive court order is not finally dispositive for reasons unrelated to the possibility of reversal on appeal. For example, when a statute purports to overturn the finality of a seemingly “final” court order, courts deem the statute unlawful for attempting to convert the earlier court order into a nonbinding advisory opinion.¹⁰⁴ In this context, the term “advisory opinion” connotes “nondispositive” rather than “premature.” Although the issues thereby removed from the federal courts’ review agenda may be polycentric, they are probably not more so by reason of being nondispositive than are issues routinely decided by federal courts in other contexts. It follows that these applications of the advisory-opinion prohibition are explainable mainly in terms of separation-of-powers concerns.¹⁰⁵

It remains to consider how the doctrines of standing and ripeness help to minimize the many-centeredness of issues presented for judicial resolution. Ripeness concerns the issue considered in connection with advisory opinions—whether conditions ever warrant allowing a party to obtain preenforcement review—but offers fairly narrowly defined circumstances in which such review will be allowed.¹⁰⁶ These circumstances include unusual hardship to the parties from withholding early review and fitness of the issues for

102. The open-endedness of what plaintiffs seek in these cases has prompted the Supreme Court to refer to them as “generalized grievance[s].” *See* *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975); *see also* CHEMERINSKY, *supra* note 1, § 2.5.5, at 91-99.

103. *See, e.g.,* *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264-65 (1933).

104. *See, e.g.,* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-19 (1995).

105. *See id.* at 225.

106. *See, e.g.,* *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

early judicial decision.¹⁰⁷ The latter condition is especially interesting from this Article's perspective. Consistent with this analysis, the more likely that waiting for a more developed factual record would render the issue to be decided less many-centered, the more likely it is that lack of ripeness will act as a bar to preenforcement review. By contrast to ripeness, standing relates less to the issue of *when* judicial review is appropriate and more to the issue of *who* may obtain such review.¹⁰⁸ The prerequisites for standing are a personally suffered injury traceable to the defendant and a strong likelihood that a favorable decision will redress the injury.¹⁰⁹ A commonly articulated rationale is that these requirements help to ensure that the party seeking review is adequately motivated to pursue the claim vigorously.¹¹⁰ This Article's analysis frames the point somewhat differently. The standing requirements encourage not only a rigorous presentation, but also a presentation that reduces the many-centeredness of the issues by focusing on the narrowest, most fact-sensitive grounds for a favorable outcome. A party seeking redress for actual injury is more likely to focus her presentation in this manner than is an uninjured plaintiff seeking to make her point more abstractly. Thus, from the process perspective developed in this Article, standing helps to improve not only the forcefulness of the plaintiff's presentation, but also its direction and content.

2. The Justiciability Doctrine Prohibiting Responses to Political Questions Excludes Highly Polycentric Problems from Judicial Review

To appreciate the many-centeredness of the institutional-design problems excluded from judicial review by the political question doctrine, one need only consider the doctrine at work. For example, the Supreme Court has approved lower court refusals to review the reasonableness of plans for the training of the Ohio National Guard;¹¹¹ designs of congressional districts;¹¹² plans for the seating of

107. *Id.* at 149.

108. *See, e.g.,* *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)

109. *Id.* at 734-35 (personally suffered injury); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (causation and redressability).

110. *See, e.g.,* *Baker v. Carr*, 369 U.S. 186, 204 (1962) (holding that a plaintiff should have "such a personal stake in the outcome . . . as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

111. *See Gilligan v. Morgan*, 413 U.S. 1, 3-4, 11-12 (1973).

delegates at a Democratic National Convention;¹¹³ foreign policy decisions by the federal executive;¹¹⁴ and designs of procedures for congressional self-governance.¹¹⁵ Besides these outcomes generally being supported by a separation-of-powers rationale,¹¹⁶ the underlying social coordination problems share a high level of polycentricity for that reason are unadjudicable under a vague reasonableness standard.¹¹⁷

B. Applying the Justiciability Requirements Does Not Present Highly Polycentric Problems

1. *Applying the Doctrines Governing Advisory Opinions, Standing, and Ripeness Does Not Present Highly Polycentric Problems*

Were courts to apply vague standards in determining whether sought-after rulings are “advisory,” “premature,” or “dispositive,” litigants would be less able to insist on outcomes as a matter of right. However, as indicated in the preceding discussion of advisory opinions and standing, courts have articulated formal criteria of justiciability that determine whether or not a plaintiff’s case may proceed.¹¹⁸ To these foundational criteria the Supreme Court has added requirements that further decrease the polycentricity of the issues to be decided.¹¹⁹ In determining whether these criteria are sufficient to support meaningful party-litigant participation, it will be

112. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 271-73, 306 (2004) (plurality opinion).

113. See *O’Brien v. Brown*, 409 U.S. 1, 2-5 (1972) (per curiam).

114. See, e.g., *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 299-300, 304 (1918).

115. See, e.g., *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669-70, 673 (1892).

116. See *supra* note 96 and text accompanying.

117. See *supra* notes 48-53 and text accompanying. As a subsequent discussion will indicate, the Supreme Court has held that the lack of a manageably specific standard for determining outcomes is an independent ground for invoking the political question doctrine. See *infra* note 136 and accompanying text.

118. See *supra* note 99 and accompanying text; *supra* text accompanying note 109.

119. These include a rule against asserting injury-based claims on behalf of third parties; a rule denying claims by taxpayers who share their grievances with taxpayers generally; and a rule requiring the plaintiff’s claim to be within the zone of interests protected by the regulation in question. See CHEMERINSKY, *supra* note 1, § 2.5.1, at 62, §§ 2.5.4-2.5.6, at 83-104.

observed that, while what constitutes an injury for purposes of the rules governing advisory opinions admits of several interpretations,¹²⁰ Supreme Court decisions have formally identified specific categories of injury that have achieved the status of settled law. For example, injuries to a range of legal rights have been held to suffice to support judicial review,¹²¹ as have injuries to economic interests¹²² and environmental interests.¹²³ And any related judicial determinations regarding the likelihood that a given plaintiff will suffer future injury or be negatively affected by the granting of relief present essentially unicentric, more-versus-less, problems.¹²⁴ Moreover, the circumstance that federal courts applying these doctrinal matrixes tend to resolve the issues as a matter of law suggests that the issues for decision are relatively unicentric.¹²⁵ Critics have lamented the lack of unifying principles with which to reconcile Supreme Court rulings on what constitutes an injury for purposes of standing.¹²⁶ However, such criticisms involve substance more than process—as long as the rule of decision applicable in a given case is formulated to avoid excessive many-centeredness, the rule will support meaningful participation by the litigants.¹²⁷

120. One scholar has observed: “No ascertainable principle exists to rationalize [Supreme Court] rulings” on what constitutes an injury for standing purposes. *See id.* § 2.5.2, at 72.

121. *See id.* § 2.5.2, at 69-72.

122. *See, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 167 (1970).

123. *See, e.g.*, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

124. Presumably such a likelihood would be determined on a linear scale of probability. For a description of unicentric problem solving, *see supra* Section I.A.

125. For matter-of-law ruling as a matter of law to be justified when the relevant facts are not in dispute, the legal rules and standards must be specific enough to allow the courts to avoid relying on triers of fact to respond to mixed questions of law and fact. *Cf. Fuller, supra* note 1, at 369, 398.

126. *See CHEMERINSKY, supra* note 1, § 2.5.3, at 79.

127. That is, from an overarching Olympian perspective, all of the rules, standards, exceptions, and precedents may not add up to a conceptually cohesive whole, and from a substantive standpoint that is regrettable. But if the law applicable in a given case is sufficiently specific and has a plausible rationale, the litigant working under that law will have a meaningful day in court.

2. *Applying the Doctrine Excluding Political Questions from Judicial Review Does Not Present Highly Polycentric Problems*

An earlier discussion indicates why a system of judicial review that promises party-litigants meaningful opportunities to participate would be well served by keeping the sorts of social coordination and institutional design problems deemed political questions out of court.¹²⁸ Here the question is whether the rules determining what are, and are not, political questions render that issue manageably unicentric. In the view of one influential commentator, they do not: “[The] criteria [adopted by the Supreme Court] seem useless in identifying what constitutes a political question. . . . As such, it hardly is surprising that the doctrine is described as confusing and unsatisfactory.”¹²⁹ By contrast to the earlier-considered criticisms aimed at the overall lack of consistency in the principles underlying the advisory opinion/standing doctrines,¹³⁰ the foregoing criticism comes close to rejecting the political question doctrine for being too vaguely open-textured—for amounting to little more than an assurance that federal judges will “know a political question when they see one.”¹³¹ If such were the case, applying the doctrine would be every bit as problematic as trying to solve the political questions sought to be excluded, thereby denying party-litigants the opportunity to guide courts to favorable outcomes.

But the just-quoted criticism misses the mark. Admittedly, judged only by separation-of-powers criteria, the Supreme Court has reached results that sometimes appear inexplicable. For example, decisions condoning judicial reapportionment of state legislatures and upholding judicial redesign of public schools involve “political” questions as that phrase is used in common parlance, and yet the political question doctrine poses no barrier to robust judicial review.¹³² When one examines the pattern of outcomes in these and

128. Cf. *supra* notes 52-53 and accompanying text.

129. See CHEMERINSKY, *supra* note 1, § 2.8.1, at 132-33.

130. See *supra* notes 126-127 and accompanying text.

131. Cf. Justice Stewart’s concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), regarding pornography: “I know it when I see it.”

132. See, e.g., *Baker v. Carr*, 369 U.S. 186, 209 (1962) (“Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question.”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971) (allowing judicial review in a case of public school redesign).

related cases from the process perspective advanced in this Article, however, an acceptable level of consistency emerges. In both the reapportionment and the school redesign cases, fairly specific legal standards are available with which to decide the substantive issues without courts being forced to rely on vague reasonableness standards.¹³³ By contrast, in the cases in which the Supreme Court has invoked the political question doctrine to bar judicial review, no manageably specific standards are available with which to reduce the polycentricity of the issues to be decided.¹³⁴ Perhaps the clearest example of how the availability of a manageable legal standard determines whether judicial review will occur involves federal redistricting and gerrymandering. Although an earlier Supreme Court decision had held that challenges to gerrymandering were justiciable because standards more manageable than reasonableness would be forthcoming,¹³⁵ a more recent decision by the Court reversed the earlier holding and invoked the political question doctrine because adequate standards had not emerged for two decades, nor would they emerge in the future.¹³⁶

So the applicability of the political question doctrine does not turn simply on whether the issue before the court is highly political or whether a ruling one way or the other would arguably intrude on the prerogatives of a nonjudicial branch of government. Instead, consistent with this Article's analysis, applicability of the political question doctrine turns mainly on the availability of a substantive

133. *Baker v. Carr* established the one-person-one-vote standard that renders unicentric the central issues in reapportionment cases. 369 U.S. at 208; *see also* CHEMERINSKY, *supra* note 1, § 2.8.3, at 138-39 (illustrating a combination of rule adjustments and delegative procedural innovations that renders unicentric the issues for judicial decision in the context of school redesign); *infra* notes 201-02 and accompanying text.

134. *See supra* notes 111-15 and accompanying text.

135. *See* *Davis v. Bandemer*, 478 U.S. 109, 123 (1986).

136. *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion), in which a plurality of four Justices concluded that no adequately manageable standard is available. Justice Kennedy concurred in the result but held out hope that manageable standards would emerge. *Id.* at 312 (Kennedy, J., concurring). One critic has argued that, given the unlikelihood that a workable standard more specific than reasonableness would ever be available, it would have been preferable for the Court to employ a rational basis standard of review in connection with gerrymandering claims. *See* Joshua S. Stillman, Note, *The Costs of "Discernible and Manageable Standards" in Vieth and Beyond*, 84 N.Y.U. L. REV. 1292, 1321, 1323 (2009). However, from the process perspective developed herein, lack of a viable standard would end up frustrating rational basis judicial review in any event. *See infra* notes 184-85 and accompanying text.

rule of decision sufficiently specific to reduce the open-endedness of the analysis sufficiently to allow party-litigants to participate meaningfully and courts to reach purposeful, consistent decisions.¹³⁷ And the issues regarding the relative availability of a workable legal standard and the relative need for judicial discretion are themselves sufficiently unicentric to render them adjudicable.¹³⁸ Thus, the rule barring judicial review of political questions eliminates more polycentricity than its application generates, rendering more meaningful the role of party-litigants in helping to steer federal courts away from the thickets of political wrangling engaged in by the other branches employing nonadjudicative decision processes.

C. The Justiciability Requirements Constitute Principled Grounds for Limiting Judicial Review: The Bickel–Gunther Debate

More than fifty years ago, Alexander Bickel published a provocative law review article on judicial review¹³⁹ that subsequently became the centerpiece of an influential book.¹⁴⁰ In both, the author describes and defends what he terms the “passive virtues”—a collection of doctrinal devices, including the justiciability doctrines, whereby federal courts may at their discretion withhold constitutional adjudication of issues otherwise properly before

137. In *Baker v. Carr*, the Court identified six “independent” tests for determining whether or not a political question is presented. 369 U.S. at 217. Four of the tests (the first, fourth, fifth, and sixth in Justice Brennan’s opinion for the Court) relate to separation-of-powers concerns and, taken together, constitute a necessary condition for the doctrine’s application. *Id.* The other two (the second and third) are the ones required by this Article’s analysis: “[The] lack of judicially discoverable and manageable standards for resolving [the substantive question before the court]” and “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.” *Id.* Both the underlying logic and a fair and sensible reading of the case law indicate that the tests reflecting separation-of-power concerns are necessary, but not sufficient, conditions for application of the political question doctrine. As the Supreme Court’s decisions in a number of cases make clear, only the second and third tests, relating to the absence of a manageable standard that supports nondiscretionary decision making, constitute both necessary and sufficient conditions for the application of the political question doctrine.

138. See *supra* text following note 15. Both the second and the third tests from *Baker v. Carr* present the more-versus-less judgmental tasks that are characteristic of unicentric, adjudicable issues. 369 U.S. at 217.

139. See generally Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

140. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

them.¹⁴¹ He observes that principles of federal constitutional law often develop slowly and that occasions arise in which a federal court, reviewing decisions of the other branches, cannot decide one way or the other in principled fashion. At these junctures it is expedient for federal courts neither to strike down nor to legitimize challenged regulations but instead to refuse to decide the constitutional issues, deferring to the political branches either to reach stable solutions or to work on the problems so that the Supreme Court is better able to develop the constitutional principles necessary for eventual judicial solution.¹⁴² Bickel endorses these deferral devices as legitimate means of preserving the principled integrity of the judicial review process. Because he views the devices as equivalent to “no decisions” on the relevant constitutional issues, he is willing to grant federal courts broad discretion regarding when the devices should, or should not, be invoked.¹⁴³ He reasons that the same system that embraces a discretionary, certiorari-based approach to setting the Court’s appellate agenda should not balk at doing the same thing via his “passive virtues.”¹⁴⁴

Shortly after Bickel’s book appeared, Gerald Gunther published a highly critical review of what he calls the “subtle vices” of Bickel’s passive-virtues analysis.¹⁴⁵ Because Bickel includes the justiciability doctrines among his passive virtues, and because Gunther’s critique of Bickel’s thesis is devastating (at least in the view of this author), it is important to make clear that the instant analysis of justiciability does not fall prey to Gunther’s critique of

141. See *id.* at 207; Bickel, *supra* note 139, at 42.

142. See BICKEL, *supra* note 140, at 69-71.

143. *Id.* at 127-28.

144. *Id.* at 126. Clearly, Bickel is wrong in this regard. Articulate criteria are available that presumably guide the Court to some degree in deciding whether or not to grant such writs. See SUP. CT. R. 19(1). Moreover, the Court’s refusal to hear an appeal does not mean that the parties are denied the opportunity to be heard in court. Presumably, the claim will have been adjudicated at trial in federal or state court and, if warranted, reviewed to final judgment on appeal, fulfilling the promise to the parties that they will be given the opportunity to participate meaningfully in the process of judicial review, albeit not necessarily in federal court. From the descriptive perspective of this analysis, given the tradition of discretionary Supreme Court review, the system makes no promise that the highest federal court will hear every appeal. This conclusion begs the question from a normative perspective; but clearly Bickel is wrong descriptively in equating the certiorari phenomenon with his discretionary system of “passive virtues.”

145. See generally Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

Bickel's "deferral of decision" approach. In essence, Gunther accuses Bickel of placing expediency ahead of principle.¹⁴⁶ According to Gunther, the "no decision" option is an illusion. In reality, it represents a denial of the plaintiff's claim of illegal governmental action and thus a legitimation of the status quo.¹⁴⁷ Gunther argues that to vest federal courts with broad discretion to refuse to decide whenever a decision on the merits appears badly timed or conceptually inconvenient is essentially lawless.¹⁴⁸

Although Bickel's analysis and this Article share a common concern for keeping difficult problems out of court, the means by which they seek to achieve that common objective are mirror opposites. Reflecting the view that deferring judgment is not judging at all, Bickel gives federal courts broad discretion to decide, on a case-by-case basis, whether or not to defer. In granting such discretion, obviously Bickel allows courts to solve highly polycentric problems. By contrast, working from the premise that affording party-litigants meaningful opportunities to participate is a responsibility properly assigned to courts, this Article observes that justiciability rejects primarily those categories of claims whose many-centeredness would diminish such opportunities and does so by means of an evolving set of relatively formal rules. Because unfettered judicial discretion all but destroys party-litigants' chances of meaningful participation, the concept of justiciability described in this Article aims at reducing such discretion rather than, in Bickel's vision, embracing, enlarging, and promoting it. Simply stated, the approach to issue avoidance described in this Article is principled in a manner that Bickel's is not.

In a subsequent law review article, Gunther considers the question of whether the inherent limits of judicial competence justify the development of doctrine that self-consciously assigns difficult planning and design problems to nonjudicial decision makers, including the other governmental branches and the marketplace.¹⁴⁹ Observe that this clearly is not Bickel's vision—Bickel is condoning the ad hoc exercise of judicial discretion based on informed judicial intuition. By contrast, Gunther is considering essentially what this Article describes—judicial recognition of institutional limits that may properly be dealt with by the development of categorical, rule-

146. See *id.* at 5 ("[T]he inferences Bickel draws . . . yield guidelines which invite not accommodation but surrender of principle to expediency.").

147. See *id.* at 7.

148. See *id.* at 13.

149. See Gunther, *supra* note 97, at 23-24.

based exclusion mechanisms. In a remarkably prescient passage, Gunther considers the possibility of elaborating on traditionally recognized mechanical aspects of limited judicial competence¹⁵⁰ to include the sorts of limits described in this analysis. He refers to Justice Stewart's majority opinion in a decision in which the Court employs a minimum level of scrutiny in upholding a state law placing an aggregate cap on family welfare benefits regardless of family size.¹⁵¹ Gunther observes: "Justice Stewart's [concern over adjudicability] is a justifiable concern when problems are truly 'intractable': [that is,] when the Court cannot confidently assess whether the means contribute to the end because the data are exceedingly technical and complex."¹⁵²

III. HOW THE DIFFERENT LEVELS OF SCRUTINY IN EQUAL PROTECTION BASED JUDICIAL REVIEW HELP MAKE IT POSSIBLE FOR PARTY-LITIGANTS TO PARTICIPATE MEANINGFULLY

A. Why the Concept of Equality, by Itself, Does Not Avoid Polycentric Issues for Decision: Peter Westen's Insight

The philosophical basis of equal protection jurisprudence—that persons who are alike should be treated alike—might appear to provide built-in, specific standards by which to judge the reasonableness of regulatory classifications. To be sure, substantive due process appears to require application of an external reasonableness standard, threatening to generate polycentric issues for judicial decision.¹⁵³ But to decide an equal protection claim, it would appear that one need only compare the treatment afforded the claimant with the treatment afforded similar persons—a unicentric quantification problem. Or so it seemed to many observers until Professor Westen explained that in order to determine whether two or more individuals are sufficiently alike to require equal treatment, one must determine how each of them is entitled to be treated under the relevant external, noncomparison-based set of values, and that once that determination is made, the need to compare the

150. *Id.* at 23.

151. See *id.* at 23-24, wherein the author quotes Justice Stewart. For the quoted language, see *infra* text accompanying note 171.

152. See Gunther, *supra* note 97, at 24.

153. See CHEMERINSKY, *supra* note 1, § 7.1, at 557-58 ("[S]ubstantive due process looks [for] a sufficient justification for the government's action.").

individuals' alikeness to one another, as such, disappears.¹⁵⁴ In a word, Westen concludes that the concept of equality, and by implication its derivative, equal protection, are "empty"—they beg, rather than answer, the underlying normative question.

Westen's article has prompted responses and commentaries exploring many aspects of the subject—except for the aspect upon which this Article focuses.¹⁵⁵ In essence, the critics argue that while Westen's core insight is valid, the author overstates his position by arguing that the concept of equality is altogether empty. Thus, Professor (now Dean) Chemerinsky argues that even if Westen is correct logically, the concept of equality is nevertheless useful in legal discourse.¹⁵⁶ He argues that "a concept [like equality] is analytically useful if it [does no more than] determine[] who has the benefit of a presumption in a dispute and who must bear the burden of proof."¹⁵⁷ He observes that because the primary concern of equality analysis is not to avoid unjustified equal treatment but to avoid unfair discrimination, an experience-based presumption that superficially similar persons deserve equal treatment is warranted even though the basis for such a presumption cannot be derived logically from the concept of equality.¹⁵⁸ Thus, any regulation that discriminates between two seemingly similar classes of actors may rationally be presumed, subject to rebuttal, to be a violation of the equality principle. From Chemerinsky's perspective, such presumptions are analytically useful even if they are not logically necessary; from this Article's perspective, they are useful in reducing polycentricity when courts create presumptions of validity or invalidity and then require rebuttal based on unicentric elements of proof.¹⁵⁹

154. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 553 (1982).

155. See generally, e.g., Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996); Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997); Kent Greenawalt, "Prescriptive Equality": *Two Steps Forward*, 110 HARV. L. REV. 1265 (1997).

156. Chemerinsky, *supra* note 155, at 588-91.

157. *Id.* at 587-88.

158. *Id.* at 588.

159. See *supra* notes 87-88 and accompanying text (describing judicial review of actions by administrative agencies); *infra* notes 163-66 and accompanying text (describing judicial review of governmental classifications under the rational

B. A Summary of the Different Levels of Scrutiny

Equal protection based judicial review consists of answering three basic questions: first, into which classification category does the challenged governmental regulation fall?; second, depending in large measure on the category, what is the appropriate level of judicial scrutiny?; and third, does the challenged regulation pass muster under the applicable level of scrutiny?¹⁶⁰ Two categories of regulatory classification—race and gender—are sufficiently suspect to require heightened scrutiny. Classifications based on race are presumed to be unconstitutional unless the government proves that they are necessary to achieve a compelling government purpose and that the purpose cannot be achieved by less discriminatory means.¹⁶¹ Regulatory classifications based on gender are presumed to be unconstitutional unless the government proves that they are substantially related to an important government purpose.¹⁶² All other forms of classification are presumed to be constitutional unless the claimant proves that a particular example has no rational basis whatsoever—that it could not possibly serve any legitimate government purpose.¹⁶³ The following sections examine these different levels of scrutiny more closely, beginning with the rational basis test applicable to most government regulations. The analysis will focus on judicial manageability and the preservation of party-litigants' opportunities to participate rather than on substantive or political rationales.

C. The Manageability of Rational Basis Review

It may seem odd that, aside from considerations of race and gender, governmental classifications that serve no important public purpose and are downright unfair should pass constitutional muster as long as they can be related to some government interest, even if

basis test); *infra* notes 191-192 and accompanying text (describing judicial review under strict scrutiny); *cf. supra* text following note 13.

160. See CHEMERINKSY, *supra* note 1, § 9.1.2, at 685-90.

161. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality opinion).

162. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

163. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). The Supreme Court has observed that a strong presumption exists in favor of regulations reviewed under the rational basis test. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

that interest is not the one actually intended to be served.¹⁶⁴ Nevertheless, in the absence of suspect classifications, almost total deference is the received wisdom from a substantive perspective. This was not always the case; in an earlier era, the Supreme Court played a more aggressive role in reviewing the reasonableness of economic regulations.¹⁶⁵ And even today, the Court condones aggressive review when regulations place so-called “fundamental rights” in jeopardy.¹⁶⁶ In any event, from the process perspective developed in this Article, rational basis review in connection with most regulatory classifications is quite understandable. Even if little may be said substantively in support of a number of regulatory classifications, invariably such classifications are part of larger governmental designs that, whether politically unimportant or unfair, are highly polycentric. The rational basis test, which defers to the political branches in connection with the great majority of governmental regulations, thereby avoids drowning litigants in an ocean of many-centeredness.

Critics of the different-levels-of-scrutiny approach to equal protection argue that it is too formal and rigid, and relies too heavily on how courts initially characterize cases.¹⁶⁷ Many such critics, especially critics of rational basis review, prefer that courts address, on a case-by-case basis, the many-centered question of whether or not the collective governmental interests promoted by a classification are, all things considered, sufficiently important to justify curtailment of the individual interests at stake.¹⁶⁸ It is difficult to imagine a means of adjudicating equal protection claims more potentially destructive of party-litigants’ rights to participate than such an open-ended, discretion-based approach. To be sure, the

164. See, e.g., *McGowan*, 366 U.S. at 425-26.

165. See, for example, *Lochner v. New York*, 198 U.S. 45, 64 (1905), in which the Court declared unconstitutional a New York law that set maximums for the hours that commercial bakers could work. The Court applied a vague test of reasonableness and appropriateness in light of “the safety, health, morals, and general welfare of the public.” *Id.* at 53; see also CHEMERINSKY, *supra* note 1, § 8.2.2, at 630-37; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1717-18 (1984); cf. *supra* note 94 and accompanying text.

166. See, e.g., *Cruzan v. Dir., Mo. Dep’t. of Health*, 497 U.S. 261, 278-79 (1990) (explaining the right to refuse medical treatment is part of liberty protected by the due process clause).

167. See, e.g., Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 173-74 (1984); *infra* notes 172-73, 179-82 and accompanying text.

168. See Shaman, *supra* note 167, at 174.

lawmaking involved in creating the rule structures relating to levels of scrutiny require courts to address polycentric problems, even if only marginally.¹⁶⁹ But once those structures are in place, the problems presented for adjudication are essentially unicentric, quantification problems that support meaningful party-litigant participation.

Specific examples will help focus the analysis. Fairly early in the development of modern rational basis review, a claimant argued that a Maryland public welfare program was unconstitutional because by placing an aggregate dollar limit on family benefits regardless of family size, it unfairly discriminated against needy children in large families when measured on a benefits-per-capita basis.¹⁷⁰ A divided Court upheld the program on the ground that it had a rational basis even if some might characterize the fixed limit as unfair. Writing for the majority, Justice Stewart rested the Court's conclusion partly on process grounds that reflect this Article's concern over the difficulties of courts reviewing many-centered planning and design decisions:

We do not decide today that the Maryland regulation is wise, . . . or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. *But the intractable economic, social, and even philosophical problems presented . . . are not the business of this Court.*¹⁷¹

Justice Marshall, joined by Justice Brennan, dissented based on what he deemed the manifest unfairness of the state placing an inflexible dollar limit on family benefits. Clearly implying that the business of the Court does most certainly include reviewing the reasonableness of welfare limits on a case-by-case basis, Justice Marshall characterizes Justice Stewart's categorical, process-oriented approach as the "emasculat[i]on of the Equal Protection Clause."¹⁷² Although Justice Marshall purports to be applying the rational basis test, his opinion reveals his contempt for a scope-of-review rule that defers significant political responsibility to a decision-making entity—the state of Maryland—which he clearly does not trust.¹⁷³

169. See *supra* notes 58-62 and accompanying text.

170. See *Dandridge v. Williams*, 397 U.S. 471, 475 (1970).

171. *Id.* at 487 (emphasis added).

172. *Id.* at 508 (Marshall, J., dissenting).

173. See *id.* at 528-30. Marshall clearly favors a more flexible, nuanced approach to measure welfare benefits, one over which the federal courts would have the final say. See *id.* at 520-21.

A landmark Supreme Court decision not long after the Maryland welfare-benefits case reflects these same tensions between the rule embraced by the majority of the Court, which defers judgment on highly polycentric social design and planning issues, and the rule preferred by the minority who advocate much more aggressive judicial review.¹⁷⁴ The case involved a class-action attack on the Texas public school financing system's reliance on ad valorem property taxes, thereby providing lower funding for schools in poorer districts.¹⁷⁵ As in the Maryland benefits case, a majority of the Court refused to substitute their judgment regarding school funding for that of the Texas state officials whom the majority saw to be struggling mightily with a highly complex, many-centered planning problem. In his opinion for the majority, Justice Powell observed that any solution to the problem is a function of many interdependent variables, including fiscal policies, educational policies, considerations of dividing control between state and local managers, and issues of federalism.¹⁷⁶ Given this many-centered complexity, solutions should be left to state administrators.¹⁷⁷ In a concurring opinion, Justice Stewart, while acknowledging that the Texas school funding plan was "chaotic and unjust," insisted that more aggressive review "would mark an extraordinary departure from principled adjudication."¹⁷⁸

Four Justices dissented, including Justice Marshall who wrote separately to reject the majority's "rigidified approach"¹⁷⁹ and to condone more expansive scrutiny that would require the Court to address what are clearly polycentric problems under a general reasonableness standard.¹⁸⁰ According to Justice Marshall, instead of adopting the alternative designs for public school funding specifically suggested by the plaintiffs, the Court can avoid imposing its own design simply by invalidating the "mere sham" of the design

174. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 1 (1973).

175. *Id.* at 4-7.

176. *Id.* at 42-44.

177. *Id.* at 43 ("[T]he judiciary is well advised to refrain from imposing on the [s]tates inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems . . .").

178. *Id.* at 59 (Stewart, J., concurring).

179. *Id.* at 98 (Marshall, J., dissenting).

180. Marshall refers to "a spectrum of standards in reviewing discrimination." *Id.* at 98. Many pages later he observes, "[I]t seems to me that discrimination on the basis of group wealth in this case . . . calls for careful judicial scrutiny." *Id.* at 122.

currently in place.¹⁸¹ Under Justice Marshall's approach, when the State of Texas replaces its existing funding design with another, the Court may again undertake polycentric-design review, and so on, until the Court is satisfied that the design last chosen by the state is acceptably fair and reasonable. Whatever may be said for such an approach on the substantive merits, clearly it would involve what Justice Marshall appears to deny—the imposition by federal courts of their own solutions to the problem of public school funding.¹⁸²

A leading scholarly observer concludes that the rational basis test articulated by Justices Stewart and Powell applies in all instances not involving suspect categories.¹⁸³ Consistent with this assessment, the Court has set aside nonsuspect classifications in only a very few cases.¹⁸⁴ Certainly it is reasonable to attribute this pattern of judicial deference in significant measure to the political reality that legislative and executive regulators typically possess information, hands-on expertise, and political accountability that courts generally lack.¹⁸⁵ Rather than disagreeing with this attribution, this Article suggests an additional rationale, equally consistent with the data: in part, the rational basis test persists because a majority of Justices understand that, if they were to undertake generally to review the reasonableness of governmental regulation, they would be doing so by exercising largely unsupervised discretion, with no opportunity by the party-litigants to participate meaningfully in the process.

Justice Marshall refuses to defer to the political branches because for him political concerns outweigh those of process—he does not trust school officials to take into account fairly and honestly the interests of politically powerless minorities, such as the chronically poor. Up to a point, of course, so long as courts retain

181. *Id.* at 129-30. “[T]his Court . . . should require that the State present something more [in the way of an alternative school financing scheme] than the mere sham now before us.” *Id.* at 130.

182. Over time, if such a scenario ever played out, the Court would have redesigned the Texas school funding scheme just as surely as if it had issued injunctive relief in the first instance. *Cf. infra* note 197 and accompanying text.

183. See CHEMERINSKY, *supra* note 1, § 9.2.1, at 694 (“Although the Court ha[d] phrased the test in different ways, the basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose.”).

184. See, e.g., *id.* § 9.2.3, at 706 (“Cases [where the Court has set aside regulation under rational basis review] indicate that [the test] is not completely toothless. Yet it also must be remembered that these are the rare and exceptional cases . . .”).

185. This is the major thrust of what Justices Stewart and Powell were saying in *Dandridge* and *Rodriguez*. See *supra* notes 171, 176 and accompanying text.

sufficient formal structure to assure meaningful party-litigant participation, distrust of the political branches may be viewed by some as the essence of the Supreme Court's role in protecting individuals' civil rights.¹⁸⁶ However, by all but abandoning formal structure, Justice Marshall's analysis threatens to go too far. In effect, from Justices Powell and Stewart's perspective, Justice Marshall insists that the citizenry trust him to do the right thing even as he denies those most directly affected—the party-litigants—any meaningful opportunity to participate, save as supplicants seeking empathy in Justice Marshall's discretionary decision making.¹⁸⁷ Understandably, the plaintiffs in the welfare-limits and school-funding cases would have preferred being beggars before Justice Marshall to being denied relief at the hands of Justices Powell and Stewart. But defendants as well as plaintiffs deserve their day in court. Moreover, in other circumstances it will be plaintiffs who benefit from the levels-of-scrutiny approach. And there exists the possibility that Justice Marshall's approach, based so heavily on judicial discretion, will be seen by fair-minded observers as something of a sham—judges purporting to listen intently to arguments that they do not feel bound to take seriously in reaching their decision.¹⁸⁸

D. The Manageability of Strict Scrutiny Review

One of the most interesting aspects of strict scrutiny review is how, by condemning almost all suspect classifications that disadvantage minorities based on race, national origin, or alienage, courts avoid many-centered coordination problems to no less degree than they avoid them under the rational basis test by which courts uphold almost all nonsuspect classifications. Although these two distinct levels of scrutiny point in opposite directions, both allow courts to avoid polycentric problems. The analogy to “no duty” and “strict liability” rules in tort law is useful. In those familiar contexts, the tort liability rules at the opposite extremes do not present

186. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 84-85 (1980).

187. Although he probably did not realize what he was doing in this regard, Justice Marshall's approach would deny the litigants any meaningful opportunity to participate except as either cheerleaders or supplicants begging for mercy.

188. See *supra* notes 2-5 and accompanying text.

significant process difficulties.¹⁸⁹ Only when courts attempt to occupy the middle ground—to review complex, many-centered patterns of conduct based on negligence standards of reasonable care—do courts routinely confront polycentric problems.¹⁹⁰ The next Section examines the extent to which the intermediate scrutiny approach, undertaken in connection with gender-based classification, forces courts to occupy such a potentially troublesome middle ground. Here, the focus is on classifications based on race, national origin, or alienage. In this context, as suggested earlier, a regulation will be declared illegal—the government will, in effect, be held “strictly liable”—unless the government can carry the heavy burden of proving that the regulation is necessary to achieve a compelling government purpose.¹⁹¹ In practice, this is tantamount to a per se rule of illegality, presenting few polycentric problems for the court to solve.¹⁹²

The threshold question of whether a given classification is based on one or more of the suspect categories may present polycentric problems. When the regulation discriminates expressly, the issue of whether race, national origin, or alienage are involved is not particularly polycentric.¹⁹³ But when a facially neutral classification has a racially discriminatory impact, one can anticipate difficulties. To avoid many-centered problems in that context, courts require claimants to prove that the regulators acted with discriminatory purpose.¹⁹⁴ Although this requirement may act as a substantive impediment to the claimant’s receiving the relief he seeks and is controversial for that reason,¹⁹⁵ it eliminates highly

189. See *supra* notes 63-66 (explaining that no-duty tort rules prevent polycentric negligence claims from being adjudicated); see also Henderson, *Constitutive Dimensions of Tort*, *supra* note 15, at 244-45 (explaining that rules of strict liability in tort do not present polycentric problems).

190. See Henderson, *Constitutive Dimensions of Tort*, *supra* note 15, at 237; cf. *supra* notes 52-53 and accompanying text.

191. See *supra* note 161 and accompanying text.

192. See *supra* note 189 and accompanying text.

193. Indeed, the plaintiff’s evidentiary burden is greatly eased. See text accompanying note 189.

194. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976).

195. See, e.g., Robert W. Bennett, “Mere” Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1071-77, 1088 (1979) (favoring the purpose requirement); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1106 (1989) (opposing the purpose requirement).

polycentric problems.¹⁹⁶ It follows that the threshold issues presented by equal protection review under a strict scrutiny standard are not so polycentric as to jeopardize litigants' opportunities to participate meaningfully in the review process.

It remains to consider two subject areas—injunctions aimed at remedying the historical effects of invidious racial discrimination and race-based affirmative action programs—that may be more problematic from a process perspective. Fashioning injunctive remedies in connection with public school desegregation has proven difficult.¹⁹⁷ Once again, the focus here is not on the substantive merits, but on the manageability of the problems that courts are being asked to solve. The constituent elements of educational planning are mutually interdependent, including modes of financing, physical facilities, separation of grade levels, transportation, staffing, curricula, and the like. When a trial court undertakes to issue a desegregation order guided only by vague standards of fairness and reasonableness, the court must redesign the existing educational entities, thereby solving a many-centered social coordination problem.¹⁹⁸ Although the Supreme Court has made clear that federal courts are empowered to issue such orders,¹⁹⁹ the problem solving involved in framing them threatens to deny party-litigants any meaningful opportunity to guide courts through linear chains of logic to outcomes claimed of right.²⁰⁰ Developments in recent years suggest that the Supreme Court is aware of these difficulties and is willing both to adjust substantive rules of entitlement to reduce the polycentricity when feasible²⁰¹ and to rely on procedural innovations that allow litigants to participate in judicially supervised settlement negotiations aimed self-consciously at solving the polycentric planning and design problems that remain.²⁰²

196. For a discussion of how tort law governing the element of intent avoids polycentricity, see Henderson, *Constitutive Dimensions*, *supra* note 15, at 234-36.

197. See CHEMERINSKY, *supra* note 1, § 9.3.4, at 739 ("Fashioning a remedy was most difficult, by far, in the area of school desegregation."); see also *id.* § 9.3.4, at 738-745.

198. See *supra* notes 23-24 and accompanying text.

199. See, e.g., *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 19 (1971).

200. Cf. *supra* notes 50, 53 and accompanying text.

201. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 721-22, 752-53 (1974) (imposing significant limit on interdistrict busing).

202. For a description of how federal district courts delegate problem-solving responsibilities in "structural reform litigation," allowing the party-litigants to work out solutions extrajudicially, see Alvin K. Hellerstein, James A. Henderson,

Affirmative-action programs benefiting racial minorities are, from the perspectives developed here, significant sources of difficulties. Were the Supreme Court to apply a rigorous version of the strict scrutiny test in such cases, rejecting virtually all forms of affirmative action, polycentric problem solving would not be necessary.²⁰³ To date, only a minority of Justices have advocated such a relatively extreme position.²⁰⁴ When government regulators are transparent in their willingness to indulge in favoritism that benefits minorities, such as by establishing numerical quotas and set-asides, the Court is likely to reject them straightaway.²⁰⁵ Over time, however, majorities of the Court have allowed regulators to rely on racial classifications less transparently—to use race as a relevant, unquantified consideration in efforts to achieve greater diversity in school admissions, government hiring decisions, and the like.²⁰⁶

From the perspective developed in this Article, these judicial responses are puzzling in that the Court rejects quantified, up-front racial preferences, which might seem to present reviewing courts with less polycentricity,²⁰⁷ and embraces unquantified, less formal racial preferences, which might seem to present more.²⁰⁸ Something like the following hypothetical scenario may explain what is happening. For a number of reasons, and quite apart from whether it is substantively justified, affirmative action aimed at achieving racial diversity in academic admissions is awkwardly embarrassing for

Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 164-65 (2012).

203. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-66 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

204. See CHEMERINSKY, *supra* note 1, § 9.3.5.1, at 753-55.

205. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 288-289, 290-91 (1978); *Gratz v. Bollinger*, 539 U.S. 244, 273, 275 (2003).

206. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 315, 343 (2003).

207. Certainly the question of whether specific standards have been followed would present essentially unicentric quantification problems. The question of whether the standards, themselves, are reasonable would be worked out incrementally, over time. *Cf. supra* text accompanying notes 58-59.

208. The premise here is, of course, that the Court will actually undertake to review the reasonableness of the administrators' admissions decisions—whether race played an appropriate role interdependently in relation to all the other factors taken into consideration. The author doubts that such a review does, or ever will, take place. See *infra* note 211 and accompanying text. But if judicial review occurs under an open-ended reasonableness standard, the Court will confront highly polycentric problems.

those involved.²⁰⁹ Quantified racial preferences, because they are transparently obvious, are especially so. With the Court refusing to apply a strict version of strict scrutiny in such instances, the current case law allows the Court to express its uneasiness by striking down stark examples of affirmative action—quotas and set-asides—while deferring virtually entirely to the discretion of admissions officers and hiring authorities to apply the unquantified, one factor among many approach beneath the radar of judicial review, as it were. That this may be what is taking place is supported circumstantially by the fact that the Court’s opinion in the leading case embracing the one factor among many approach does not even raise the question of how courts might effectively review specific applications of that approach in particular instances.²¹⁰ Consistent with this admittedly speculative hypothesis, the author assumes that the Court will defer virtually completely to admissions committees in such cases, thereby avoiding the polycentric task of reviewing the reasonableness of admissions decisions.²¹¹

209. Affirmative action as a means of redressing past discrimination is arguably different in this regard. *See infra* notes 212-16 and accompanying text. But even if one assumes that affirmative action aimed at compensating for past discrimination preserves a plausible aura of dignity, parallel initiatives aimed at achieving racial diversity in admissions do not. In the words of Justice Thomas, concurring in *Adarand Constructors, Inc. v Peña*, “benign prejudice is just as noxious as . . . malicious prejudice. In each instance, it is racial discrimination, plain and simple.” 515 U.S. 200, 241 (1995) (Thomas, J., concurring). The point here is not that Justice Thomas’s conclusion—that affirmative action should fail under strict scrutiny—is necessarily correct. Even if one believes that affirmative action initiatives are justified, there is enough awkward truth to what Justice Thomas says in the quote to embarrass those who believe, however sincerely, that “benign prejudice” is an appropriate social response. *Id.* When one adds the plausible observation that such benign prejudice stigmatizes even those minority students who would have been admitted on their academic merit, the assertion in the text is warranted.

210. The major focus of the majority’s attention in *Grutter*, 539 U.S. at 327-28, the leading affirmative action/diversity decision, is on the Michigan Law School’s protracted efforts to discover a better, more transparent method for achieving racial diversity in their student body. At no point does the Court attempt to review the law school’s application of its plan for unquantified racial favoritism to the facts of the particular case.

211. In addition to the reality that meaningful review in the absence of a formal record would be all but impossible, the majority opinion in *Grutter* contains abundant language supporting the conclusion of judicial deferral to school administrators. *See id.* at 329 (finding that the law school’s good faith is “presumed” in “absence of a showing to the contrary” (internal quotation marks omitted)); *id.* at 333 (finding that the law school’s decisions were based on its “experience and expertise”); *id.* at 343 (“We take the [l]aw [s]chool at its word . . .”).

Another line of Supreme Court decisions allows regulators to take racial considerations into account when such considerations are reflected in narrowly drawn measures aimed not at achieving diversity but at compensating for past discrimination in particular contexts.²¹² Unless adequately specific doctrinal guideposts are in place, a trial court faces polycentric problems, and litigants' opportunities to participate are correspondingly diminished, in determining how an affirmative action initiative compensating minority plaintiffs may reasonably be expected to remedy past wrongs to others.²¹³ Despite attempts by concurring and dissenting Justices to develop specific criteria by which to determine when informally applied remedial measures are permissible, these cases remain problematic.²¹⁴ The analysis in this Article predicts, to quote the poet, "the centre [cannot] hold."²¹⁵ Either the Court will insist on greater guidance via rule-specificity from both regulators and plaintiffs, or the Court will retreat to a strict version of strict scrutiny, as it has in rejecting racial quotas and set-asides.²¹⁶

A recent decision by the U.S. Supreme Court, touching directly on the process concerns raised in this Article, suggests that the future trend will be in the direction of applying strict scrutiny.²¹⁷ The case involved racial preferences in the context of college admissions. The basic issue on review from the Sixth Circuit²¹⁸ was whether the State of Michigan could, by amending its constitution, abolish all forms of regulative discrimination based on race or gender.²¹⁹ Except for the

212. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 491-92 (1980); *United States v. Paradise*, 480 U.S. 149, 153-54 (1987).

213. In response to these potential difficulties, Justice Powell proposes a more specific, four-factor polycentricity-minimizing test in his concurrence in *Fullilove*. 448 U.S. at 510-11 (Powell, J., concurring). Justice Stevens dissented in *Fullilove*, insisting that if Congress intends to discriminate in order to remedy past wrongs, it should make that intent clear by identifying the characteristics that justify the special treatment. *Id.* at 533-35 (Stevens, J., dissenting).

214. See CHEMERINSKY, *supra* note 1, § 9.3.5.2, at 757-58.

215. See William Butler Yeats, *Ten Poems: The Second Coming*, DIAL, Nov. 1920, at 466.

216. See CHEMERINSKY, *supra* note 1, § 9.3.5.3, at 761-64; cf. *supra* note 205 and accompanying text.

217. See *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623, 1663 (2014) (Sotomayor, J., dissenting).

218. See *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary v. Regents of the Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), *rev'd sub nom. Schuette*, 134 S. Ct. at 1623.

219. *Schuette*, 134 S. Ct. at 1628.

fact that the University of Michigan had already adopted an affirmative action admissions policy, of which the Supreme Court had explicitly approved,²²⁰ the constitutional amendment hardly seems controversial. After all, on its face it appears to be an accurate statement of the equality principle. Judged in context, however, the amendment could be characterized as depriving minorities of advantages previously granted to them by the University. The court of appeals set aside the amendment as violating equal protection, holding that earlier Supreme Court decisions²²¹ imposed a two-pronged test that forced the conclusion that the Michigan constitutional amendment “has a racial focus, targeting a policy or program that ‘inures primarily to the benefit of the minority’; and . . . reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group’s ability to achieve its goals through that process.”²²²

It will be observed that the test embraced by the majority of the court of appeals is questionable from this Article’s perspective because it presents the many-centered problem of judging the reasonableness of basic governmental design.²²³ As in other contexts considered thus far, the point here is not that the test applied by the court of appeals is necessarily wrong on the substantive merits; assessed politically it may suffice as an abstract summary of what is objectionable about the Michigan constitutional amendment. Rather, the point is that the test presents problems sufficiently polycentric as to significantly reduce party-litigants’ opportunities to participate meaningfully in the judicial-review process.²²⁴

In any event, the Supreme Court split six to two (with one abstention) in favor of refusing to apply the court of appeals’ test and

220. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

221. See *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467, 472 (1982).

222. See *Coalition to Defend Affirmative Action*, 701 F.3d at 477 (quoting *Seattle Sch. Dist. No. 1*, 458 U.S. at 472).

223. See *supra* notes 23, 48-53 and accompanying text.

224. The second part of the test is the more troublesome. The concept of special burdens is the key. See *Coalition to Defend Affirmative Action*, 701 F.3d at 477. If the modifier “special” means “any” burdens, the test will strike down virtually every measure that impacts minorities negatively and will not present polycentric problems for the court. And likewise if “special” means “crushing” burdens, no measure is likely to meet that test. Cf. *supra* note 189 and accompanying text. But the modifier “special” is almost certainly code for “unreasonable,” in which case the issues presented in this version of the “middle ground” will be highly polycentric. Cf. *supra* note 190 and accompanying text.

upholding the Michigan constitutional amendment abolishing government-imposed affirmative action initiatives. Justice Kennedy wrote the plurality opinion, joined by two other Justices; as this Article's analysis might have predicted, he emphasizes the lack of "clear legal standards or accepted sources to guide judicial decision" under the two-pronged test proposed by the minority plaintiffs.²²⁵ Justice Scalia wrote a concurrence in which he rejects the test applied below as unadministrable and insists that actual intent to discriminate must be shown in order to set aside a "no affirmative action" regulation on equal protection grounds.²²⁶ Justice Sotomayor authored a dissent in which she criticizes the plurality and Justice Scalia for relying on lack of administrability as one of the grounds for rejecting the court of appeals' test for legality.²²⁷ In her opinion, the issues presented by that test are simply issues of fact that are inherently no different from, nor more difficult than, any other issues of fact, including the issue of actual intent that Justice Scalia concedes could supply an appropriate basis for determining the legality of regulations abolishing affirmative action programs.

Of course, what Justice Sotomayor entirely overlooks is the reality that what she considers to be generic issues of fact are most certainly *not* all alike with respect to their many-centeredness and thus their manageability. The essentially evaluative issues under the test that Justice Sotomayor embraces are highly polycentric and thus do not lend themselves to litigant participation or judicial resolution;²²⁸ whereas the issue of regulators' intent upon which Justice Scalia would rely is of the more-versus-less, unicentric sort that classically lends itself to being resolved via adjudication.²²⁹ Thus, whatever one's view regarding the substantive merits of the central issue before the Court,²³⁰ the plurality and Justice Scalia are clearly correct in their assessments of the unadministrability of the test applied by the court of appeals, and Justice Sotomayor is just as clearly in error. Relative administrability does not automatically win

225. See *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623, 1635 (2014) (plurality opinion).

226. See *id.* at 1643, 1647-48 (Scalia, J., concurring).

227. See *id.* at 1675 (Sotomayor, J., dissenting).

228. *Supra* notes 50-53 and accompanying text.

229. See *supra* note 196 and accompanying text.

230. *Supra* note 209 and accompanying text.

the day;²³¹ but the substantive rule that Justice Sotomayor endorses is not nearly so routinely easy to implement as she makes it out.

E. The Relative Unmanageability of Middle-Ground Intermediate Scrutiny Review

The preceding discussions of rational basis and strict scrutiny review show how, as with the extremes of strict immunity and strict liability in tort, federal courts avoid highly polycentric problems that threaten to deny party-litigants their opportunities to participate meaningfully in the review process. Here, in connection with gender-based classifications to which intermediate scrutiny attaches, attention turns to the question of how federal courts have managed to occupy the middle ground—how, to extend the tort analogy, courts have coped with a reasonableness-based, negligence-like standard of review.²³² That the Supreme Court has no realistic choice but to try to occupy this middle ground is clear upon brief reflection. Quite simply, neither of the polar extremes generates acceptable outcomes in this context. To apply a rational basis test, tantamount to governmental strict immunity, would be under inclusive because relying on role stereotypes to discriminate against either gender is clearly inappropriate.²³³ Equally clearly, to apply strict scrutiny, analogous to governmental strict liability, would be over inclusive.²³⁴ Thus, unlike race-based classification, from a substantive perspective, gender-based classification is Janus-like.²³⁵ It has an antisocial face that must be rejected on equal protection principles.²³⁶ But it also has a benign face that, in some contexts, appropriately

231. See *supra* notes 13-14 and accompanying text.

232. Cf. *supra* note 190 and accompanying text. For a defense of judicial recognition of “a legal middle ground between logically coherent alternatives” in the context of racial gerrymandering and affirmative action, in which the alternative extremes are colorblindness and unabashed racial preferencing, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 504 (1993).

233. See CHEMERINSKY, *supra* note 1, § 9.4.3, at 780-84.

234. See *supra* text accompanying notes 191-92.

235. Except for affirmative action initiatives that may be justified because on balance they help minorities, no benign reasons exist for treating individuals differently based on their race, national origin, or alienage. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978).

236. See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

distinguishes between the sexes in ways that sensibly reflect the fact that men and women are fundamentally different.²³⁷

Faced with the dilemma of accommodating both of these valid substantive perspectives, the Supreme Court might have followed one of two paths. First, the Court might have modified the strict scrutiny test by relaxing the operative language. “*Necessary* to achieve a *compelling* government purpose”²³⁸ might have become “*helpful* in serving a *valuable* governmental purpose,” thereby providing greater leeway for courts to accommodate a somewhat larger number of gender-based classifications.²³⁹ Or second, the Court might have divided gender classifications into two formal subcategories—for example, those that are, and those that are not, based on role stereotypes²⁴⁰—applying strict scrutiny to the former and rational basis to the latter.²⁴¹ Under the first of these possible approaches—relaxing the standard of review—the problem solving would occur case-by-case as courts applied the vague general standard in efforts to link gender-based classifications to legitimate government purposes. Under the second possible approach, problem solving would occur at the rule-making stage, with courts giving formal meaning to the pivotal concept of role stereotypes.

For better or worse, the Supreme Court appears to have chosen the first of these paths by which to traverse the middle ground of gender discrimination. Under the Court’s “intermediate scrutiny” test, a regulatory classification based on gender is unconstitutional unless the government proves that it is “*substantially related*” to an “*important*” government purpose.²⁴² As suggested earlier, this test may appear, on first encounter, to function as a slightly relaxed

237. Gender-based segregation for purpose of sports competition, or public bathroom facilities, is appropriate on the same “separate but equal” basis that would be unacceptable for similar segregations based on race. See CHEMERINSKY, *supra* note 1, § 9.3.3.1, at 718-26 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)).

238. See *supra* text accompanying note 161.

239. One might conceive the different modifiers as marking different places on a sliding-scale continuum between “allowing most classifications” to “allowing almost no classifications.” Strict scrutiny would allow almost no gender-based classifications; “helpful to serving a valuable purpose” would allow somewhat more but still reject a majority of such classifications; and so on.

240. Gender-based role stereotypes are close to the heart of what is troubling about gender classifications. See *supra* note 233 and accompanying text. The important point is that the pivotal concept would not present polycentric problems.

241. Neither of these levels of scrutiny present polycentric problems. See *supra* text preceding note 189.

242. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (emphasis added).

version of the strict scrutiny test. On this view, intermediate scrutiny would presumably allow, compared with strict scrutiny, a marginally greater number of gender-based classifications to pass constitutional muster. However, from a process perspective, the superficially small adjustment in language produces a huge difference in outcomes. As explained earlier in connection with strict scrutiny, the operative modifiers in the context of racial discrimination are sufficiently extreme to support narrow applications that all but seal the doom of any regulatory classification that works to the disadvantage of a racial minority.²⁴³ Thus, aside from the special circumstance of affirmative action, strict-scrutiny leaves no room for the government to defend instances of racial discrimination. By contrast, once the intermediate standard of review is expanded to allow more than the smallest sliver of exceptions, the standard's gatekeeping capacity collapses, leaving courts to work out solutions on a fact-sensitive, case-by-case basis.²⁴⁴ When the solutions depend on value judgments, as the phrase "important purpose" suggests, the problems presented are likely to be highly polycentric.²⁴⁵ Justice Rehnquist probably foresaw these developments when, in a dissent in the decision that established the intermediate scrutiny test in the first instance, he described the modifiers in the intermediate scrutiny test as "diaphanous" and "elastic."²⁴⁶

243. The modifiers "necessary" and "compelling" in connection with strict scrutiny are sufficient, when supplemented by sub-rules in connection with affirmative action, to allow courts to hold the fort and allow only a sliver of exceptional claims. *See supra* text accompanying notes 191-92. This sort of reliance on extreme modifiers serves the same gatekeeping, polycentricity-reducing functions in tort law. *See generally* James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 *IND. L.J.* 467, 468, 514 n.175 (1976) (noting that the rule allowing recovery for intentional infliction of mental suffering requires "extreme and outrageous conduct," causing "severe emotional distress").

244. Extreme modifiers serve effectively as gatekeepers in connection with open-ended problems because of their extremeness. *See supra* note 243 and accompanying text. Nonextreme modifiers require, in their application, consideration of a number of relevant variables, thereby presenting the underlying polycentric problems. *Cf. supra* note 153 and accompanying text. The concept of equality, as such, requires consideration of relevant variables in determining whether actors are truly "alike." *See Westen, supra* note 154, at 543.

245. The same thing is true of strict scrutiny's "compelling government purpose." By contrast, if the sliding scale referred to *supra* note 239 were expressed in a single metric such as degrees centigrade, deciding where "somewhat hot" falls on the scale would be a unicentric, qualification problem. *See supra* text following note 24.

246. *Craig*, 429 U.S. at 221.

Whatever Justice Rehnquist may have intended by his skeptical assessment of intermediate scrutiny, evidence suggests that the federal courts are confronting potentially complex, many-centered problems in gender cases and that the intermediate scrutiny approach is not providing an adequate doctrinal framework. Justice Brennan commented on this state of relative disarray and expressed regret that members of the Court were “splintered” regarding the proper path to take.²⁴⁷ It is also telling that, while Supreme Court opinions have reiterated that the intermediate scrutiny test applies in cases involving gender-based classification,²⁴⁸ the Court has decided a number of gender cases during the same time period without ostensibly relying on that test.²⁴⁹ Consistent with the alternative approach suggested earlier, many of these decisions focus on whether or not the classifications in question rest on outmoded stereotypes regarding the roles played by men and women in workplace and family settings.²⁵⁰ That the Supreme Court’s rhetorical commitment to intermediate scrutiny is on shaky ground is suggested by a decision that held unconstitutional the Virginia Military Institute’s exclusion of women cadets.²⁵¹ Justice Ginsburg explained that, while the test was intermediate scrutiny, defenders of gender-based classifications reflecting role stereotypes “must demonstrate an ‘exceedingly persuasive justification’ for that action. . . . The burden of justification is demanding and it rests entirely [with] the [s]tate.”²⁵² Given the forcefulness of this language, it is hardly surprising that strong minorities of the Court over the years have favored a strict scrutiny approach to gender classification claims²⁵³ and that some of the Justices who have favored retention of intermediate scrutiny may have done so out of concern that a strict scrutiny approach would jeopardize the prospects for women becoming the beneficiaries of gender-based affirmative action.²⁵⁴

Given that the current state of affairs regarding gender-based classifications is troublesome from the perspective advanced in this

247. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 488 (1981) (Brennan, J., dissenting).

248. See CHEMERINSKY, *supra* note 1, § 9.4.1, at 775 & n.44.

249. *Id.* § 9.4.1, at 775 & nn.49-50.

250. *Id.* § 9.4.3, at 780-86.

251. See *United States v. Virginia*, 518 U.S. 515, 546 (1996).

252. *Id.* at 531, 533.

253. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (agreeing Justices included Brennan, Douglas, Marshall, and White).

254. See CHEMERINSKY, *supra* note 1, § 9.4.1, at 777 & n.57.

Article, what might constitute more workable alternatives? As suggested earlier, one such alternative might be for the Court to divide gender classifications into two formal subcategories depending on whether or not they rest on traditional role stereotypes. For classifications that reflect stereotypes, strict scrutiny would apply. For those that do not, rational basis would be appropriate. Neither level of scrutiny would present highly polycentric problems.²⁵⁵ Deciding whether a given classification reflects stereotypes might often be difficult;²⁵⁶ but the problems presented would be essentially unicentric, not polycentric, and would allow for meaningful party-litigant participation.²⁵⁷ Regarding gender-based affirmative action initiatives, the key from this Article's perspective would be whether the Court could develop an approach, perhaps along the lines of race-based remedial initiatives, that would not present courts with many-centered coordination problems.²⁵⁸ Once again, this analysis does not argue based on first principles that these proposals should necessarily be implemented.²⁵⁹ The analysis does suggest, however, that current gender discrimination law leaves a great deal to the discretion of law-appliers and to that extent denies party-litigants their promised opportunities to participate meaningfully in the process of judicial review.

CONCLUSION

Meaningful participation by party-litigants lies at the core of adjudication. American judges know this, although often, when they encounter impediments to party-litigant participation, they refer to the limits of their own institutional capacities to solve complex social coordination problems. When judges talk this way they may, of course, be invoking the substantive principle that courts should not intrude too far into the political prerogatives of the other branches. Or judges may be referring to what might be deemed courts' "mechanical" limitations, including their incapacity to collect and

255. See *supra* text preceding note 189.

256. Such stereotypes are forms of historical, customary categorization. Evidence on both sides would often be conflicting and potentially confusing.

257. Whether an alleged stereotype exists and whether the classification reflects the stereotype are essentially more-versus-less, quantification problems, the elements of which are additive and subtractive, not mutually interdependent.

258. See *supra* notes 212-16 and accompanying text.

259. Cf. *supra* notes 6-10 and accompanying text.

process large quantities of data on broad social issues.²⁶⁰ However, as this analysis makes clear, meaningful party-litigant participation extends further and necessarily involves opportunities for litigants not only to prove facts, but also to participate in the decision process by taking courts through linear chains of logic to favorable outcomes upon which they may insist as a matter of right. Complex polycentric problems that must be solved under vague reasonableness standards present major impediments to such participation. When such impediments are present, courts necessarily reach outcomes through the exercise of broad discretion and party-litigants, having made their proofs, are reduced to the functional equivalents of supplicants, begging for judicial empathy.

The requirements of justiciability and the different levels of scrutiny help courts to avoid the sorts of many-centered design problems that threaten party-litigants' opportunities to participate in judicial review. Justiciability categorically excludes open-ended, highly polycentric problems, including requests for abstract, noncontextual advisory opinions and answers to political questions. And the different levels of scrutiny in equal protection-based review identify relevant categories of regulatory classification and apply correspondingly different types and intensities of judicial review that, with notable exceptions in areas such as affirmative action and gender-based discrimination, reduce the many-centeredness of claims that do reach court. For all the scholarly attention these doctrines have received, virtually no one has addressed the issues raised in this analysis.

To the extent that the observations in this Article are accurate and the analysis is sound, what is to be made of them? As indicated from the outset, this analysis is mainly descriptive. No claim is made that first principles require the American system to make these commitments to party-litigant participation or to adopt these methods of preserving and promoting that participation. However, given the system's *de facto* commitments to meaningful party-litigant participation, one ought to take them into account when prescribing what should be taking place in the substantive areas included in this analysis. Thus, if one were to urge, as some critics have urged, the abandonment of one or more of the justiciability doctrines, or to urge that the Supreme Court adopt a more flexible, intuition-based, "[c]ourts will know it when they see it" approach²⁶¹ in a controversial

260. See *supra* note 97.

261. Cf. *supra* note 131 and accompanying text.

area of equal protection, one should be expected to take into account the realities described in this Article.

