SYMPOSIUM INTRODUCTION

Notes Towards an Alternate Vision of the Judicial Role

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INTRODUCTION

It has been roughly a quarter-century since William Rehnquist took over as Chief Justice of the United States Supreme Court. Under first his stewardship and then that of his former clerk John Roberts, the Supreme Court has grown increasingly skeptical about the efficacy of litigation, increasingly parsimonious in construing federal statutes that facilitate litigation, and increasingly uninterested in insuring the availability of functional remedies for the violation of federal rights.[1] In matters of interpretation—both statutory and constitutional—the Court's course has been more complicated, but it would be difficult to contest the assertion

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1. For discussion of these themes during the Rehnquist Era, see for example Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343 (2002); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224 (2003); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006). During its first few years under the stewardship of Chief Justice Roberts, the Court has given no indication that it is deviating from its anti-litigation course. Indeed, the court-closing consequences of the Court's decisions were the lead story in most analyses of October Term 2006. *See, e.g.*, Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (describing October Term 2006 as "the year the Court closed the courts"); Posting of Andrew Siegel to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2007/06/hostility_to_li.html, "Litigation Hostility in the Early Roberts Court" (June 6, 2007, 10:41 PST).

that it has tacked in the direction of more formalistic approaches that increasingly focus our attention on statutory text and historical evidence at the expense of other forms of evidence and argument.[2]

The Court's course in these matters has been justified by—and perhaps propelled by[3]—a particular vision[4] of the judicial role. In this vision, judges play a limited and secondary role in the maintenance of the American polity. Judges exist to resolve disputes and answer technical questions about the meaning of statutes and discrete constitutional texts. They are definitively and categorically prohibited from "making law." Even within their narrow sphere of permissible activity, judges are not to be proactive, but rather are to sit back and wait to see if Congress, in its infinite wisdom, has chosen to break the glass and call on their expertise. As Chief Justice Roberts evocatively opined,[5] judges properly understand their role to act as "umpires," making sure that pre-existing rules are accurately and even-handedly enforced and staying out of the way as much as possible.[6]

The Rehnquist and Roberts Courts' decisions to constrict remedies and shrink the universe of acceptable interpretive strategies have, for the

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2. Though a citation should be unnecessary, one might see William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and Amar's Bill of Rights*, 106 MICH. L. REV. 487, 488 (2007) ("In less than twenty years, textualism has moved from the periphery of constitutional discourse to a position of the greatest prominence") and Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 1 (2006) ("Textualists have been so successful discrediting strong purposivism and updating their new brand of 'modern textualism' that they have forged a new consensus on the interpretive enterprise that dwarfs any remaining disagreements").

3. Whether recent shifts in Supreme Court doctrine and methodology have actually been motivated by—as opposed to simply justified by—a principled commitment to a limited judicial role is a matter of passionate dispute that this Essay cannot resolve and will not engage. For my earlier view on the topic, see Siegel, *supra* note 1, at 1117 (rejecting explanation of the Rehnquist Court's court-closing decisions grounded in separation of powers concerns).

4. My decision to talk about "visions" of the judicial role is heavily influenced by the work of my former colleague, Tommy Crocker, who argues that disputes about constitutional doctrine, structure, and methodology are, at bottom, arguments about how we "envision" an ideal constitutional culture. *See* Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1 (2007). It is also driven by my sense that the ideas about the judicial role that have currency in our constitutional culture are insufficiently fleshed out to count as "theories," but go well beyond mere "instincts" or "notions." For further discussion of how such conversations ought to be pitched, see *infra* Part I.A. For those who resist the visual metaphor, "conceptions" might be the best substitute.

5. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.").

6. *But see* Michael P. Allen, *A (Limited) Defense of (at least some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525 (2009) (arguing that the analogy to umpiring actually supports a more active judicial model).

most part, been hotly contested.[7] Many have drawn stinging dissents which, particularly in recent years, have expressly identified and contested the Court's anti-litigation orientation.[8] In a variety of areas, ranging from implied private right of action cases to technical cases interpreting the scope of the Federal Rules of Appellate Procedure, Justices Stevens, Breyer, Ginsburg, and Souter have taken turns questioning the wisdom, the historical accuracy, and even the interpretive integrity of the Court's court-closing decisions.[9] Academic commentators have echoed—and expanded upon—their criticisms,[10] as have politicians and popular commentators.[11]

Intriguingly, however, those who have been quick to criticize the substance of the Court's decisions and its anti-litigation orientation have not, as yet, done much to challenge the vision of the judicial role that undergirds the Court's approach. While an occasional Justice might explicitly contest the majority's approach to statutory interpretation[12] or their framework for deciding, say, private right of action cases,[13] the Justices rarely dig deeper to critique, let alone offer alternatives to, the broad pronouncements about the judicial role that often dot the Court's anti-litigation opinions.[14]

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7. *See* Siegel, *supra* note 1, at 1126–27 (explaining that the Supreme Court's court-closing decisions have been characterized by "[c]onsistent 5-4 voting patterns and spirited dissents" even though all nine Justices are to some degree litigation-hostile).

8. *See, e.g.*, Schriro v. Landrigan, 550 U.S. 465, 127 S. Ct. 1933, 1954 (2007) (Stevens, J., dissenting) ("In the end, the Court's decision can only be explained by its increasing familiar effort to guard the floodgates of litigation.").

9. *See, e.g.*, Summers v. Earth Island Inst., No. 07-499,—S. Ct. —, 2007 WL 509325 (March 3, 2009) (Breyer, J., dissenting); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 128 S. Ct. 761 (2008) (Stevens, J., dissenting); Bowles v. Russell, 551 U.S. 205 (2007) (Souter, J., dissenting); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (Ginsburg, J., dissenting).

10. In addition to the works cited *supra* note 1, see for example Peter Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891 (2002); Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 121–22 (2007).

11. Note, for example, the strident public criticism of the Court's decision in *Ledbetter*, 550 U.S. 618, which led to the case becoming an issue in the 2008 Presidential Election and, ultimately, to its statutory undoing. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

12. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1549 (2007) (Stevens, J., concurring).

13. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (Stevens, J., dissenting).

14. The dissenting Justices have not been entirely silent on questions about the judicial role, particularly in their off-the-bench writings. Justice Stephen G. Breyer, in particular, has attempted to articulate an overarching theory of the judicial role, most notably in his book ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005). While ACTIVE LIBERTY has not yet made a substantial dent in the broader culture's attitudes about the proper judicial role, it probably deserved greater attention than we have given it in this Symposium.

The Justices' unwillingness to explicitly articulate an alternative vision of the judicial role tracks developments in broader culture. In the contemporary United States, the debate over the proper judicial role is one-sided. We hear the same language with striking persistence: Judges should "find law" not "make law." "Judicial activism" is bad; "judicial restraint" is good.[15] When it comes to allocating rights and responsibilities in our complicated democratic polity, unelected judges should get out of the way and leave the heavy lifting to the democratic branches. To do otherwise is to live under "judicial tyranny."[16] Voices from across the political spectrum warn of the dangers of "judicial supremacy"[17] and laud the virtues of judicial "minimalism."[18]

It is my belief—and the premise of this Symposium—that the absence from both Supreme Court dissents and public debate of a coherent alternative vision of the judicial role is a failure of rhetoric rather than a failure of ideas. Those of us who have made academic or professional careers out of critiquing and challenging the parsimonious decisions of the recent Supreme Court find ourselves facing a stacked deck when we turn to the task of articulating an affirmative alternative vision. The language of restraint, minimalism, and passivity are so paradigmatic that efforts to break out of them often break down over simple questions of vocabulary.[19] For reasons of both politics and substance, few would voluntarily embrace the labels "judicial maximalist," "judicial supremacist," or "judicial activist." Similarly, it is impossible to imagine

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15. Craig Green carefully traces the intellectual history of these particular terms in a forthcoming Article. *See* Craig Green, *An Intellectual History of Judicial Activism*, 62 VAND. L. REV. (forthcoming 2009).

16. *See generally, e.g.*, MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005) (accusing the Supreme Court of "judicial tyranny").

17. *See, e.g.*, Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

18. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Though Professor Sunstein has been the leading academic advocate for "judicial minimalism," he also has been willing to acknowledge its faults. *See, e.g.*, Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2006).

19. The power of a prevailing discourse to impose constraints on the ability to give voice to countervailing instincts and ideas, of course, transcends questions of vocabulary. In our constitutional culture, for example, we have developed archetypes of the "good judge" and the "bad judge," which loom over any discussion of the judicial role and police the boundaries of acceptable argument despite a near-consensus among judges and scholars that the archetypes seriously oversimplify and distort the process of judging. If, as the archetypes would have it, we are in the midst of a Manichean struggle between "good judges" (who understand the limited nature of their own role, forsake the temptation to use the tools of common law adjudication to transform their policy preferences into law, and develop the humility to tolerate the compromises of imperfect democratic lawmaking) and "bad judges" (who, drunk with their own power, mistake their own beliefs for legal commands), judges and commentators have strong political and psychological incentives to associate themselves with the forces of light, whatever their actual practices.

a nominee to the Supreme Court analogizing their role to that of a batter or pitcher in a baseball game.

When the authors in this Symposium gathered for our initial round-table, we gave ourselves the task of affirmatively and unapologetically articulating a vision of what it is that courts should be doing. While the substance of our answers were grounded in our critiques of the Court's current approach, the goal was to speak in our own language in an effort to bypass the rhetorical traps set by the politics of the last several decades. What became abundantly clear after our two-hour session was that paradigm-shifting concepts cannot be ordered up on demand; our progress, though substantial, was incremental.

In preparing essays for the written portion of this Symposium, each author has taken a slightly different path. Scott Moss, focusing in on the role of the trial judge in employment cases, identifies a crucial judicial function that has withered from disuse—the evaluation of conflicting evidentiary claims—drawing lessons from its decline, and explaining the single importance of revitalizing it.[20] Taking a similar tack, Steve Vladeck calls on the current Supreme Court to account for its failure to fulfill its obligation to give content to the Constitution's criminal procedure provisions, offering a procedural tweak that might get the Court back onto the path of fulfilling its law-saying obligations.[21] With characteristic chutzpa, Mike Allen attempts to capture the judge-as-umpire analogy for those who favor a more active judiciary, questioning many of the Chief Justice's assumptions about both law and baseball.[22] Caprice Roberts takes the broadest approach, interrogating our legal order and broader culture for explanations as to why current rules of jurisdiction and justiciability produce a judiciary that is at crucial moments anemic and then offering a new paradigm for empowering the judiciary in some such cases.[23] Finally, in the pages that follow, I use a creative device to further frame our collective project and then begin to tentatively explore some of the rhetoric and themes that might be of service in articulating a new affirmative vision of the judicial role.

The Essays in this Symposium can be read with profit as stand-alone contributions to legal scholarship. However, they also profit from being read together in a single setting. What comes through these pieces—and a host of other recent scholarship on similar topics by scholars

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20. Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549 (2009).

21. Steven I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595 (2009).

22. Allen, *supra* note 6.

23. Caprice L. Roberts, *Asymmetric World Jurisprudence*, 32 SEATTLE U. L. REV. 569 (2009).

such Neil Siegel,[24] Craig Green,[25] and Chad Oldfather[26]—is a generation's collective frustration with the limited rhetorical and intellectual space that the prevailing legal order has marked off for discussions of the judicial role. This Symposium represents an effort to channel some of that frustration in a creative and productive direction.

I. RE-ENVISIONING THE JUDICIAL ROLE: A THOUGHT EXPERIMENT

Imagine a nominee for the United States Supreme Court who believes that, over the last quarter-century, the Court has become excessively formalistic in its modes of interpretation, unduly hostile to litigation, and inappropriately blasé to the court-closing and rights-limiting consequences of its rulings. Also, imagine our fictional nominee to be brave (and perhaps a little foolish). When asked by Senators whether he considers himself a "judicial activist," this nominee eschews a simple denial and offers a sophisticated answer in which he questions the utility of terms such as "judicial activism" and "judicial restraint."[27] When asked if, like John Roberts, he believes that judges are simply umpires, he declines the opportunity to riff on baseball, Mom, and apple pie, and instead offers a nuanced explanation on the virtues and the (serious) limitations of such an analogy. After several hours of back and forth about labels, analogies, and particular cases, a prickly Senator from a bright red state asks the chipper nominee to cut out the fancy footwork and identify for the Committee *his* vision of the proper judicial role. The remainder of this Essay asks two related questions: First, what are the requisites of a successful answer? And second, how might the nominee go about constructing such an answer?

A. The Proper Pitch

Any inquiry into the requisites of a successful answer must begin with the issue of pitch. When people talk about judges, they talk in varying registers and with varying degrees of sophistication. On the one

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24. *See, e.g.*, Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

25. *See* Green, *supra* note 15.

26. *See, e.g.*, Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L. J. 121 (2005).

27. Many scholars and commentators have written eloquently about the need to get beyond the language of "judicial activism." For a recent comment of my own along this vein, see Posting of Andrew Siegel to ProfsBlawg, http://prawfsblawg.blogs.com, "A Shared Vision of the Judicial Role" (June 26, 2008, 14:28 PST) (commenting that, in light of recent decisions of the Supreme Court, "the gap between the reality of constitutional law (in which two groups of judges committed to a broad judicial role battle over the substance of the rights to be jealously protected) and the rhetoric of constitutional politics (in which liberal "activists" battle conservatives committed to "judicial restraint") has grown untenable").

hand, there is vast academic literature on judges and judging, much of it sophisticated and nuanced. While we would presumably hope that our fictional nominee is well-versed in that literature, it would be neither responsive nor wise for him to respond with a jargon-filled taxonomy of judicial functions or virtues.[28] (Indeed, it was his cautious attempt to incorporate a degree of academic precision that got him in the hot seat in the first place.) So, high theory is out.

On the flip side, however, the question calls for more than a political catch phrase or an invective-filled diatribe. While much public discussion of judging takes place in those terms, the setting and the stakes require greater engagement with the question. (Perhaps, earlier in the proceeding, the nominee might have tip-toed off of the firing line with a charming personal anecdote or a folksy appeal to common sense, but that door is now closed.) The nominee's answer must resound in terms that the public will understand; but, it must also reflect a level of seriousness and erudition commensurate with the position to which she aspires and must survive at least cursory vetting by academic and professional commentators.[29] In short, it must be studiously "middlebrow."[30]

B. The Characteristics of a Successful Answer

A successful answer to such a loaded question requires not only the proper tone but an appreciation for the several layers on which the question operates. Discussions of the judicial role inherently call to mind a mixture of descriptive, prescriptive, and normative questions. While in some contexts we *might* productively cabin our discussion of judging to one or two of these axes, it is clear that our fictional nominee does not have that option. At its core, the questioner wants to know want kind of Justice the nominee would be; but, any answer the prospective Justice gives will be vetted for consistency with the actual work of the courts and will be dissected for potential criticisms of her future colleagues. Furthermore, accuracy and insight are not enough; even the wisest and most careful answer will fail to achieve its instrumental objectives if, for

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28. So, with apologies to the interesting and important work done by Lawrence Solum and others writing in this vein, we will not be hearing any citation to "a virtue-centered theory of judging." *Cf.* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003).

29. Anyone who doubts the importance for a Supreme Court nominee of looking and sounding like a serious constitutional thinker, or of minimally impressing the relevant scholarly and professional communities, should attend to the tale of Harriet Miers.

30. I have always had an appreciation for the role of "middlebrow" communication in shaping culture, but my willingness to embrace the term stems largely from a conversation with Amanda Frost about the pros and cons of different models of scholarship. I thank her for that valuable exchange.

example, it comes across as aloof[31] or suggests an unpopular approach to politically-sensitive or emotionally-charged issues.

When envisioning and articulating alternative conceptions of the judicial role, our fictional nominee—and anyone else who wishes to influence our constitutional culture—must keep in mind three requisites. First, the vision must be *descriptively accurate*: that is, it must be plausibly consistent with the great bulk of the Supreme Court's decisions, particularly those in which the Court has dealt with questions of its own powers vis-à-vis other branches of government.[32] Second, it must be *normatively desirable*: that is, it must forward an appealing and achievable vision for a successful legal order. Finally, it must be *politically persuasive*: that is, it must speak in terms that resonate with—or at least do not run afoul of—our deepest cultural commitments.

II. NOTES TOWARDS AN ANSWER: A CONCEPTUAL TOOL-KIT

While it may be possible to develop and articulate an over-arching alternative conception of the judicial role through a process of deduction from broad postulates about the interaction between the courts, the other branches, and the broader culture, that project has borne at most minimal fruit over the last several decades. Our fictional nominee—and those of us who share in his project—might, therefore, adopt an alternative, inductive strategy. Instead of starting at the top and working down, we might identify a set of themes, rhetoric, and ideas about the proper functioning of the courts that meet the above criteria (descriptive accuracy, normative desirability, and political persuasiveness) and use them as the building blocks for constructing a broader theory. In this Part, I identify and briefly discuss five such themes and the role each might play in this project.

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31. Here the classic referent is Robert Bork, who, by many accounts, doomed his Supreme Court candidacy when he explained that his primary motivation for seeking a seat on the Court was that the Court's work would be "an intellectual feast." *See* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 275–76 (1989) (recounting Bork's description of the Supreme Court as "an intellectual feast," confirming the fear of many that Bork "just wanted to play with ideas" and was unaware "that beyond those elegant intellectual constructs, the lives of real people hung in the balance").

32. To be clear, my suggestion is not that a model of judging must accord with every area of contemporary doctrine; nor do I suggest that those offering alternative models of judging cannot critique or call for the overruling of existing case law. Rather, I merely point out that, in order to achieve plausibility, any proposed model of judging must look broadly familiar to those attuned to coherent doctrine and practices.

A. The Partnership Paradigm

Scholars skeptical of the Supreme Court's recent turn to formalism in both statutory and constitutional interpretations have frequently invoked the language of "partnership" to explain their vision of the Court's proper role.[33] The partnership model suggests that the current Court ought to conceptualize itself as working in tandem with some other entity—be it the legislature, the Framers, or earlier Courts—toward some common end.

For advocates of a more assertive judiciary, the partnership model has great appeal. The core insight of the partnership metaphor is that judges should be unapologetic about judging. In conceptualizing an ongoing, nonhierarchical relationship between branches of government (or between generations) this model has the potential to purge the guilt that most judges have internalized from a constitutional culture obsessed with the counter-majoritarian objection and originalist methodologies.[34]

The partnership model also has the virtue of grounding claims for a more robust judiciary in the core principles of American constitutionalism. As legal historians have long explained,[35] the American experiment with constitutional self-government was made possible by a breakthrough in political theory: the realization that a sovereign people acting collectively can—and probably should—divide up the duties and responsibilities of governance among different entities without designating one such entity as "sovereign." In Justice Kennedy's famous phrase, the Founders "split the atom of sovereignty."[36] If it is the people who are ultimately sovereign, and all branches are doing their bidding according to rules proscribed for nominal, substantive reasons, then judges should undertake their duties with pride and a sense of purpose.

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33. For a discussion of the role of the partnership metaphor in the battle over methods of statutory interpretations, see Molot, *supra* note 2, at 6–7 (contrasting the "faithful actor model" with a view of judges as "coequal partners" and "members of a coordinate branch of government that share equal responsibility for law elaboration"). For one among the many constitutional theorists who use the language of "partnership," see generally LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

34. Concern—most would say obsession—with the Democratic legitimacy of judicial decisionmaking is a nearly ubiquitous feature of American constitutional theory. Credit for kicking off the modern wave of concern over the subject usually goes to ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

35. Despite its arguably snide tone, the best book on the emergence of the theory of popular sovereignty during the revolutionary era is still EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1989).

36. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Justice Kennedy was speaking about issues of federalism when he coined the metaphor, but the same analytic move necessary to justify American federalism was also required to explain the existence of co-equal branches of government.

While the partnership metaphor has substantial utility for someone seeking to explain why the prevailing vision of the judicial role is unduly cramped, standing alone it does not provide an alternative vision. When viewed in the abstract, the partnership model simply begs too many questions: With whom are judges in partnership? To what ends? On what terms?[37] Without answers to these questions, the partnership model cannot answer basic questions about what it is that a judge is supposed to—or is not supposed to—do. Those answers must come from sources external to the notion and language of partnership. Perhaps, then, the notion of judicial partnership is better thought of as a paradigm within which to build an alternative vision of the judicial role, rather than a vision in and of itself.

B. Of Rights and Remedies

Perhaps the single aspect of the Court's recent anti-litigation decisions that most raises the hackles of non-legal audiences is the frequency with which the Court's decisions leave individuals, whose rights have been infringed, without viable remedies.[38] Such decisions strike many observers as violations of both natural justice and of our legal system's founding commitments. After all, Justice John Marshall's rhetorical question in *Marbury v. Madison* wondering, "If [Marbury] has a right and, if that right has been violated, do the laws of his country afford him a remedy?"[39] is one of the few lines of judicial writing most familiar to learned Americans.

Now, those better versed in legal doctrine understand that our legal system has treated that precept as aspirational rather than prescriptive. In a long line of cases stretching back to *Marbury* itself, our courts have recognized that—for a variety of legal, practical, and institutional reasons—some rights are simply under- or un-enforceable.[40] To suggest that the purpose of courts is to remedy all violations of rights with a

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37. When more formalist scholars criticize those who adopt the language of "partnership," their criticism more often than not is aimed at the partnership scholars' claims about these subsidiary questions. *Cf.* Molot, *supra* note 2, at 6–7 (characterizing the partnership position in the statutory interpretation debate as including claims of "coequal" status with the legislature and the subject of that partnership as "law elaboration").

38. Many of the Court's litigation-hostile decisions specifically foreclose the availability of remedies for individuals who have—or are likely to have—meritorious claims. Some such decisions, like *Ledbetter*, are case- or statute-specific. Others, like the Court's broad embrace of qualified and sovereign immunity, are more general.

39. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803).

40. *See generally* John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (demonstrating the persistence of a gap between rights and remedies and arguing that, under some circumstances, the gap serves salutary purposes).

"though the heavens may fall" zeal would certainly raise questions about the descriptive accuracy of one's theory of judging.

Nevertheless, there is certainly some room to employ the language of rights and remedies in defining and advocating for a more robust judicial role. As many commentators have demonstrated, the modern Supreme Court has become increasingly sanguine about issuing decisions that leave important rights un- or under-protected.[41] There is a major difference between acknowledging that a one-to-one fit between rights and remedies is a practical impossibility and losing sight of the core institutional goal of providing efficient and effective relief to those whose substantive entitlements have been improperly trampled. Returning focus to the goal of calibrating remedies to rights is a politically potent and substantively sound tool for exploring and articulating the contours of the judicial role.

C. Of Law and Equity

According to a common (and largely accurate) story, once upon a time there were two systems of courts in the Anglo-American world: law courts, which enforced a more established set of rules often without regard to their consequences, and equity courts, which applied free-floating principles to smooth the rough edges of the common law.[42] Under our current structure of federal civil procedure, a single set of federal courts possess all (or more accurately most) of the powers that traditionally belonged to both law and equity courts.[43] One way to tell the tale of the Rehnquist and Roberts years is to argue that the Supreme Court has increasingly become uncomfortable with its equitable role.[44]

While that diagnosis is not perfect, it resonates very well with the tenor and substance of many of the Court's decisions. Like the rights and remedies language discussed above, the language of law and equity has both substantive and political appeal for those seeking to construct an alternative model of judging. Both substantively and rhetorically, "law" and "equity" stand out as a sort of judicial "yin" and "yang": a paired set of approaches to the administration of justice that must be properly

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41. *See, e.g.*, *id.*; *see also* Thomas, *supra* note 10; Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*, 41 SAN DIEGO L. REV. 1633 (2004).

42. For one abbreviated version of the tale, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 26 (2d ed. 1985) (describing how equity courts at one time applied loose principles of equity in an ad hoc fashion but eventually developed a coherent set of principles of their own, "almost a system of antilaw").

43. *See* FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

44. To some extent, that is the story Judith Resnik tells in Resnik, *supra* note 1.

balanced in order for a court system to function properly.[45] While denigration of the "law" side of the equation leads to ad hoc judging and threatens chaos, denigration of the "equity" side of the equations leads to excessive formalism and threatens justice. A vision of the judicial role that conceptualizes the "good judge" as someone who properly balances the legal and equitable impulses, has substantial potential to add texture and substance to our cultural conversation about judging.

D. Questions of Institutional Competence

For several generations before the 1980s, the ideas of the "Legal Process" school represented the orthodox approach in conversations about the judicial role.[46] Legal Process orthodoxy was subject to a host of legitimate criticisms and cracked under the strain.[47] I have no space to recount these criticisms and no desire for a wholesale revival of the legal process approach. However, at the risk of reigniting old battles, those advocating for a more robust alternative to the prevailing vision of the judicial role ought to consider the utility of some of the core insights of the Legal Process school. In particular, there may well still be mileage in the proposition that, when determining how to divide the labor of democratic governance, we ought to focus our attention on the relative competence of different institutions to answer different types of questions.[48] Under such an approach, our tolerance for judicial judgment is differentiated depending on the nature of the questions and dispute before the court. Judicial expertise becomes the ticket to more active judicial engagement on some matters, say questions of remediation and procedure. A renewed focus on institutional competence would demand a more nuanced alternative vision of the judicial role: one that acknowledges that there are many areas in which a court must be hesitant to go in

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45. To be clear, I am not suggesting that there would be much profit in making technical arguments about the traditional roles of equity courts and law courts; nor am I suggesting that traditional courts of either stripe behaved in the stylized way implied by this dichotomy. My point is that, with at least some degree of basis in fact, "law" and "equity" have come to represent different approaches to judging—different judicial impulses if you will—and that the side of judging associated with "equity" has been under attack in recent years.

46. The "Legal Process" school of looking at questions about the power of judges and the roles of different institutions is largely traceable to two works: HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (Foundation Press 1953) and the oft-cited, though never-published, HENRY M. HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Cambridge, Mass., Tentative ed. 1958). For a clear discussion of the basic principles at the heart of this approach, see Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994).

47. For a discussion of some of the reasons for the (partial) decline of the legal process model, see Fallon, *supra* note 46, at 971–76.

48. *See id.* at 974 ("The best Legal Process scholarship continues to consider issues of how to get the 'best' performances from various institutions of government, including courts.").

order to avoid stepping on the toes of better-positioned legislators or administrators, yet also one that actively seeks to identify those cases and questions that are best addressed through the unapologetic application of judicial judgment to concrete legal disputes.

E. Litigation as Democracy

As I have written elsewhere, litigation is, at its core, a quintessentially democratic activity.[49] "Anyone of any social status can drag their so-called betters into court and make them answer before a body whose job it is to neutrally adjudicate that dispute."[50] To those of us who believe in the democratic promise of litigation, the court-closing decisions of the Rehnquist and Roberts Courts run contrary to our basic civic principles. There is rhetorical and analytical power in thinking about barriers to litigation as part and parcel of a broader assault on democratic norms. The rigid enforcement of court-closing rules, the parsimonious interpretation of remedial statutes, and the expansion of doctrines like qualified and statutory immunity that categorically exclude some transgressors from monetary liability, thwart the exercise of democratic citizenship in much the same way as butterfly ballots and intentionally overbroad felon disenfranchisement campaigns.[51] In thinking about the role of the judge, some attention might be given to replacing the notion of a judge as gate-keeper with the image of judge as facilitator of democratic participation. Though the contours of this argument are probably the least developed of any of the sets of tools mentioned in this Part, they provide yet another fertile area in which those seeking to grow a new theory of the judicial role might profitably sow.

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49. Siegel, *supra* note 1, at 1159–60 & n.256; Andrew M. Siegel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851, 862 (2008).

50. Siegel, *supra* note 49, at 862.

51. For some more direct links between the Rehnquist Court's hostility to litigation and its handling of the 2000 Florida election controversy, see Siegel, *supra* note 1, at 1176–96.