Resorting to Courts: Article III Standing as the Guardian of Free Speech & Democratic Self-Governance

Hallows Lecture Marquette University Law School

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Thank you, Dean Kearney, for your gracious introduction and thanks to Marquette Law for the honor of delivering this year's Hallows Lecture. I appreciate Marquette's warm hospitality, the alma mater of my Chief Judge Diane Sykes—a superb jurist and a great leader.

I give this lecture nearly seven years after joining the federal judiciary, at a time of deep political division in our country, and as someone who loves the law of federal jurisdiction. My observations from my time on the court and in light of our current divisions combine to inform the content of my remarks, and I want to begin by describing an appeal the Seventh Circuit decided about a year ago, in March of 2024. The appeal helps frame the title and topic of my lecture, "*Resorting to Courts: Article III Standing as the Guardian of Free Speech & Democratic Self-Governance*."

I. Framing the Issue – *Parents Protecting Our Children v. Eau Claire Area School District*.

In 2021, here in Wisconsin, the Eau Claire Area School District developed and issued Administrative Guidance for Gender Identity and Support. This guidance, as its name implies, embodies the School District's

policy and direction to member schools encountering students with questions about their gender identity. In its own words, the policy sought to provide schools with "guidelines" and a "resource" to follow when addressing questions and requests for assistance from students or parents on matters of gender identity.

The Administrative Guidance acknowledges the difficulty and sensitivity of issues relating to gender identity and, by its terms, recognizes that some students may "not [be] 'open' at home for reasons that may include safety or [a] lack of acceptance." It was for that reason that the Guidance tells principals and school counselors that they "should speak with the student first before discussing a student's non-conforming or transgender status with the student's parent or guardian."

In implementing the Guidance, schools may complete what the policy calls a "Gender Support Plan." Here, too, the Guidance states that "school staff, family, and the student should work together" to prepare individual plans. And the School District further committed to providing parents with a copy of any Support Plan developed for their children.

A group of parents came together, formed an association called Parents Protecting Our Children, and challenged the School District's policy in federal court in Madison. The association brought their suit under Section 1983, a federal statute providing a cause of action against municipalities and state officials for violations of federal rights. The association alleged that the Administrative Guidance violates its members' substantive due process rights as parents under the Fourteenth Amendment as well as their free exercise rights under the First Amendment.

The association acknowledged that it brought its claims not in response to any experience any parents had with the School District's implementation of the Guidance, but instead as a pre-enforcement facial challenge. The central allegation was that the new policy would operate not only to sow secrecy and mistrust between parents and their children, but also to displace their parental rights by allowing school officials to make major life decisions for their children. The complaint asked the district court for a broad remedy: to declare the School District's policy

unconstitutional in all of its possible applications and to enjoin its use in Eau Claire schools.

The district court dismissed Parents Protecting's complaint for lack of standing, and the Seventh Circuit affirmed. By way of full disclosure, I was on the three-judge panel and authored the court's opinion.

Agreeing with the district court, the Seventh Circuit concluded that the association lacked Article III standing because, in the words of our opinion, "nowhere does the complaint allege that even one of the association's members—any particular parent—has experienced an actual or imminent injury attributable to the Administrative Guidance or a Support Plan." And without such allegations, the court reasoned, the association presented no Case or Controversy within the meaning of Article III of the Constitution, leaving the district court without subject matter jurisdiction. The district court's only choice was to dismiss the complaint.

In affirming the dismissal, the court offered a few observations pertinent to today's lecture. Our opinion observed that Parents Protecting's complaint, while plainly brought in good faith and rooted in genuine concerns about potential applications of the policy, contained no suggestion that any parents had approached the School District or any school administrator to discuss plans for implementing the Administrative Guidance. The court instead saw the lawsuit as coming, as our opinion put it, "as the ink was still drying" on the new policy, and reflecting what seemed like an effort "to pull a federal court into a range of complex and often emotional challenges on matters of gender identity, where the right policy recipe is not yet clear and the best answers are sure to come in time—through the experiences of schools, students, and families." In these circumstances, the court saw Article III's Case or Controversy limitation on federal jurisdiction as leaving no choice but to "stay on the sidelines" and to await, if the day came, a concrete dispute about a specific application of the Administrative Guidance.

No doubt believing our view was mistaken, Parents Protecting sought review by the Supreme Court. The Court declined, but three Justices dissented from the denial of certiorari, with two Justices writing separately to say the appeal warranted the High Court's consideration.

So there you have it—a controversial, socially-divisive issue that an associational plaintiff brought to federal court seeking broad pre-enforcement relief; a court of appeals affirming a dismissal for lack of Article III standing; and three Supreme Court Justices expressing interest in reviewing the decision.

Beyond the law professors and practitioners in Eckstein Hall this afternoon are many law students. If I paused and randomly called on a few of you to tell me what issues you see in a case like Parents Protecting Our Children—and don't' worry, I am not about to do so—I bet you would nail it. Whether you believe the Seventh Circuit got the decision right or wrong, I expect many of you would say the appeal raises hard questions about the competing interests between parents and schools and implicates structural considerations of federalism. And a real legal eagle would tell

me to be more careful with word choices in describing *Parents Protecting* as a "case" because, after all, the absence of Article III subject matter jurisdiction means there is no capital-C "Case" within the meaning of the Constitution.

Those observations would be right, but I wonder how many of you would go another step or two and see the parental association's lawsuit as implicating the role of free speech in our constitutional design—or, to put the point in broader terms, as implicating the relationship between the First Amendment and Article III's Case or Controversy requirement. That is the issue I want to explore in this lecture.

While the *Parents Protecting* case provides a helpful example to frame our discussion, my broader observations today extend well beyond the decision—to considerations that have been on my mind for a while about the relationship and role of federal courts and free speech in our constitutional democracy.

II. Article III's Case or Controversy Requirement as a Structural Limitation on Federal Courts

Allow me to start with background common to most, if not all, perspectives on this broader question. Maybe some of this legal foundation will help those of you about to stare down a federal courts exam in the coming weeks.

Article III of the Constitution extends the federal "judicial power" to particular categories of Cases or Controversies. In this way, the federal courts—from the Supreme Court to, in the words of the Constitution, all "inferior Courts" that Congress chooses to create, including the one I serve on—are courts of limited jurisdiction. Unlike state courts of general jurisdiction, federal courts must ensure the presence of a Case or Controversy to act. While our courtrooms are public and open to all, our dockets cannot accept all-comers: the Constitution limits us to resolving concrete disputes between adverse litigants—Cases or Controversies as Article III calls them.

The justiciability doctrines of standing, mootness, and ripeness, and the related prohibitions on resolving political questions and issuing

advisory opinions, give effect to this limitation. Today's law students learn standing doctrine by reading cases like *Lujan v. Defenders of Wildlife* and committing to memory the three elements of what the Supreme Court has called "the irreducible constitutional minimum of standing": the requirement that a plaintiff allege (and in the course of litigation establish with evidence) that they have suffered an injury—a concrete and particularized harm that is actual or imminent, not hypothetical or conjectural—traceable to the defendant and capable of being redressed through a favorable judicial ruling.

Scores of other cases tell us that the "law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers." And this structural principle of separation of powers, the Supreme Court has emphasized, "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."

I worry that too many today, foremost non-lawyers, hear descriptions like these as poetic and lofty—idealistic and aspirational, not

relevant or practical. For others I worry that talk of structural constitutionalism—separation of powers and federalism, in particular—invites nothing more than bumper sticker-level labelling and categorizing, with only so-called judicial conservatives being interested in such ideas and so-called judicial liberals more focused on individual rights.

If I could lodge one request with the law students here today, it is to resist these categorizations. Standing is not a conservative invention any more than a belief in federal courts as protectors of individual rights is a liberal invention. Characterizations like those are reductive, empty on many levels, and tend to force foundational elements of constitutional law into binary, mutually exclusive categories. A dialogue limited to, if not insistent on, liberal and conservative compartmentalization breeds skepticism and cynicism about law and the proper role of the courts in our constitutional democracy.

Let me emphasize the point by returning for a few minutes to the U.S. Reports. And let's start with the Supreme Court's 1992 decision in *Lujan v. Defenders of Wildlife*. The Court held that environmental groups

lacked standing to challenge a federal regulation on the ground that it violated a provision of the Endangered Species Act. In law school and many times since, I have heard *Lujan* dubbed as an anti-environmental conservative triumph for the Rehnquist Court.

I have heard much the same about *Clapper v. Amnesty International*. The plaintiffs were a group of human rights lawyers concerned that the government, as part of conducting electronic surveillance pursuant to the Foreign Intelligence Surveillance Act, would monitor their phone calls with their clients. The Court held that the lawyers, who did not actually know whether the government was monitoring their calls, had not alleged an injury, actual or imminent, under Article III. Many seem to label *Clapper* as a win for conservatives and national security and a loss for liberals, privacy, and civil liberties.

By those measures, I think the same observations apply to *Los Angeles v. Lyons*—a must-read for all law students, in my view. *Lyons* is difficult, as everyone reading it empathizes with its plaintiff, Adolph Lyons. A simple burned-out taillight led to a Los Angeles police officer

pulling him over and placing him in a chokehold that left him gasping for air, spitting up blood, and blacking out. And LAPD, at the time, had a history of subjecting African American men like Mr. Lyons to these types of chokeholds. So Mr. Lyons invoked Section 1983 and he sued the City—seeking not only compensatory damages for his injuries, but also declaratory and injunctive relief to bar LAPD's future application of chokeholds.

The Justices had no difficulty concluding Mr. Lyons had Article III standing to pursue money damages, but a majority held, over vigorous dissent, that he lacked standing for equitable relief because he could not establish a likelihood of future injury, of being subjected to another chokehold by LAPD. The Court's dismissal of Mr. Lyons' request for injunctive relief, I have often heard it said, marked a victory for law and order and a loss for civil rights.

As you might expect, and as the Court observed in its opinion, the LAPD's use of chokeholds resulted in "major civic controversy" with "a spirited, vigorous, and at times emotional debate"—with people speaking

up and voicing their concerns and perspectives about local police tactics. From what I can tell, the Police Department quelled the concerns by imposing a moratorium on the use of chokeholds—without any federal court ordering them to do so.

Applauding or criticizing *Lujan*, *Clapper*, and *Lyons* as conservative wins and liberal losses might make good soundbites but, in my respectful view, that labeling misses the true mark and risks the ideological pigeonholing of law. The more complete and compelling view comes from seeing the decisions as structural, as giving effect to Article III's limitation on the exercise of judicial power to Cases or Controversies. To borrow a phrase, let's be more concrete and particular. *Lujan*, *Clapper*, and *Lyons* are about federal courts requiring the presence of an injured party, or someone facing an imminent risk of injury, before passing on often difficult legal questions.

If I have not convinced you, allow me one more chance. Two opinions from the Supreme Court's last Term may help persuade you.

Consider first *Murthy v. Missouri*, a case in which the plaintiffs—two states and five individual social media users—alleged that federal Executive Branch agencies and officials pressured online platforms to enforce their content moderation policies against speech that many would regard as ideologically conservative, including, for example, criticism of vaccine mandates. They sought a broad injunction to limit Executive Branch communications with the platforms. But the Supreme Court concluded that the plaintiffs' alleged injuries were not redressable because they stemmed from the independent actions of the platforms—third parties not before the court. Article III's standing doctrine, the Court emphasized, prevented a federal court from exercising oversight over a coordinate branch of government—the Executive Branch—in such circumstances.

Next consider *FDA v. Alliance for Hippocratic Medicine*, often referred to as "the mifepristone case." As you can probably guess from the case's shorthand name, it involved the FDA's approval of an abortion-inducing drug. Yet the Court did not reach the merits, instead concluding

that the plaintiff doctors and medical associations lacked standing to challenge the FDA's approval of mifepristone. Since the plaintiff doctors were not prescribing, and did not have to prescribe, mifepristone, what the plaintiffs were really challenging was the authority of other physicians—non-parties to the lawsuit—to legally prescribe the drug. To permit the lawsuit to proceed, the Court worried, would risk giving any citizen standing to challenge any government action they find objectionable, rather than presenting those objections to, as the Court put it, "fellow citizens including in the political and electoral process."

For reasons obvious to all, many headlines cast *Murthy* and the mifepristone case as liberal wins and conservative losses. But do not sign me up for that view. The Court resolved both cases not on the merits, but instead on jurisdictional grounds rooted in structural reasoning.

I believe you received an outline of my lecture as you entered Eckstein Hall. If you are jotting down the cases I have mentioned and keeping score of the winners and losers, the winner sure seems to be structural constitutionalism. One broad takeaway is that Congress, the

Executive Branch, and state and local government—not federal courts—are the proper outlets through which to address these issues and, by extension, resolve grievances. Put another way, I think it is too shallow, if not misdirected, to put these cases in win-loss columns based on what we perceive as conservative, liberal, or some other ideologically measured outcome.

Is my sample set too limited and perhaps a bit cherry-picked? That's fair at some level. Can't outcomes be explained along multiple dimensions? Yes, that too is fair. Am I trying in these thoughts to offer a unifying theory of all of Article III standing law? No, definitely not. I view my point as more limited—to observing that structural constitutionalism best explains all or at least major portions of these significant standing decisions.

III. Article III's Jurisdictional Limitation as Promoting Democracy and the Role of Speech

By no means am I the first to consider these issues. Lots of ink has been spilled on Article III's Case or Controversy requirement and its structural implications within the Constitution's broader design. Law

journals are loaded with insightful commentary, and I am grateful for the opportunity this lecture has provided me to break away from my daily diet of reading briefs morning, noon, and night. The academy has a lot to offer judges, and for that I am thankful.

As part of my brief foray into the academy today, I want to offer my own perspective on a structural dimension of Article III standing doctrine that is present between the lines of some court decisions and much commentary but not express on the surface. Let's go back to the beginning and the Seventh Circuit's decision in *Parents Protecting Our Children*.

To read the decision is to see the social controversy underpinning the parent association's claims challenging the Eau Claire School District's gender identity policy. You might see the case as a "culture war" dispute taken to federal court—a postcard example of litigation raising difficult and socially-divisive questions about parenting and gender identity in public schools.

In no way should you hear one ounce of criticism in anything I am saying. To the contrary, and as the Seventh Circuit emphasized in its

opinion, Parents Protecting clearly brought its claims in good faith and out of genuine concern about the Administrative Guidance and how local schools may implement it. And so too was it clear that the School District promulgated its policy to avoid its member schools getting caught flatfooted or making mistakes on delicate and difficult subject matter.

In explaining why the Parents Protecting association lacked Article III standing, the court offered a few observations apt to the perspective I now come to in this lecture. Nowhere in the complaint or any of the parties' briefs did the court see, as our opinion observed, "an[y] indication that any of Parents Protecting's members asked the School District about how it plans to implement the Guidance." Instead, the lawsuit leveled a pre-enforcement challenge to the School District's policy, urging the district court to declare the policy facially invalid—root-and-branch unconstitutional in every possible application. Yet facial invalidation of law, the Supreme Court has emphasized, is highly disfavored and, as our opinion saw it, "especially so where, as here, the

relief sought implicates a local policy and weighty principles of federalism."

By way of contrast, just last month, the First Circuit grappled with a very similar gender identity policy, except that this lawsuit was brought by two parents challenging a concrete application of the policy to their child. Nobody disputed the parents had standing, and the court resolved the case on the merits.

The *Parents Protecting* decision, however, I would submit, is about a federal court trying to stay in its lane, about taking care to insist on a concrete dispute between adverse litigants, about making sure the right parties are before us before reaching the merits of legal questions of substantial consequence, and about considering whether the proper parties are seeking the proper relief.

Consider a few of the questions that would have taken center stage had the court concluded that the association of parents *did* have standing and, from there, reached the merits of their constitutional challenges to the Administrative Guidance:

- Do principles of substantive due process—and the right to parent in particular—preclude local school districts from even attempting to provide guidance to principals and counselors on how to address matters of gender identity?
- If the answer is no, do schools have any discretion in extraordinary circumstances to consider the safety of a student in determining whether and when to communicate with the student's parents about these issues?
- On the other hand, if the School District's policy is constitutionally problematic on its face, what principles should guide the necessary tailoring analysis?

For my two cents, these are hard questions and ones a federal court ought to be hesitant to wade into unless and until an imminent or concrete injury and challenged application of the gender identity policy presents itself in a complaint.

So, Article III's Case or Controversy requirement worked to return these difficult questions to the Eau Claire School District and, even

more specifically, to the District's School Board, which meets in public and permits school officials, parents, and other interested parties to raise questions and share perspectives. It is in this very practical way that Article III promotes democratic deliberation and federalism by channeling questions and concerns about potential applications of a local policy—and perhaps sound suggestions for modifying, clarifying, or even repealing it—back to the meeting room from which it emerged. This is how Article III's limitation on the exercise of judicial power leaves policymaking, and the difficult line drawing it often entails, to the exercise of free speech. Speaking up, objecting, and sharing perspectives with those who differ from us is how we understand, persuade, and, often, find common ground where agreement seems beyond reach.

If that framing is too idealistic in today's times, I would hope skeptics would at least recognize that the alternative—permitting very difficult legal questions to come to federal court based only on a showing of a genuine worry—casts a vote of little confidence in the role speech can play in finding solutions, or perhaps tolerable compromises, to some of the

most divisive questions of our day. And even if these culture war lawsuits should not be viewed as a vote of confidence in federal courts as the ultimate decision makers, they put great pressure on principles of restraint designed to allow democratic processes—whether at the national or local level—to offer answers and outlets for persuasion and compromise in the first instance.

Our constitutional design envisions constitutional answers coming in slower-paced increments than contemplated by pre-enforcement facial challenges like the one Parents Protecting Our Children lodged against the Eau Claire policy. It is not happenstance that the architect who designed the Supreme Court, Cass Gilbert, thought the tortoise an appropriate decorative and symbolic feature for the building's design. In the same way tortoises move slowly, sometimes the law develops best when principles, doctrines, and answers come with time and, I might add, with more speech and dialogue helping to bridge social divides. Pre-enforcement facial challenges, however, often result in expansive

injunctions that apply in one fell swoop—the sort of forward-looking policymaking that is best left to the more democratic branches.

The premature injection of a federal court's decision-making authority on a matter of state or local importance risks not only chilling free speech, but also painting with too broad a brush. The Eau Claire School District may elect to navigate the delicate issue of student gender identity in a manner which completely differs from even the next town over, let alone the next state. And that's the point. Federalism both permits and promotes the adoption of different solutions to the same challenges. And over time, states, local governments, and school districts, operating as "laboratories of democracy," as Justice Brandeis coined the phrase, might arrive at the best solution. But where a federal court intervenes with no Case or Controversy to resolve, our constitutional structure does not operate by its federated design.

Do not hear me to be questioning all pre-enforcement or facial challenges. Far from it. Take, for example, the overbreadth doctrine, which allows challenges to a restriction on speech not as applied to a particular

plaintiff, but because the restriction may apply to others in ways that limit or chill protected speech. If that sounds at odds with my description of the rules for Article III standing, thank you for staying awake because, yes, overbreadth doctrine in some ways is an exception to those rules.

So why have an overbreadth doctrine? Foremost because the law wants to protect and promote speech, and it will allow what otherwise might seem like a premature lawsuit to achieve that end. Overbreadth doctrine's remedy—declaring a statute facially invalid—returns the ultimate question to lawmakers, promoting the judiciary's proper role. So overbreadth doctrine, too, is structural in this way.

Parents Protecting Our Children is not an aberration in federal courts today. In conducting my own research, I found many cases of federal courts receiving pre-enforcement and often facial challenges to federal, state, or local policies on a range of matters fitting the culture wars label—restrictions, for example, on school policies regarding sexual orientation, the content of libraries, course offerings, vaccine mandates, and student loan forgiveness programs. I am not suggesting one or another

lawsuit on these topics is problematic, inappropriate, or not justiciable. What I am observing from my experience thus far on the Seventh Circuit is that culture wars litigation is a reality in our times.

IV. Racing to Courthouses Rather than Resorting to Speech

I am curious why these culture war disputes find a federal courthouse more attractive than discourse and dialogue. I have no doubt many factors explain the observation.

At this point some of you surely are thinking the answer is obvious. Dialogue on issues like gender identity, library collections, and public-school course offerings leads to dead ends, stalemates, if not shouting matches—literally or electronically—between mutually exclusive perspectives. Genuine dialogue, many reactions may run, seems so very scarce in America today.

Part of the reaction I get. Yesterday's image of the public square—Norman Rockwell–like gatherings of people coming together to discuss, debate, and find common ground on questions about local

affairs—seems absent, if not unrealistic for many. Pause and ask yourself the last time you experienced anything like that. I bet your list is short.

So much of our communication today does not occur in groups of any kind, much less with members of our communities. Quite the opposite: most of our interactions occur when we are communicating alone—each of us by ourselves sending and receiving information on our phones, tablets, and computers. Look around the next time you are in a coffee shop, restaurant line, airport lounge, or riding the bus, and notice how many people have their heads buried in a screen. I would plead guilty to that observation many times over.

It is not a point of criticism. I am more highlighting the magnitude of the challenge upon us as a people, as communities, and as a nation for the role and path of speech as the recipe for answering today's most difficult, socially divisive questions.

In preparing for this lecture, I learned that these same observations, made by many others, are what spawned an entire area of study on the decline of civic engagement, community connectedness, and

social discourse in the last several decades. Harvard political scientist Robert Putnam seems to have minted many of these observations in *Bowling Alone*—a book I have had a hard time putting down.

Putnam focuses on the social isolation and fragmentation that has gripped much of America—our limiting communications to those with similar views, and our hesitancy, if not unwillingness, to form social connections with those holding different ones. Bowling, Putnam observed, has remained popular, but with many no longer joining a team or league and instead preferring to bowl alone—much like the declines we have seen in people attending religious services, and joining the Rotary Club, the Scouts, or a card club. This trend has resulted in a loss of what Putnam calls "bridging social capital"—which has manifested itself in less democratic participation, among other negative consequences.

From my own perspective, we see this loss of bridging relationships, if you will, in many unfortunate ways today. Communicating so much less in-person and so much more electronically with one another has brought with it the incivility we see in today's

discourse. Too many people write things in a text and a post they would never say to someone in person.

Stepping back and thinking more broadly about the state of speech today, I have a hard time seeing much reality in Justice Holmes's famous metaphor—the marketplace of ideas. Justice Holmes invited us to see the exchange of ideas in a democratic society as a marketplace where speech comes together in ways that allow facts to disprove lies, good ideas to win out over bad ones, understanding to clarify confusion, and tolerance to defeat intolerance. Justice Holmes viewed speech as occurring within settings—be they the community square, meeting hall, local diner, or a neighbor's living room—where bridging social capital, as Robert Putnam would put it, was being built and deposited. Don't get me wrong: I want to see speech in those terms, but I'm doubtful the marketplace of ideas metaphor has much reality in today's socially isolated times.

To my mind, it seems much more accurate to see ourselves as living and communicating in many different marketplaces. And, if there is utility in adhering to the analogy, I would go a step further. I tend to think

that most of us have created our own marketplace where we communicate and, by and large, define what speech enters and what speech to transmit and push out. Indeed, we might even think of those marketplaces as little fishbowls that we confine ourselves within and populate as we choose—with our own news favorites, our own messaging feeds, and our own groups of friends and followers.

Once again, my observation is not all criticism. Indeed, I think a lot of this comes from necessity. Today's internet age, at the risk of understatement, is not like yesterday's town square. It's more like a massive ocean—full of more water than we can grasp or measure, always producing waves and storms, and leaving us feeling adrift. Our shopping carts, to add yet another metaphor, feel overloaded and the market too big, too packed, and open too many hours each day, leaving us not sure how to participate.

Those practical realities, at least as I see them, help explain why many create fishbowls or echo chambers: they feel easier and safer. But we achieve this tolerable equilibrium for ourselves only by limiting speech—

putting ourselves into a space where our ability to stay afloat comes from reducing the range of information and perspectives we consume. What often results, then, is skepticism, cynicism, and at times what seems like tremendous mistrust of public officials, fellow parents, and neighbors. Bridging divides, brokering compromise, and striving for middle ground seems bygone.

V. The Road Ahead

Let me try to bring all of this together with some observations I have come to since joining the federal judiciary and hearing appeals like the one presented in *Parents Protecting Our Children*.

By limiting the judicial power to the resolution of Cases or Controversies, Article III empowers Congress and the President at the national level, and it leaves matters closer to home to state and local governments. This is how we structured our democracy, with the Constitution creating a limited role for the federal judiciary. Fulfilling that responsibility is not about preferring the right lane or the left lane—and definitely not about promoting or pursuing any particular outcome—but

about resolving only concrete disputes between adverse parties. Keeping the federal judiciary in its designated lane promotes democracy by limiting the authority of the least democratic branch to weigh-in on concerns better reserved for law and policymakers and, by extension, we as people through our speech.

Oftentimes, of course, parties can establish standing—they can allege and show concrete and particularized injuries—and the judiciary will find itself smack in the middle of a matter of great social controversy and consequence. That comes with the job, if not our oath as judges. To restate the point in legal terms, federal courts—the Supreme Court has emphasized—shoulder a "virtually unflagging obligation" to "exercise the jurisdiction given them" by Congress.

No doubt that general precept is correct. But recognizing an obligation is not the same as knowing whether it applies in a particular circumstance. Indeed, in preparing my remarks today, I learned that the *Parents Protecting* decision itself generated ample commentary, with some thinking we got it right and others thinking we did not. I will leave it to

each of you to decide where you stand on the decision. And, yes, the pun was intended.

My own takeaway is to reinforce what I see as a relationship between Article III's Case or Controversy limitation and the role of speech in our constitutional democracy. By staying in their lane, federal courts leave certain matters to us as people to resolve in the first instance. Many times the resolution comes through the roles played by elected representatives—selected by us as voters based on the issues facing our nation, states, and local communities. Yet at other times we can and should voice our perspectives more directly—by attending a city council, school board, or any number of other policymaking meetings. By attending and speaking up we exercise a right our Constitution not only protects, but—as a structural matter—sees as essential to the operation of our democracy.

It misses the mark, in my respectful view, to see a decision like *Parents Protecting Our Children* as misapplying a conservative legal doctrine—Article III standing—to deliver a loss to an association of conservative parents genuinely concerned about the promulgation and

potential implementation of a liberal gender identity policy. The decision is better seen as a court respecting Article III's limitation and leaving, at least for the time being, questions about applications of the policy to ongoing dialogue—or perhaps robust questioning—in school board meetings or one-on-one meetings with principals or counselors.

Another observation may rush to mind for some of you. I very much sense that some today may feel that the biggest challenge is not so much individuals speaking up, but getting policymakers to listen, empathize, and show a willingness to find common ground. That too may be right, for there is no doubt our democracy is as complex as the challenges facing it in today's times. But one thing I believe for certain: the solution cannot be to give up on speech altogether.

Is the path forward easy or comfortable? Not by a long shot. Culture wars are very real and the concerns underpinning them often challenging and emotional. Perhaps what most concerns me is how we, as people in today's times, tend to approach them—not by leaving our self-selected echo chambers and engaging with each other on a new idea or

maybe just enough to find a tolerable solution or compromise. And if we do leave our fishbowls, I worry our first instinct is to race to a federal courthouse, short-changing the prospect of speech as a means through which to affect change in our democracy. We can make that choice, but Article III's Case or Controversy requirement may leave a federal court with no choice but to stay on the sideline.

My modest hope for this lecture is no more than inviting you to see the limited role the Constitution reserves for federal courts as explaining why, at times, answers to hard questions must come through speech—by using our voices to press for change or compromise. In the end for me, then, it is all about reinvigorating our sense of community, attending the local meeting, and engaging in respectful and informed dialogue. That's the recipe we endorsed in 1789, and the one we need to reinvent in 2025 by investing in relationships to bridge our many divides.

Let me restate the invitation in terms more near and dear to Marquette Law School. The namesake of today's lecture, E. Harold Hallows, served as Chief Justice of the Wisconsin Supreme Court and a

beloved law professor at this great school for almost 30 years. As I read the tributes to Chief Justice Hallows published after his passing, what stood out most was not this or that about his jurisprudence or scholarship, but an observation about how he lived his life—fully engaged. As a practicing lawyer in Milwaukee, he played an active role in local, state, and national bar associations as well as a range of civic, charitable, and religious organizations. He used his talents—and, importantly, his voice—to shape and better his community. Let this great example inspire us today.

Thank you, again, for the opportunity to share these thoughts with you.