NOTE ON MARBURY v. MADISON AND THE FUNCTION OF ADJUDICATION

(1) The Derivation of Judicial Review. In Marbury, an important strand of Marshall’s reasoning derives the Court’s power to declare acts of Congress unconstitutional, and hence its power to make authoritative determinations of constitutional law, solely from its function of deciding cases. Assume for the moment that this was the sole foundation for Marshall’s arguments. Would there be any necessary implications for contemporary constitutional adjudication? If so, what would those implications be? Or would this aspect of Marshall’s reasoning just be one relevant factor, among others, in defining the judicial role?

(2) The “Dispute Resolution” or “Private Rights” Model. In contemporary debate, insistence that the power of judicial review exists only as a necessary incident of the power to decide cases tends to cluster with a number of other views in what might be called a “dispute resolution” or “private rights” model of constitutional adjudication. Among the familiarly associated ideas are these. (a) The power of judicial review is anomalous under a substantially democratic Constitution and is tolerable only insofar as necessary to the resolution of cases. (b) The definition of justiciable “cases” should be restricted to the kinds of disputes historically viewed as appropriate for judicial resolution—paradigmatically, those in which a defendant’s violation of a legal duty to the plaintiff has caused a distinct and palpable injury to an economic or other legally protected interest. (c) Courts should avoid any role as a general overseer of government conduct, and should especially avoid the award of remedies that invade traditional legislative and executive prerogatives.

The dispute resolution or private rights model draws support from a variety of sources. First, this model coheres well with a number of familiar axioms about constitutional adjudication, including the following: (i) Courts should avoid unnecessary decisions of constitutional law. (ii) Courts sit only to adjudicate claims of legal rights, not to pronounce on generalized grievances. (iii) One party may not assert the rights of another party. For further discussion of these asserted axioms and their validity, see Section 3 of this Chapter.

Second, the Framers plainly contemplated that the jurisdiction of the courts would be “limited to cases of a Judiciary nature.” 2 Farrand, The Records of the Federal Convention 430 (1911). See Chap. I, pp. 10-11, supra. They also decisively rejected a proposal to establish a Council of Revision with
the power to pronounce on the wisdom of proposed legislation. See 1 Farrand at 21, 94. According to Justice Harlan, "unrestricted public actions might well alter the [historic] allocation of authority among the three branches of the Federal Government" and thereby "go far toward" transforming the federal courts into "the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention." Flast v. Cohen, 392 U.S. 83, 130 (1968)(Harlan, J., dissenting). ¹

Third, the dispute resolution or private law model reflects a conception of the separation of powers, which many have found attractive, in which the courts should accord deference to the democratic legitimacy and practical competences of the legislative and executive branches. See, e.g., Allen v. Wright, 468 U.S. 737 (1984), p. 123, infra, and the following Note.

Strictures by which courts limit the availability and scope of constitutional adjudication are supported from a somewhat different perspective by Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv.L.Rev. 297 (1979). Her theory rests on "three interrelated policies of Article III: the smooth allocation of power among courts over time; the unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented; and the importance of placing control over political processes in the hands of the people most closely involved" (p. 302). ²

(3) The Public Rights Model. In contrast with the dispute resolution or private rights model, a more diffused conception of the function of courts in public law matters has appeared in recent years (sometimes explicitly, sometimes assumed)—a conception that depicts constitutional (and sometimes statutory) interpretation by the courts as other than an incident of the power to resolve particular, ongoing disputes between identified litigants. This ap-

1. The historical pedigree of the private rights or dispute resolution model has not gone undisputed. See, e.g., Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816 (1969)(arguing that the British legal traditions that informed the Framer's intentions in Article III included numerous provisions for parties without a personal interest in the outcome to bring judicial challenges to unlawful government actions); Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan.L.Rev. 1371 (1988)(arguing that, from colonial times through the twentieth century, courts did not view a personal stake as an element of the case or controversy requirement, but instead granted relief when authorized by the forms of action); Pushaw, Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 Notre Dame L.Rev. 447 (1994)(arguing that the framers intended Article III "cases" and "controversies" to be distinct, and that in the former, which were not intended to require suit by an injured party in an adversary proceeding, the principal judicial function was to be norm articulation). See also Nichol, Rethinking Standing, 72 Cal. L.Rev. 68, 93–94 (1984)(arguing that the analogy between judicial power under a broad standing doctrine and the rejected judicial role in a Council of Revision is "inapt", since the proposed Council would have provided opinions on the wisdom of proposed laws as an aspect of the enactment process, not engaged in post-enactment review of constitutionality). Indeed, some have seen the foundation for an alternative conception of the judicial role in Marbury itself. See Paragraph (8), infra.

2. See also Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 Harv.L.Rev. 410, 430 (1978): "The underlying message of Forms and Limits [an article by Prof. Fuller] cannot be lightly disregarded: adjudication has a moral force, and this force is in major part a function of those elements that distinguish adjudication from all other forms of ordering. In the long run, the cost of departing from those elements may be a forfeiture of the moral force of the judicial role."
proach has at least three aspects. The first questions the importance of requiring that the plaintiff have a personal stake in the outcome of a lawsuit; in its purest form, it would permit any citizen to bring a "public action" to challenge allegedly unlawful government conduct. The second argues that the judiciary should not be viewed as a mere settle of disputes, but rather as an institution with a distinctive capacity to declare and explicate public values—norms that transcend individual controversies. The third defends the exercise by courts of broad remedial powers in cases challenging the operation of such public institutions as schools, prisons, and mental hospitals; it argues that relief cannot and should not be limited to undoing particular violations, but should involve judges (and their nominees) in the management and reshaping of those institutions.8

Support for the public rights approach, particularly in constitutional adjudication, is found by some commentators in Marbury itself. See, e.g., Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363 (1973); Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv.L.Rev. 1731, 1800–01 (1991). According to Professor Monaghan, Marbury's "repeated emphasis that a written constitution imposes limits on every organ of the state * * * welded judicial review to the political axiom of limited government." (82 Yale L.J. at 1370). At least three other historical phenomena have contributed to the emergence of the public rights model.

The first involves the vast increase in governmental regulation, especially when administered by administrative agencies, that has created diffuse rights shared by large groups and new legal relationships that are hard to capture in traditional, private law terms. At the same time, a need has arisen for judicial control of the exercise of administrative power. See generally Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv.L.Rev. 1265, 1282–84 (1961); Stewart, The Reformation of American Administrative Law, 88 Harv. L.Rev. 1667, 1674–81 (1975). Encouraged by statutes authorizing judicial review of administrative action, leading administrative law decisions gradually departed from the private rights model and permitted "standing" by representatives of interests not protected at common law to represent the "public interest" in statutory enforcement. See, e.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Scripps–Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942). For further discussion, see pp. 170–71, infra.

A second factor supporting the public rights model has been the substantive expansion of constitutional rights, especially under the Warren Court in the 1960s. For example, the broadly shared interests of voters in challenging a malapportioned legislative district, see Baker v. Carr, 369 U.S. 186 (1962), p. 284, infra, or of public school pupils in challenging school prayer, see School

Dist. v. Schempp, 374 U.S. 203 (1963), differ markedly from the liberty and economic interests recognized at common law.

Third, there has emerged an increasingly pervasive conception of constitutional rights not as shields against governmental coercion, but as swords authorizing the award of affirmative relief to redress injury to constitutionally protected interests. That development, the origins of which trace in part to the landmark decisions in Ex parte Young, 209 U.S. 123 (1908), p. 1058, infra (recognizing a judicially created equitable cause of action for violation of the Fourteenth Amendment’s Due Process Clause), and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), p. 858, infra (recognizing a judicially created cause of action for damages for violation of the Fourth Amendment), also finds expression in the institutional reform litigation following Brown v. Board of Education, 347 U.S. 483 (1954). After the recognition of such rights as those to school desegregation, courts inevitably found themselves awarding remedies of a kind hard to square with at least some of the premises of the private rights or dispute resolution model.

(4) Overlap of the Models. The distinction between the somewhat simplistically depicted “dispute resolution” (or “private rights”) and “public rights” models is not watertight. School desegregation cases, for example, have their origin in individual grievances that may be assimilated to the dispute resolution or private rights model, but seemingly require the reshaping of institutions if the rights infringed are to be enforced. Conversely, an action seeking injunctive or declaratory relief against the future administration of a government policy (such as a police department’s alleged policy of needlessly subjecting police detainees to life-threatening chokeholds) implicates the kind of publicly shared interests associated with the public rights model, but would not necessarily call for a broad or intrusive remedy. A prohibitory injunction or declaratory judgment would suffice. See Fallon, Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U.L.Rev. 1, 3–9 (1984). The devices of the class action, as well as other techniques for broadening the scope of litigation, frequently reflect efforts to meld the private rights and public rights models, and many of the tensions about the proper role of the courts have been felt in the resulting cases and doctrines.

4. For valuable discussion of similar models from a comparative perspective, see Damaska, The Faces of Justice and State Authority (1986). Professor Damaska develops the relationship between what he calls the “conflict solving” and “policy implementing” approaches to adjudication and visions of the state as “reactive” and “activist.”

5. In his well-known essay, The Forms and Limits of Adjudication, 92 Harv.L.Rev. 353 (1978), Professor Fuller stresses the inappropriateness of adjudication for the resolution of “polycentric” disputes, which he claims have too many ramifications, too many interdependent aspects, to yield to rational, properly judicial solution; they are far more suited to disposition by processes of negotiation and managerial intuition.

In an essay on institutional reform litigation, Professor Horowitz notes the difficulties of casting the issues in such cases in terms of legal rights; the dangers of attempting to treat class plaintiffs and governmental defendants as if each side were always homogeneous and adverse to the other; the hazards of delegating authority to masters and of compromising judicial neutrality; and the inevitability of unintended consequences when judges necessarily “act on a piece, and neglect the rest.” Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265. See also Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 636 (1982); Stewart, p. 80, supra, at 1802–05.
The distinction between the private and public rights models blurs, moreover, because the public rights model, sensibly construed, cannot be understood to license judicial review at the behest of any would-be litigant on the basis of any hypothesized set of facts or indeed no facts whatsoever. For there to be a constitutionally justiciable case under the public rights approach, "the functional requisites of effective adjudication" must be satisfied. See Fallon, supra, at 51. These functional requisites cannot be reduced to a short or determinate list, but involve such considerations as:

(a) The importance, in the judicial development of law, of a concrete set of facts as an aid to the accurate formulation of the legal issue to be decided;

(b) The importance of an adversary presentation of evidence as an aid to the accurate determination of the facts out of which the legal issue arises;

(c) The importance of an adversary presentation in the formulation and decision of the legal issue; and

(d) The importance of a concrete set of facts in limiting the scope and implications of the legal determination, and as an aid to its accurate interpretation.

Where the functional requisites of adjudication are not satisfied, adjudication would be inappropriate even under the public rights model. See generally Bandes, note 3, supra; Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv.L.Rev. 1698 (1980). Cf. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), p. 227, infra (acknowledging that the plaintiff in a class action no longer had a "personal stake" in the litigation in the traditional sense, but holding the case not moot, partly because "[t]he imperatives of a dispute capable of judicial resolution"—"sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions"—were satisfied).

(5) A Testing Case. Suppose that a state employee, claiming that she is threatened with discharge in violation of her constitutional rights, brings a federal court action to enjoin her discharge and to require her state employer to institute certain procedures for dealing with cases like hers in the future. Two days after the complaint is filed, the plaintiff dies of unrelated causes, and her lawyer resists a motion to dismiss on the ground that the case raises important constitutional questions about the procedures and structure of the state employer. The lawyer seeks to substitute her client's husband, who is not a state employee, as plaintiff.

Of the functional requisites of adjudication cited above, some do not seem to be affected by the death of the original plaintiff, while others plainly are. But since only prospective relief was sought, the original plaintiff's death surely eliminates any ongoing dispute that the court's judgment and decree might resolve. Nor is there any indication in the character of the lawsuit that other employees of this agency confront similar problems, or, if they do, that they wish to press any claim they might have. Would a judicial decision passing on the constitutional question under these circumstances, and issuing an injunction requiring the agency to change its operations, be a legitimate exercise of judicial power? If you think so, would it matter if no evidence could be adduced that the original plaintiff had been threatened with discharge? If she had never been a public employee but had simply been seeking to determine whether the agency could discharge someone under certain conditions?