The Justiciability Myth and the Concept of Law

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Introduction

A myth is an imaginary thing, person, or series of events ostensibly based on historical fact and used to explain or exemplify a cultural phenomenon.[1] Whether believed or not, a myth can have an impact on the decisional processes of living persons.[2] What better way to describe the phenomenon of justiciability, which does not exist but which has a profound impact on important constitutional decisional processes?

This Article contends that there is no such thing as justiciability, except for the narrow requirement that courts handle only judicial proceedings.[3] To say that a "case" before the court[4] is nonjusticiable is to say that the plaintiff has no judicially enforceable right. To say that the plaintiff has no judicial right is to make a conclusive statement about the nature of the "law" on which the plaintiff is relying; it is necessarily an exercise in interpretation and application of that law to say that the law applied by the court does not protect the plaintiff. Masking the holding

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Portions of this Article are based on the corresponding chapter in CONSTITUTIONAL LAW: PRINCIPLES AND POLICY (3d ed. 1987), which the author had the privilege of coauthoring with Dean Jerome Barron of George Washington University, Professor Thomas Dienes of George Washington University, and Professor Martin Redish of Northwestern University. If any of their words have crept into this Article, I apologize and claim inadvertence. The views expressed here are solely mine and should not be attributed to, nor derogate from, the other authors or the casebook itself.

1. WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1622 (1946).

2. Examples of myths that have had profound impact in the twentieth century would include Aryan Supremacy, nuclear deterrence, and human rights. If one says that the Western world has been dominated for centuries by the myths of the virgin birth and resurrection of Christ, there is a risk of offending others by seeming to conclude that those events were imaginary rather than real. It does not really matter for that purpose, however, whether the events were imaginary; the impact of the mythology is the same. With respect to a contemporary concept such as justiciability, it makes only a slight difference whether the concept is real or imaginary. The difference is in how one conceptualizes the analysis.

3. *See infra* note 153.

4. There is no question that the Supreme Court, or any other court with similar discretionary control over its docket, can avoid decision by refusing to accept a case.

in language that purports to decide only a "preliminary" or "threshold" issue hides a decision on the merits without elaborating the reasons behind the decision. Justiciability, like any other decision for or against a claimed "right," is a label that expresses a decision on the conflicting interests of the parties and the constraints that operate on each.

Many commentators have decried the tendency of the Burger Court[5] to avoid decision or to deny access to the courts,[6] while others have defended and rationalized the use of "decision avoidance" techniques.[7] It is not enough to critique the Court on these apparently practical bases. It is important to go further to show that the Court is altering the nature of constitutional "law."[8]

The point of this Article will be familiar to students of the debate over the existence or proper use of the "political question" doctrine. For Professors Wechsler[9] and Henkin,[10] exercise of the "political question" doctrine is no different from any other constitutional decision, because the decision to defer to the political branches is itself an interpretation of the constitutional commands. Professor Bickel, on the other hand, not only believed that the doctrine exists but that it should be used readily when the Court faces issues that are too monumental or beyond the Court's capacity.[11] Professor Redish agrees that the doctrine exists but argues that it should not.[12] This Article attempts to show that the Wechsler-Henkin position results in repudiating the very existence of the

5. On issues of justiciability, the Supreme Court of the last decade could be termed the Rehnquist Court because it is primarily Justice Rehnquist who has revitalized the doctrine. Many opinions of the Court authored by other Justices bear the unmistakable stamp of Rehnquist leadership on this issue. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984) (opinion by Justice O'Connor); Warth v. Seldin, 422 U.S. 490 (1975) (opinion by Justice Powell); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (opinion by Chief Justice Burger).

6. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52 (1985); Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985).

7. Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Sedler, *The Assertion of Constitutional* Jus Tertii*: A Substantive Approach*, 70 CALIF. L. REV. 1308 (1982).

8. Many of the Rehnquist decisions hold that the "law" is not as the plaintiff wishes it because any constitutional duties that the defendant might have are not judicially enforceable. The notion that the Constitution imposes duties that are not enforceable may be in keeping with some modern strands of legal philosophy. *See* C. WELLMAN, A THEORY OF RIGHTS 213 (1985). But it markedly changes the Constitution from a positive check on government into a set of hortatory directives that "We the People" may be quite incapable of enforcing.

9. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959).

10. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 213 (1972).

11. A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (2d ed. 1986).

12. Redish, *Judicial Review and the "Political Question"*, 79 NW. U.L. REV. 1031 (1985).

doctrine, and suggests that that conclusion extends to the related doctrines of standing and ripeness. In the process, this Article will deal with the various rationales for the existence of the doctrine to show that none is terribly persuasive.

I. The Appearance of Decision Avoidance

Courts dealing with common law and most statutory issues have rarely engaged in decision avoidance of the type claimed by courts dealing with constitutional issues. Common-law courts have not been reluctant to deny a litigant relief because he or she has no right which has been invaded or which the court can enforce against the defendant. For example, prior to the recognition of valid third-party beneficiary contracts, the beneficiary attempting to enforce a contract would be dismissed for lack of an enforceable right against the promisor; the promisor had no duty to the beneficiary.[13] Prior to the recognition of a duty by accountants to foreseeable third parties when preparing financial statements, the defrauded investor who relied on a company's financial statement would lose in a suit against the accountant; the accountant had no duty to unknown third parties.[14] Prior to recognition of the tort of infliction of emotional distress, a person could not recover for traumatic injuries unless there was physical contact inflicted by the defendant; the defendant had no duty to avoid causing emotional harm.[15] In each of these instances, the decision could be phrased as a lack of "standing" on the part of the plaintiff, but common-law courts have left no doubt about the nonexistence of a right on the part of the claimant and a lack of duty on the part of the defendant.

By contrast, the Supreme Court and other federal courts may purport to leave the existence of constitutional "rights" in limbo, at least for a period of time. The result of a "refusal to decide" is just as effective a denial of relief to that litigant and those similarly situated as a "decision on the merits," but the court purports to leave open the possibility that the claimed "right" exists. The right may exist in someone else or under different circumstances, or it may exist without being judicially enforceable.

13. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 17-1 (2d ed. 1977).

14. *Compare* Landell v. Lybrand, 264 Pa. 406, 107 A. 783 (1919) (no duty), *with* State Street Trust Co. v. Ernst, 15 N.E.2d 416 (N.Y. 1938) (duty of accountant to avoid gross negligence).

15. *Compare* Harned v. E-Z Finance Co., 254 S.W.2d 81, 82 (Tex. 1953) (the plaintiff must have been within the zone of contact), *with* RESTATEMENT (SECOND) OF TORTS § 46 comment k (1985) (physical proximity not required).

For example, the federal court may say that a black citizen has no standing to sue the Internal Revenue Service for failing to enforce nondiscriminatory policies against private schools.[16] Does the citizen nevertheless have a "right" to nondiscriminatory treatment by the school and does the school have a "duty" to be nondiscriminatory while receiving tax benefits? The answer is "perhaps"; we do not know whether other rights and duties exist, but we do know that the citizen does not have a judicial claim for IRS enforcement of any of the duties owed by the school.

Some scholars are highly critical of the federal courts' behavior in this regard. Professor Davis asks the question in this way:

> The natural system is that of the common law. If A and B are private parties and A hurts B, B has standing to get a determination of the legality of A's action. Why should not the law be the same, whether A is the government, an agency, an officer, or a private party, and whether the injury is to B's person, his physical property, or his intangible interests? Is not the natural system the simple one that injury in fact is enough for standing?[17]

The answer given by the federal courts essentially is that the formidable weapon of judicial review and the delicate role of the courts in a political system make it necessary for the courts to develop techniques for avoiding decision on some issues, leaving themselves free to come back to the issue in another setting at another time.[18] But what happens to the claimed "rights" during the period of limbo? Do they exist somewhere in ether, or do they enter a chrysallis to emerge later as full-grown adults?

Declaring an issue to be nonjusticiable leaves three points in the hands of the political branches. First is the question of whether the Constitution contains any limits on governmental action. Second is the question of what those limits should be if they exist at all. Third is whether the limits are transgressed in a given circumstance. The differences between this third point and a frank recognition that no limits exist at one extreme, or a review with deference to the political branches at the other, is found principally in the "debate value" of the constitutional provision. *United States v. Richardson*,[19] the "CIA funding" case, provides a good example. When the Court held that the requirement of a public accounting of funds was nonjusticiable, the debate on CIA funding in Congress

16. Allen v. Wright, 468 U.S. 737 (1984). *See also infra* notes 36-40 & 158-161 and accompanying text.

17. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 468 (1970).

18. A. BICKEL, *supra* note 11, at 146.

19. 418 U.S. 166 (1974).

became entirely political. Although it is possible for a member of Congress to argue that a particular secret use of funds is unconstitutional, nobody is likely to take the argument very seriously if the Court has already declared the provision to be nonenforceable. If, on the other hand, the Court had said that there must be an accounting of the total federal budget, with public disclosure of each expenditure required only when the expenditure was "significant" in terms of size or purpose, the debate could have centered on whether this specific use of funds was one that should be disclosed.

Thayer believed that the "debate value" of the Constitution was diminished by the exercise of judicial review and that legislators tended to become lazy and defer constitutional decisions to courts.[20] That is undoubtedly true, but the problem can hardly be turned into an attack on the foundations of judicial review itself. Unless we are willing to do away with judicial review entirely, the debate value of any particular provision turns on whether the provision is deemed to be a part of the higher law of the Constitution. Once having assumed the *Marbury* burden of following the law, for the Supreme Court then to leave both interpretation and enforcement to the political branches is to attempt to read the provision out of the governing law and make it a mere exhortation.

If the Rehnquist Court wishes to make the political branches more involved in interpreting and enforcing the Constitution, then it should disclaim the role of ultimate arbiter which the Court has held for almost 200 years. Without that step, the declaration of "nonjusticiability" of a constitutional provision places the provision in the category of "nonlaw."

A. The Standing Decisions Which Decide the Merits

1. The Citizen-Taxpayer Cases

The cases that best exemplify the attempt to avoid a question while deciding it are the citizen-taxpayer cases. In *Frothingham v. Mellon*,[21] the Court held that a taxpayer lacked standing to challenge a spending measure by Congress because the only restraint she alleged was one shared generally by all taxpayers. In *Flast v. Cohen*,[22] the Court held that a taxpayer had standing to challenge a spending measure when there was a restraint, such as the first amendment prohibition on establishment of religion, that was violated by the measure.[23] Then, in *Valley Forge*

20. J. THAYER, JOHN MARSHALL 103-07 (1901).

21. 262 U.S. 447 (1923).

22. 392 U.S. 83 (1968).

23. The precise way that the Court reached this sophistic conclusion was through the so-called dual nexus test. The taxpayer was required to establish a nexus between his status as a taxpayer and the measure challenged, which is inevitable with a spending measure. Secondly,

Christian College v. Americans United for Separation of Church and State, Inc.,[24] the Court held that a taxpayer did not have standing to challenge an executive decision to give away property rather than money for religious purposes. The Court noted two distinctions between the cases.

First, the Court said that the transfer was accomplished under the Property Clause rather than the Spending Clause and that *Flast* held the Establishment Clause to be a limitation only on Congress' spending power.[25] The opinion does not say what difference it makes that the school received land and buildings worth $577,500 rather than receiving $577,500 in cash to purchase land and buildings. It is hard to believe that the taxpayer-citizen has less interest in land than in cash. To distinguish *Flast* on this basis, the Court must hold that the Constitution prohibits transfers of cash without prohibiting transfers of land. *Valley Forge* thus stands as a pristine example of the Court's masking a holding on the merits behind the language of standing.[26]

Second, the *Valley Forge* Court stated that the transfer of property was accomplished without implicating the validity of a congressional enactment.[27] It is hard to believe that *Flast* would have been decided differently if the statute left the Department of Health, Education, and Welfare free to decide which schools received subsidies and the administrator had decided to give money to a religious school.[28] A statute dictating that money or land is to be given to religious schools leaves less doubt about the overall impact of a subsidy program than does a statute giving discretion to the executive branch, but the amount of money and

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the taxpayer status had to be linked to a constitutional prohibition. In *Flast*, the second link was found in the Establishment Clause's specific purpose of protecting taxpayers from having their money spent for religious purposes. Two points deserve emphasis. First, if there is a nexus between the taxpayer and the other two elements, then logically there must be a link between those two elements themselves. Second, the link between those two elements is only established if the constitutional provision itself protects against the measure under challenge. In other words, the taxpayer has standing if she is correct on the merits of the legal challenge.

24. 454 U.S. 464 (1982).

25. *Id.* at 479-80.

26. Perhaps we should not be too critical of this Court because the problem was actually created when *Flast* did precisely the same thing in response to the earlier example in *Frothingham*. The latter case was just as much a holding on the lack of limits on Congress' spending power as one could ask. The *Flast* opinion then went to substantial lengths to explain that the taxpayer had standing because the taxpayer was right on the merits. 392 U.S. at 103-06. By contrast, *Valley Forge* does not explain why the Establishment Clause does not operate on the Property Clause. *Flast* and *Valley Forge* thus make it easier to see that *Frothingham* initially was a decision on the merits.

27. 454 U.S. at 480.

28. That, of course, is exactly what happened in *Flast*. The purported distinction is not even accurate on the facts.

the impact on religious values may be just as great under either. In any event, these arguments do not avoid the merits of the case; they are the merits.

The Court has frequently disparaged citizen-litigants who present no "particularized" claim of injury not shared with the citizenry at large.[29] With regard to the *Valley Forge* plaintiffs, the Court said: "Although [they] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[30] The Court essentially held that there had been no "legal injury" because the Establishment Clause did not create a private right of action to sue the government official who violated it—thus imposing the same hurdle that had already been crossed in *Flast*. On this point, *Valley Forge* stands in flat contradiction to *Flast* on an important underlying constitutional issue.

The Court's handling of the "Public Accounting" and "Dual Office" Clauses provides two more examples of this phenomenon. In *Schlesinger v. Reservists' Committee To Stop the War*,[31] the Court held that a citizen did not have standing to enforce the constitutional proscription against members of Congress also serving in the armed forces. In *United States v. Richardson*,[32] the Court held that a taxpayer-citizen did not have standing to enforce the clause requiring a public accounting of all federal expenditures as against a CIA claim of confidentiality in its budget. In both of these cases, the Court pretended to leave open the possibility that the constitutional provision was being violated and that the citizen had a form of "right" to better treatment. But in both cases the Court held that there was no showing of harm to the complainant. The Court has held all that it can hold when it says that there is no judicially enforceable right against the government conduct. Whether the rights are enforceable in some other forum is not particularly helpful on this question, at least not when the other forum is provided by the party alleged to have violated those claimed rights.

The Public Accounting and Dual Office Clauses will not be enforced if a majority does not want them enforced. The Supreme Court has said that the minority cannot insist on their enforcement because there is no harm to the minority that is not also suffered by the majority. This asser-

29. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 508 (1975).
30. 454 U.S. at 485 (emphasis in original).
31. 418 U.S. 208 (1974).
32. 418 U.S. 166 (1974).

tion is simply wrong. The harm suffered by the minority in having a constitutional value ignored is shared by the majority, but the majority has declared that it does not feel aggrieved. That declaration does not change the harm but shows that it will not be redressed unless by the courts. If we accept the textual and structural bases of judicial review, then we must assume that the Constitution itself defines the harm or else the provision would not have been written down.[33] Moreover, in these two instances the constitutional value is one of the structure of government itself, perhaps the most important of constitutional principles.

2. Causation as an Issue Decided on the Pleadings

Several recent decisions predicate lack of standing on the lack of a direct causal link from a defendant's conduct to a plaintiff's claimed harm. In most of those decisions, the Court is implying that the plaintiff is suing the wrong person, which is nothing more than a statement that the defendant owes no duty. In others, the causal link might be established after trial, but the case never gets that far.

In *Simon v. Eastern Kentucky Welfare Rights Organization*,[34] the Court dismissed, on the basis of standing, a claim that the IRS should enforce a stringent definition of "charitable" in exempting hospitals from federal tax laws. The Court held that the plaintiffs could not show that the hospitals would render free health care if threatened with loss of their tax exemption, nor that IRS inaction had resulted in a lessening of charitable health care in the plaintiffs' community.[35] In *Allen v. Wright*,[36] the Court held that plaintiff citizens and parents of black school children had no standing to force the IRS to enforce nondiscrimination rules against tax exempt private schools. The dismissal was based at least in part on the belief that tax exempt status was not causing the discriminatory practices of private schools.[37] In *Simon* and *Allen*, it was barely possible that the plaintiffs' requested relief would not have brought complete satisfaction because the third parties—schools and hospitals—still could have behaved as they did before the lawsuit even without their tax exemption. The Court seized on this possibility to claim that the plaintiffs had not shown it was the government who had caused their harm, if any.

33. Professor Doernberg argues that many constitutional provisions were specifically designed to create "collective interests" that the Court is refusing to recognize. "The effect is that certain constitutional provisions effectively exist only at the whim and during the good will of the government, because the collective interest in enforcement of such provisions will not be protected by the courts." Doernberg, *supra* note 6, at 56.

34. 426 U.S. 26 (1976).

35. *Id.* at 42-44.

36. 468 U.S. 737 (1984).

37. *Id.* at 757-59.

One puzzling element is what exact procedural device the government could use for raising this type of "no causation" issue.[38] None of the normal procedural devices short of summary judgment is useful for asserting that the plaintiff may not be completely satisfied by the relief available or for raising factual issues of causation.[39] If the court decides, on summary judgment or after trial, that the plaintiff has shown no harm, then the decision against the plaintiff is not a refusal to decide the merits but is a final decision on the merits:

> The crucial question on the merits of the *Allen* claim was whether the government created a subsidy that in fact encouraged white students to leave the public schools. Under the majority's application of the traceability requirement, the connection between government action and the enrollment of white students in discriminatory private schools must be alleged in such a specific manner that there could be no speculation as to its truth. As a result, the plaintiffs were required to prove their case in the complaint without benefit of discovery or trial.[40]

Justice Brennan's dissent in *Allen* accuses the majority of "improperly requiring [the plaintiffs] to prove their case on the merits in order to defeat a motion to dismiss."[41] Justice Brennan was the author of another stinging dissent in *Warth v. Seldin*,[42] in which the Supreme Court dismissed on standing grounds a complaint by every conceivable complainant against the allegedly racially exclusive zoning practices of a suburban community. With respect to taxpayers in the nearby city who alleged that their taxes were higher as a result of having to provide all the low-income housing in the vicinity, the majority decided that their taxes were not set by the suburb but by the city and therefore the suburb had caused them no harm.[43] With regard to low-income plaintiffs who wanted to live in the suburb, the majority held that there was no showing that they could afford low-income housing there if it were built.[44] And with re-

38. In Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979), the Court emphasized that the plaintiffs were entitled to a trial on the issue of whether they had been harmed by the realtors' steering practices.

39. Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for a motion to dismiss a case on the ground that the complaint fails to state a claim on which relief could be granted. Rule 12(b)(3) deals with dismissal for lack of subject matter jurisdiction. Rule 19 states the tests for whether a case can go forward in the absence of concerned parties.

40. Nichol, *supra* note 6, at 640 n.27.

41. 468 U.S. at 775 (Brennan, J., dissenting).

42. 422 U.S. 490, 519 (1975) (Brennan, J., dissenting).

43. *Id.* at 508-10. Builders who claimed to have been deterred by the town practices from preparing applications for zoning or building permits for low-cost housing were said by the Court not to have shown a harm because they had not persevered to the end of the process. *Id.* at 516. In other words, their claims were not ripe because they lacked temerity.

44. *Id.* at 504-07.

gard to residents of the suburb, the majority held that they were not harmed despite their assertion of harm from living in a segregated environment.[45]

Justice Brennan pointed out that the factual allegations of the complaint must be taken as true on the motion to dismiss and that therefore the majority must mean that the alleged harms were not "legal" harms or harms to a "judicially cognizable" interest.[46] This is nothing other than a decision that the suburb had not violated any constitutional rights of the plaintiffs. It may be that this is a perfectly defensible result, but the language of standing provides no analysis by which to measure the denial of constitutional protection.

The causation requirements of the Court go well beyond the question of when causation must be shown. During a half-century of writing about tort law, Dean Leon Green tried to show that courts were on the wrong track when they confused issues of causation with issues of whether a defendant *should* be liable for the plaintiff's harm.[47] Dean Green sympathetically but roundly criticized courts for masking holdings on whether a defendant ought to be liable in the language of causation, saying that "we run ahead in our mind to grapple in terms of cause with the ultimate problems of responsibility though causal relation is obvious."[48] The result of that tendency, for Dean Green, was to mask holdings on policy as if they were mere holdings on fact.[49]

Why has the Burger Court fallen into the trap from which Dean Green tried to extricate courts in tort cases? A cynical view would be that the Court is masking its policy holdings deliberately to avoid criticism on policy grounds.[50] An explanation more in keeping with Dean

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45. *Id.* at 512-14.

46. *Id.* at 519-23 (Brennan, J. dissenting).

47. Green, *The Causal Relation Issue in Negligence Law,* 60 MICH. L. REV. 543, 549 (1962) ("Conduct is a factual concept; the victim's hurt is a factual concept; causal relation is a factual concept. Duty, negligence, and damages are legal concepts and depend upon different considerations from those involved in the determination of causal relation.").

48. *Id.* at 545-46.

49. In numerous meritorious cases the judgment of a trial court based on the verdict of a jury is upset, or liability is denied altogether. In other cases causation doctrines are drawn in when they are not needed, and the cases could be disposed of briefly in terms of duties and risks, understandable and acceptable to everyone. In still other cases the courts have reached a rational judgment on the basis of duties and risks, only to turn back in quest of judgments based on "cause" and sometimes nullify their own good work.

Green, *Duties, Risks, Causation Doctrines,* 41 TEX. L. REV. 42, 62 (1962).

50. It may well be that the Supreme Court has no desire to make sense of the standing doctrine. As the doctrine presently exists, standing can apparently be either rolled out or ignored in order to serve unstated and unexamined values. . . .

The Burger Court has raised the toughest standing hurdles in cases in which minorities have challenged exclusionary zoning practices, patterns of police brutality,

Green's sympathetic view of the matter is that the Court has found some of these challenges to be difficult on policy grounds and yet does not want to say that citizens are not entitled to some degree of expectations from their government in that area. Therefore, rather than deny any role for constitutional restraints, the Court limits the scope of those restraints by finding that the plaintiff cannot assert a harm that is covered by the restraint in question.

In *Simon, Allen,* and *Warth,* the Court could have forthrightly concluded that the plaintiffs were wrong in asserting that government conduct had violated their constitutional rights. Rather than insult the citizen, the Court held that the plaintiff had suffered no harm at the hands of government and that there were others more directly responsible. The problem with this approach is that it does not explain why the constitutional provision does not protect the plaintiff against the harm which has been alleged. The Court holds the constitutional provision does not cover this harm with no explanation in constitutional terms.

3. *Enforcing the Government's Obligation to Enforce the Law*

As mentioned above, some of the "causation" cases are actually attempts to compel the exercise of the government's law enforcement authority. In a few instances, the Court has dealt directly with whether a duty of enforcement is owed, but has still cast the holdings in standing language.

In *Linda R.S. v. Richard D.*,[51] an unwed mother brought suit seeking an injunction to require state officials to enforce a child support law against the father of her child. The Court said that "appellant has made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father,"[52] of the child support law. The Court also stated that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-

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and judicial or administrative bias. Poverty plaintiffs have been barred from challenging the discriminatory enforcement of child support obligations, and the tax-exempt status of hospitals that deny them emergency medical services. Litigants seeking to prevent government from contributing valuable property to religious organizations and to force public disclosure of the CIA budget have similarly fallen before an aggressive standing doctrine.

On the other hand, standing requirements have been eased in cases sustaining the constitutionality of the federal subsidy for the nuclear power plant industry, upholding Secretary [of the Interior James] Watt's offshore leasing policy, affirming the propriety of tuition tax credits to private schools, and condoning government support for chaplains and Christmas creches. One could perhaps be forgiven for confusing standing's agenda with that of the New Right.

Nichol, *supra* note 6, at 658-59.

51. 410 U.S. 614 (1973).

52. *Id.* at 618.

prosecution of another."[53]

Is this case based on a lack of causation or a lack of a right? Obviously, the government officials did not cause the father to refuse to pay child support, but on the other hand their prosecution of him might cause him to make the payments. Therefore, the question to be decided was whether the officials owed a duty to the mother to prosecute the father. The Court resolved this issue by dismissing for lack of standing, but provided no explanation for why there was no constitutional duty to enforce the law.

In *Adams v. Richardson*,[54] the plaintiffs were black students, citizens, and taxpayers. They alleged that officials of the Department of Health, Education, and Welfare had been "derelict in their duty to enforce Title VI of the Civil Rights Act of 1964 because they ha[d] not taken appropriate action to end segregation in public educational institutions receiving federal funds."[55] The government claimed that judicial review was unavailable because the question of enforcement was "committed to agency discretion," and relied on "cases in which courts have declined to disturb the exercise of prosecutorial discretion."[56] The court of appeals held that funding is a different matter and that a general policy of nonenforcement is reviewable.[57]

Most state courts take the view that prosecutorial discretion is unreviewable.[58] The reasons are hinted at in the *Adams* opinion. Prosecutors do not have sufficient personnel or funds to prosecute every case and therefore must make some selective choices for which there usually are no standards to judge whether the discretion was properly exercised in a given case. The result is to say that the citizen has no litigable interest in

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53. *Id.* at 619.

54. 480 F.2d 1159 (D.C. Cir. 1973).

55. *Id.* at 1161 (footnote omitted).

56. *Id.* at 1161-62.

57. [T]his suit is not brought to challenge HEW's decision with regard to a few school districts in the course of a generally effective enforcement program. To the contrary, appellants allege that HEW has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty. . . .

. . . HEW is actively supplying segregated institutions with federal funds, contrary to the expressed purposes of Congress. It is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools.

Id. at 1162.

58. *See, e.g.,* Pennsylvania Tavern Ass'n v. General Pa. Liquor Control Bd., 472 Pa. 567, 372 A.2d 1187, 1192 (1977) (Roberts, J., concurring). It has been suggested that a court could impose some parameters for an agency's prosecutorial discretion when due process concerns are raised or when the agency's decision violates the state Administrative Procedure Act. Surf Attractions, Inc. v. Department of Business Reg., 480 So. 2d 1354, 1356 (Fla. App. 1985).

whether a given case should be prosecuted, much like the second rationale in *Linda R.S.*[59]

After *Linda R.S.*, *Adams* might not be decided the same way today, although the funding rationale might still be maintained. The reasons would be much more understandable and palatable if openly and honestly stated in terms of the lack of an enforceable duty to citizens on the part of government law enforcement agencies.

The citizen's law enforcement issue arose in an unusual way in *Diamond v. Charles*.[60] Dr. Diamond intervened at the district court level in a suit brought by other physicians against a new Illinois statute regulating abortions. When the statute was declared unconstitutional in part, the State appealed to the Court of Appeals for the Seventh Circuit, which affirmed. Dr. Diamond then appealed to the Supreme Court, but the State did not. The Court, citing *Linda R.S.*, held that Dr. Diamond had no standing to pursue the appeal.[61] The Court also dismissed as too speculative Dr. Diamond's claims that if the abortion law were upheld, there would be more babies born and thus his practice as a pediatrician would improve.[62] *Diamond* is a wholly unexceptional example of the lack of a duty to prosecute. Why it should use special language such as standing is a mystery.

4. Third-Party Standing

The *Warth v. Seldin*[63] opinion provides a concrete example of the anomaly called "third-party" assertion of rights. The Court says that "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[64] For this purpose, with respect to the low-income and minority plaintiffs, the court will "assume . . . that such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded."[65] Then, with respect to the white taxpayers of Rochester and the white residents of Penfield, the Court finds that those plaintiffs "do not, even if they could, assert any personal right under the Constitution or any statute."[66] This is an adjudication on the merits of their claim to personal rights. Without saying

59. If a state prosecutor refuses to enforce a provision of state law, she might be subject to quo warranto action challenging her fitness to hold office.

60. 106 S. Ct. 1697 (1986).

61. *Id.* at 1704.

62. *Id.* at 1705.

63. 422 U.S. 490 (1975).

64. *Id.* at 498.

65. *Id.* at 502.

66. *Id.* at 509.

why, the Court has held that these people have no right to have Penfield integrated.

The contraception cases present another example. In *Tileston v. Ullman*,[67] the Court held that a doctor had no standing to challenge Connecticut's prohibition on birth control. Twenty-two years later, in *Griswold v. Connecticut*,[68] a doctor and the nonphysician director of a birth control clinic were convicted of aiding and abetting married persons in violating the criminal provisions of the Connecticut birth control statute. The Court held that these defendants had standing to raise the rights of privacy of their patients and reversed the convictions.[69] The Court emphasized that the defendants had a "professional relationship" with the persons whose rights were at stake. In *Eisenstadt v. Baird*,[70] a pharmacist was allowed to raise the rights of unmarried persons to receive contraceptives. After *Griswold* and *Eisenstadt*, it must be true that a health care provider has a right to distribute contraceptives. It makes no sense that the provider must rely on the rights of the recipients to successfully establish standing.

In *Barrows v. Jackson*,[71] the Supreme Court allowed white property owners to resist state judicial enforcement of a racially restrictive covenant on the sale of property. The owners had entered into a contract to sell their property to a black family in violation of a mutual restrictive covenant which bound all the owners within a certain neighborhood. When neighbors sued for damages, the sellers resisted on the ground that state enforcement of the covenant would constitute a violation of the equal protection rights of the black purchasers. The Court assumed that the sellers had no equal protection rights at stake, but focused on the practical inability of the black purchasers to assert their own rights and granted the sellers standing to assert those rights.

The seller in *Barrows* or the doctor in *Griswold* could be compared to the beneficiary of an insurance policy. The process of denying or conferring rights in the constitutional cases does not differ in any significant degree from a court's deciding whether the third-party beneficiary has a "right" to enforce a contract. Courts at common law have not worried about letting the beneficiary enforce rights of the original party to the contract but instead have focused directly on whether the beneficiary should be able to obtain relief.[72] Once the sellers or the doctors are al-

67. 318 U.S. 44 (1943).
68. 381 U.S. 479 (1965).
69. *Id.* at 481.
70. 405 U.S. 438 (1972).
71. 346 U.S. 249 (1953).
72. J. CALAMARI & J. PERILLO, *supra* note 13, at 605.

lowed to obtain judicial relief, it makes no sense to say that they are asserting someone else's rights.

There are, of course, cases in which a person attempts to represent another without authority to do so. For example, the Supreme Court decided in *Bender v. Williamsport Area School District*[73] that an individual member of the school board lacked standing to make an appeal from a district court decision regarding the school organization's wish to conduct prayer sessions on school property. The Court held that one member of a "collegial body" cannot act for the body itself.[74] These are not cases in which a person is attempting to rely on another's rights to his own benefit, but instead, they are examples of attempts to bind another person to a position that the other does not assert. In these instances, the courts are perfectly correct in insisting upon the requisite degree of authority.

Professor Sedler once advocated the creation of a body of rules that would recognize standing in "third-party" cases and labelled it "*jus tertii.*"[75] He has reexamined his position in light of more recent cases and has come to the following conclusion:

> I now believe that as a general proposition, a party should be able to prevail in constitutional litigation only if he can show some violation of his own rights. . . . [I]n the cases in which the assertion of constitutional jus tertii was permitted, the application of the challenged law or government action to the party asserting jus tertii was itself unconstitutional or otherwise invalid. Conversely, in the cases in which the assertion of jus tertii was not permitted, any possible violation of third party rights was irrelevant to a determination of the constitutionality of the law as applied to the litigant.[76]

Professor Sedler argues that the real question in any case is whether the law being challenged violates substantive constitutional protections to be afforded the party before the court. That position is precisely the same as the one advocated in this Article. Sedler might be more restrictive in the number of instances in which a law would be found unconstitutional as applied to the litigant before the court, but at least he would not phrase the dismissal in terms that obscure the factors being used for decision: either the statute violates the plaintiff's constitutional rights or it does not.

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73. 106 S. Ct. 1326 (1986).

74. *Id.* at 1333.

75. Sedler, *Standing to Assert Constitutional* Jus Tertii *in the Supreme Court,* 71 YALE L.J. 599 (1962).

76. Sedler, *supra* note 7, at 1309.

Some rules of law, such as the trademark rules,[77] explicitly base legal rights on the effects of the defendant's conduct on absent parties.[78] If one person is sued by another for using a name similar to the tradename of the plaintiff, the central question is whether consumers will be confused about which product they are patronizing.[79] The rule of law itself makes injury to third persons the touchstone for defining the rights of the plaintiff. There may well be constitutional provisions that carry this type of protection for the interests of third persons, but under the standing rubric one would never find out because the court would refuse to listen to the arguments of the parties. When the court refuses to listen, it is deciding that the constitutional rule does not carry the protection claimed for it.

5. *Summary—Standing as a Decision-Avoidance Technique*

Oddly enough, it may be surprising to realize that even Professor Bickel doubted that the standing rubric could be used in many cases to avoid decision. In discussing the *Tennessee Valley Authority* cases, he provided the following analysis.[80] In the case in which an existing company was said to have no standing to challenge the existence of the TVA, the Court decided the ultimate constitutional issue by holding that one has no right to be free of competition from a federally chartered entity.[81] In the case of the shareholders' suit against their own company which was selling out to the TVA, Bickel argued that the Court should have dismissed their claim for lack of standing because the shareholders had no right from the "general law" to block the sale of their company, regardless of the legality of the TVA.[82] Of course, the latter example would be as much a decision on the merits as the former, but it would be a decision on state law grounds rather than on the constitutional issues.

77. *See* 15 U.S.C. §§ 1116-1117 (1982).

78. Every first-year law student is taught to argue the "public interest" in the most routine legal arguments. These arguments are nothing but an appeal to how a decision in the case of *A v. B* will affect the interests of persons not before the court. For example, in a products liability case, the impact on consumers of having to pay more for the product will be balanced against the desirability of spreading the risk of loss. The plaintiff essentially is arguing the interests of other injured persons and the defendant is arguing the interests of consumers, but both are arguing about their own legal rights.

79. Waterman Co. v. Modern Pen Co., 235 U.S. 88 (1914); John B. Stetson Co. v. Stephen L. Stetson Co., 85 F.2d 586 (2d Cir. 1936).

80. A. BICKEL, *supra* note 11, at 119-20.

81. *Id.* at 120 (discussing Tennesse Elec. Power Co. v. TVA, 306 U.S. 118 (1939)):

> [T]he Court was either deciding, on the merits but without opinion, that the Constitution does not protect against competition by such a governmental unit as the TVA, or that the case was for some discretionary reason an unsuitable one in which to pass on the constitutionality of the Tennessee Valley Authority.

82. *Id.* at 119-21 (discussing Ashwander v. TVA, 297 U.S. 288 (1936)).

Similarly, in discussing whether a film distributor could claim a first amendment right to be free of a licensing scheme without first submitting his film and being denied a permit, Bickel asserted that the plaintiff certainly had standing to adjudicate the question of whether the licensing scheme was void on its face in advance of enforcement.[83] For Bickel, however, the case for decision-avoidance often could be made on the basis of the ripeness doctrine when standing was unavailable.

B. Ripeness

Ripeness refers to whether there is a current controversy. Unfortunately, however, the Court has used it in a way that decides issues while pretending to wait for a more concrete case. In *United Public Workers v. Mitchell*,[84] challenge was made to the Hatch Act's prohibition on political activities by public employees.[85] Only one plaintiff had not yet been threatened with enforcement. The Court held that the "threat of interference by the Commission with rights of these appellants . . . implied by the existence of the law and the regulations" was not a current constitutional violation.[86] There is no point to using language of ripeness when at least that issue has been decided. The Court in *Socialist Labor Party v. Gilligan*[87] decided that the Party was not unconstitutionally injured by being forced to file an affidavit and oath before it could have access to the ballot. Did the Court gain ground by pretending not to decide the "substantive merits" of the dispute?

Gilligan may be close in spirit to *Poe v. Ullman*,[88] in which the Court held that the Connecticut birth control statute presented no ripe controversy because it had not been enforced in decades. It has been argued that *Poe*, along with *Tileston v. Ullman*,[89] forced the political process of Connecticut to come to terms with its own "responsibility for decision,"[90] and also that it allowed the Court to reflect on the mood of

83. *Id.* at 135 (discussing Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961)):
> There is and there ought to be no rule of constitutional standing that, in order to construct a justiciable case, a plaintiff must submit to the very burden whose validity he wishes to contest. It is necessary to comply with the other conditions of a licensing process before one can object to denial of a license on this or that specific ground, because there is no injury before the denial. But no like necessity arises before one can object to licensing altogether, for then the very requirement constitutes the injury alleged to be illegal.

84. 330 U.S. 75 (1947).
85. 7 U.S.C. §§ 361a-390k (1940).
86. 330 U.S. at 91.
87. 406 U.S. 583 (1972).
88. 367 U.S. 497 (1961).
89. 318 U.S. 44 (1943).
90. A. BICKEL, *supra* note 11, at 147.

the country for several years before reaching the constitutional privacy issue. The result, supposedly, is that the Court was in a stronger position with the public when it decided *Griswold*. But what of the "rights" of the people in Connecticut who misguidedly followed the law for those many years, some of whom may have ended up with unwanted children with all the attendant social ills that accompany that phenomenon?[91]

Mitchell, *Gilligan*, and *Poe* each teach that a person who wants to challenge a criminal statute alleged to be restricting his or her first amendment freedoms must first violate the statute and be prosecuted before the Court will listen to the complaint. The social utility of forcing people to violate an existing law is certainly open to question, particularly when their first amendment interests in speech and privacy are at stake.[92]

The Supreme Court has recognized at least one rather interesting exception to the doctrine. In *Ex parte Young*,[93] the shareholders of a railroad company sought to enjoin the State Attorney General from enforcing a rate regulation scheme. Violation of the regulations would have occasioned a heavy fine. The Court held that the railroad need not violate the statute and face the risk of having to pay the fine if its constitutional attack failed; the risk was deemed to be excessive in light of the benefits to be gained from violation. In dozens, if not hundreds, of cases businesses have been able to challenge state and local government regulation or licensing schemes without having to violate the provisions of the law prior to the challenge.[94] Is it fair to say that the Court values corporate dollars more than individual interests in free speech and privacy, or is there some other explanation?

In *Steffel v. Thompson*,[95] the plaintiff sought a declaratory judgment that a state trespass law could not be applied to his distribution of leaflets

91. The answer given by Professor Bickel was that "[o]ne day the people of Connecticut may enjoy freedom from birth-control regulation without being guaranteed it by the judges, and it is much better that way, if possible, even at some intermediate cost to Dr. Buxton [one of the plaintiffs in *Poe*]." *Id.* at 156.

This is an extremely cold-hearted view even as far as it goes. It focuses exclusively on the practice of a doctor and totally ignores the human costs and potential tragedies of teen-age pregnancy, for example. Moreover, it assumes the very question of whether the Court could and did actually avoid decision in *Poe*. The truth of the matter is that the Court decided Dr. Buxton had no present constitutionally guaranteed right to dispense contraceptives to his patients.

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

93. 209 U.S. 123 (1908).

94. *See, e.g.*, Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

95. 415 U.S. 452 (1974).

at a private shopping center. He and a companion had gone to the shopping center to hand out leaflets protesting the Vietnam War. The police were called by the shopping center management and threatened to arrest the leafletters if they did not leave. Steffel left but his companion defied the order and continued handing out leaflets. The companion was arrested, prosecuted, and convicted of criminal trespass. Steffel then sought federal court relief. The Supreme Court held that the specific threat in light of specific conduct was sufficient to provide a live controversy for a declaratory judgment that the statute was unconstitutional as applied to that conduct.[96]

Steffel shows rather clearly that the ripeness issue is merely whether a remedy can be framed in a given case. The problem is determining what is protected by the judgment in *Steffel*. What if Steffel goes back to the shopping center at a more crowded time of day? With leaflets on a different subject? With several rough-looking companions? The difficulty with deciding a case in advance of enforcement, unless the decision is addressed to the validity of the statute on its face, lies in whether a decree can be formulated with sufficient specificity to give both sides notice of what is allowed and what is prohibited. Whenever a statute is challenged as applied, in advance of enforcement, the plaintiff must be able to show that a decree can be framed to take into account the relevant facts without becoming too vague for later enforcement of the decree itself.[97]

Mitchell presented both variations on the theme. The plaintiff intended to challenge the Hatch Act on its face, claiming that the statute, by its mere existence, interfered with first amendment rights. The Court rejected this challenge and then looked to whether the statute might be unconstitutional as applied. Here the information in advance of enforcement left the situation open to too much speculation for the confident drafting of a decree.[98]

Thus, all the cases except *Poe*, *Gilligan*, and the facial challenge in *Mitchell* can be explained as mere problems in drafting remedies. *Gilligan* and the facial challenge in *Mitchell* were improperly dismissed without a full explanation of why the statutes were not unconstitutional restraints on the current first amendment interests of the plaintiffs. In *Mitchell* the Court actually gave a reasonable explanation that some

96. *Id.* at 458-60. A similar result was reached in Dombrowski v. Pfister, 380 U.S. 479 (1965), in which the Court decided that threatened enforcement of a state antisubversive statute had a "chilling effect" on rights of free expression.

97. *Dombrowski* and *Young* presented no similar problem because the statutes were challenged on their faces rather than as applied.

98. 330 U.S. 75 (1947).

types of political campaigning by public employees are not protected by the First Amendment. In this regard, *Mitchell* required no special "ripeness" language; it was enough to explain why the plaintiff lost. The *Gilligan* opinion lacks any explanation of this type.

The *Poe* dilemma is that of a Court presented with an issue that may never come to fruition in an enforcement action. The Court therefore wonders why it should be bothered. The reason is that one might actually have respect for the "law" that transcends his or her moral scruples. For the person who wants to obey the law, disobedience to the only extant legal provision—the state statute—is unacceptable until the Court says that the law is otherwise. Thus, the result in *Poe* is actually to decide that the law is what the statute says. *Griswold* was not truly a return to an issue that had been ducked years before but an overruling of prior case law, declaring the law to be different from what it had been after *Poe*.

C. Political Questions

The most purposeful of the nonjusticiability doctrines is the political question doctrine, which claims that an issue is for one of the political branches to decide. It is so avowedly a refusal to decide what law applies that at least one scholar has advocated that some of the standing cases should actually be decided under the political question rubric.[99] In reality, however, the doctrine is more easily demonstrated to be nonexistent than any other nonjusticiability doctrine. There is no more clear application of law by the Court than to decide that what the political branches have done is within the scope of their discretion. On those few occasions when a court has dismissed a suit under the political question doctrine, the result is an unmistakable decision on the merits of the controversy. It is surprising that, with all the attention that has been focused over the years on this doctrine,[100] the Supreme Court has almost never used it. One explanation is that the Court has readily available tools for avoiding the need even to approach these kinds of cases through denial of certiorari or summary affirmance of appeals.

The only Supreme Court cases explicitly analyzing or applying the political question doctrine are *Luther v. Borden*,[101] *Coleman v. Miller*,[102]

99. Doernberg, *supra* note 6, at 68.

100. *See* A. BICKEL, *supra* note 11, at 183-97; L. HENKIN, *supra* note 10, at 210-16; Redish, *supra* note 12, at 599-600; Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517 (1966); Wechsler, *supra* note 9, at 5.

101. 48 U.S. (7 How.) 1 (1849).

102. 307 U.S. 433 (1939).

Colegrove v. Green,[103] *Baker v. Carr*,[104] *Powell v. McCormack*,[105] and *Goldwater v. Carter*.[106] *Baker* and *Powell* rejected application of the doctrine; in *Colegrove* and *Carter*, the political question rationale commanded only a plurality of the Court. The original political question cases, *Luther v. Borden* and *Coleman v. Miller*, thus stand as the only clear applications of the doctrine. The most thorough analysis is found in *Baker v. Carr*, and this analysis merits consideration. It will then be helpful to look at the effect of some lower court cases that applied the doctrine to issues arising out of the Vietnam War.

1. Luther v. Borden *and* Coleman v. Miller

Luther presented the Court with a dispute over which of two rival factions was the lawful government of Rhode Island. The old "charter" government derived its authority from the pre-Revolution colonial charter and was elected by votes of freeholders pursuant to the charter. The "convention" government purported to derive authority from a new constitution drawn up at a self-appointed convention and ratified by votes in the various counties. The vote under the new constitution was extended to all persons. Luther was a leader of the new government whose house was invaded by the old government. His trespass action was dismissed on the theory that the old government was the lawful government and could exercise its police power against a rebellion.

The Supreme Court's affirmance in *Luther* was premised on two grounds. First, the state courts had recognized the old government as the lawful one; in fact, the new government had never been able to function as a government.[107] Second, it was the duty of Congress and the

103. 328 U.S. 549 (1946).
104. 369 U.S. 186 (1962).
105. 395 U.S. 486 (1969).
106. 444 U.S. 996 (1979).
107. Although the Court relied on the holding by the state courts regarding the composition of the state's own government, it pointed out reasons that could have justified ignoring that holding altogether.

> Indeed, we do not see how the question could be tried and judicially decided in a State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.

48 U.S. (7 How.) at 39-40.

President to determine what was a republican form of government. The route to the latter conclusion was indirect and questionable at best. The Court stated that "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority."[108] The clause of the Constitution promising presidential intervention to quell uprisings within a state made it the President's duty to determine which of the two competing factions represented the lawful government of any state at any given time.

The problem with *Luther* is that the Court in fact did not stay out of the dispute. In reality, it decided that the old charter government was the lawful government of Rhode Island. It did so by accepting the decision of the "political" branches on the matter.[109] As a consequence, Luther's damage action was dismissed because the defendant's actions were lawful.

The Court's reasons for accepting the decision of one of the political branches on this issue are identical to the reasons given for accepting the President's decision on which is the lawfully recognized government of a foreign nation.[110] When a court applies the President's decision to recognize a certain government, it is doing nothing different from its normal function of applying to the dispute the law given by another branch. The political branches make decisions; the courts interpret and apply them. It requires no special doctrine to defer to the decisional authority of the other branches on subjects within their special competence.[111]

Curiously, however, even in *Luther* the Court reserved some notion of legal standards in the Guarantee Clause:[112] "Unquestionably, a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Con-

108. *Id.* at 42.

109. Whether the people of a state have "changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it." *Id.* at 47.

110. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-12 (1964); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); L. HENKIN, *supra* note 10, at 47.

111. Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 608 (1976). To Professor Redish, the Henkin analysis borrowed here "amounts to little more than a play on words." Redish, *supra* note 12, at 1036. But the difference is only that Redish looks to the manner of the Court's decision, while Henkin and this author look at the results of the Court's decision. Everything that Redish says about the inappropriateness of the Court's analysis can certainly be shared by an adherent of the view that the Court actually decided the issues before it.

112. U.S. CONST. art. IV, § 4.

gress to overthrow it."[113] If the question of what is a republican form of government was truly nonjusticiable, from what did the Court derive the authority for this titillating bit of dictum? Further, if Congress has a "duty" to act, by what means is that duty to be enforced? Unless the Court is willing to enjoin congressional action, the answer must be that the duty is enforceable only through political persuasion. The duty is not a judicially enforceable duty and therefore not a "legal" duty by the normal meaning of our language.

Coleman v. Miller[114] could be described as a "political question" case or as a straightforward decision on the merits. When Kansas attempted to ratify the Child Labor Amendment many years after it was promulgated, the plaintiffs challenged the attempt on the ground that the Constitution permitted a proposed amendment to lie before the states for only a "reasonable" period of time. The Court rejected the argument that an open-ended ratification period would result in a potential failure of consensus among the states at any one time. In dictum, the Court stated that Congress could set an expiration date if it chose, but the presence of that option did not affect the conclusion that the Court could not set a limit.[115] *Coleman* is nothing other than a decision that the Constitution alone does not impose an expiration date. No special doctrine is implicated in that constitutional interpretation.

2. Baker v. Carr *and the Criteria of Political Questions*

By the time *Baker v. Carr*[116] reached the Supreme Court, along with several other challenges to the apportionment of mostly Southern and Midwestern legislatures, the Court had been saying in dictum and nonmajority opinions for sixteen years that malapportionment was bad but had been waiting for the legislatures to cure the problem themselves.[117] The initial problem faced by the Court in *Baker v. Carr* was

113. 48 U.S. (7 How.) at 45.

114. 307 U.S. 433 (1939).

115. *Id.* at 451-54.

116. 369 U.S. 186 (1962).

117. Most of the early cases challenging state legislative malapportionment did so on the grounds that it denied a republican form of government or that it diluted voting rights. Most state legislatures were modeled after the bicameral approach of the United States Congress, in which one house is designed to represent roughly equal blocs of people and the other house is designed to represent historic political units. Toward the end of the nineteenth century, population shifts began to have a dramatic impact on the social and political scene as families tended to congregate in cities. These rapid shifts in population were not followed in many states by redesign of voting districts. The urban districts contained many more people than the rural districts on as much as a 20:1 ratio. Imagine, for example, a Georgia Legislature in which Atlanta had one seat out of twenty-four even though more than half the people in the state lived in Atlanta. The result would be that rural interests would dominate the legislature

Justice Frankfurter's language in *Colegrove*[118] describing legislative apportionment as a "political thicket" into which the courts should not venture.

Justice Brennan's opinion for the *Baker* Court identified six indicia of a political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.[119]

The first two elements invoke the nature of the judicial function, while the last four refer in various ways to compelling needs for deference to the other branches of government. Justice Brennan's categories are useful for comparing other cases.

a. Commitment to Another Branch

The first indicator of a political question described by Justice Brennan is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Professor Wechsler articulates what has come to be known as the "classical" form of the political ques-

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and make it impossible for the bulk of the people to have their way in a democratic process. Once a system of this type was in place, it would be impossible for the legislature to reapportion itself because the legislators would have no incentive to district themselves out of a seat. Challenges to this type of situation began arriving in the Supreme Court immediately after World War II. In Colegrove v. Green, 328 U.S. 549 (1945), the Supreme Court could muster only a 3-1-3 vote with Justice Frankfurter announcing the result and authoring the plurality opinion. In that opinion, he described legislative apportionment as a "political thicket" into which courts should not venture. *Id.* at 556. MacDougall v. Green, 335 U.S. 281 (1948), took tentative steps toward viewing the problem as a denial of equal protection, stating in dictum that a state could not permit unequal representation in its legislature. South v. Peters, 339 U.S. 276 (1950), dismissed a reapportionment request on the now outdated notion that a court of equity will not order affirmative steps to be taken by a defendant. Then, in Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court was faced with a ludicrous example of racial discrimination when a town redrew its own boundaries into a 28-sided figure to exclude black residents from voting in city elections; this action was declared to be a denial of equal protection and attention was focused on dealing with state legislatures. For further background, see Pollak, *Judicial Power and the Politics of the People,* 72 YALE L.J. 81 (1962).

118. 328 U.S. at 556.

119. 369 U.S. at 217.

tion doctrine by asserting that this is the only acceptable use of the doctrine:

> [A]ll the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation. . . . That . . . is *toto caelo* different from a broad discretion to abstain or intervene.[120]

Under this view of the doctrine, the Court would actually decide the constitutional issue by deciding that the other branch of government had acted within its power under the Constitution.[121]

In *Baker v. Carr*, Justice Brennan had no difficulty with this question because the Tennessee Legislature was not a coordinate body but a subordinate body. For Professor Wechsler, however, the Court should have deferred to the powers of Congress with regard to election regulations and the Guarantee Clause. In his view, courts were excluded from "passing on a constitutional objection to state gerrymanders" because that job was for Congress.[122]

This elaboration of the Wechsler position unfortunately obscures the clarity of his view that political question reasoning is just constitutional interpretation. As in *Richardson* and *Coleman*, the presence of a potential congressional remedy is extraneous to the question of a judicial remedy.[123] That some third party, in this instance Congress, could invalidate the scheme is almost irrelevant to the question before the Court of the constitutional rights and duties of the Tennessee Legislature and voters. It is equally irrelevant that Congress would be acting under constitutional mandates so long as those mandates are different from the ones urged on the Court. What the Wechsler position does not do is permit the Court to "refuse decision" on a provision that can be enforced later by Congress.

The Court's role in deciding whether an issue is committed to an-

120. Wechsler, *supra* note 9, at 7-9.

121. *Id.* at 8-9.

122. *Id.* at 9.

123. This view was consistent with Professor Wechsler's desire to depoliticize the Court, guarding its judicial review power from political attack by using the power only when neutral principles were required. Professor Weschler's reliance on Chief Justice Marshall's statement in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), that a "Court has no more power to decline the exercise of jurisdiction which is given than to usurp that which is not", was designed to counter what he viewed to be the very dangerous suggestion that a court has discretion and a choice about whether to become involved in a volatile political dispute. The neutral principles that he advocated would often leave the court out of the dispute but give it greater legitimacy when it was forced to intervene.

other branch is well illustrated by *Powell v. McCormack*.[124] Adam Clayton Powell was reelected to Congress while under heavy suspicion of wrongdoing. The House of Representatives refused to seat him on the grounds of improprieties committed as a Congressman. Although article one, section five of the Constitution provides that "[e]ach House shall be the Judge of the Qualifications of its own Members," the Court rejected the argument that this constituted a textual commitment of "judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications."[125] The "qualifications," of which each House is to be the sole judge, are those listed in article one, section two—age, citizenship, and residence.

Professor Dixon made the Frankfurter-Bickel argument that the Court should have stayed out of the *Powell* dispute simply because it was politically volatile. "The proper formulation [of the political question doctrine] is: Even if there be no 'textually demonstrable' (or historically verifiable) *commitment*, should the judiciary proceed to *exercise* the jurisdiction it concededly possesses?"[126] In response, Professor Laughlin pointed out that the Court could not have avoided the dispute in any event. "A decision that the *Powell* case posed a 'political question' would have been a victory for the respondents of equal or greater magnitude than a decision that Powell was properly excluded under Article I, Section 5, for it would have conceded that Congress has unfettered power to exclude members-elect for whatever reason it chooses."[127] Surely Laughlin has the better of the arguments, at least in describing the results if not the techniques of adjudication.

b. Standards To Be Applied—Is There Law?

The "lack of judicially discoverable and manageable standards for resolving" a question is listed by Justice Brennan in *Baker* as the second of the six indicia of a political question.[128] The "standards" applying to the apportionment of legislatures were said by Justice Brennan to be familiar questions of discrimination.[129] But *Baker* left some important questions to be resolved in future litigation, including whether areas with greater natural resources or more dispersed populations were entitled to more votes per person than populated areas; whether historical boundaries (such as county lines) were entitled to weight in the apportionment

124. 395 U.S. 486 (1969).
125. *Id.* at 548.
126. Dixon, *Comments on* Powell v. McCormack, 17 UCLA L. REV. 1, 111 (1969).
127. *Id.* at 103.
128. *Baker*, 369 U.S. at 217.
129. *Id.* at 209-10.

process; and whether one house of a two-house legislature could reflect unequal population, as the United States Senate does, for an antidemocratic checking function.[130] Ultimately, the choice among any of the infinite methods of drawing voting district lines is at best a nontraditional judicial function.

After several intermediate steps, the Court squarely faced its self-created dilemma in *Reynolds v. Sims*.[131] The Court decided that "legislators represent people, not trees,"[132] a conclusion that is not altogether obvious from the Constitution. The Court adopted as its standard of review and relief the view that each person's vote in a state legislative election should count the same as every other person's vote. The Court thus instituted the one person, one vote principle.[133] Over time, however, application of this principle has yielded to pressures of slight variations from district to district, reflection of historic local boundaries, or difficulties of administration. The Court now seems willing to accept up to a ten percent variance among district populations if there is a nondiscriminatory reason for the variance.[134]

If the Court had thought ahead at the time of *Baker* to the question of what standards it would be using after *Reynolds*, it would have been able to deal with the "political" argument more cleanly. If *Reynolds* and its progeny had been decided differently, *Baker* might have been nonjusticiable. For example, if there were no standards and the choice of drawing district lines was one of choosing from among infinite numbers of equally valid proposals, the task is no more a judicial task than determining the appropriate level of taxation or the appropriate level of rates for a public utility. Those are the nonjusticiable issues, the ones that call for judgment based on no standards other than political desirability or expediency.

When the Court decided in *Baker* that there were standards available for judging the legality of particular districting schemes, it should have known what those standards were. This was as much a decision on the merits as would have been a decision that the issues were nonjusticiable because they called for purely political judgments. Conversely, to have dismissed the case on the basis of a lack of standards would have been a victory on the merits for the sitting legislature.

130. Reynolds v. Sims, 377 U.S. 533, 578-81 (1964).

131. *Id.*

132. *Id.* at 562.

133. *Id.* at 562-68.

134. White v. Regester, 412 U.S. 755, 763-64 (1973).

c. Inter-Branch Disputes

Perhaps the most difficult political question cases involve a blend of Justice Brennan's last four indicia. These are the cases of inter-branch disputes based on separation of powers. One of the principal areas for advocacy of the political question doctrine has been in the field of foreign affairs or international relations.[135] These cases are particularly difficult for the Court when, as is often the case, one branch has exercised authority and the other branch has been silent or has acquiesced, as in recent uses of military force by the Executive.[136] Despite Congress' silence or acquiescence, the executive action may be challenged as a violation of Congress' power in the field. When these cases arise, they often seem to be almost unripe or noncontroversies because the "offended" branch has not taken steps to assert its prerogatives. But when the challenged action directly harms an individual citizen, the focus should shift from the "offended" to the "offending" branch.

Perhaps the most illustrative case is *Goldwater v. Carter*.[137] President Carter purported to abrogate a mutual defense treaty with Taiwan and several Senators sued to enjoin his unilateral action. The Court was not able to reach a consensus position, although a majority did agree that no relief should be granted. The Rehnquist plurality of four Justices explicitly based its decision on the political question doctrine. For this group, the question "must surely be controlled by political standards."[138] The most important factors seemed to be the possibility of using different termination procedures for different treaties, and the "resources available [to Congress] to protect and assert its interests."[139] Justice Powell argued that this was a case that was not ripe because the Senate had not asserted its interests as a corporate body.[140]

The effect of both the Rehnquist and Powell positions is to uphold the actions of the President until such time as Congress objects and claims that a different procedure is required by law. The next question is what would happen if the Senate had attempted to exert its authority? In *Goldwater*, the Senate had considered and failed to pass a resolution disagreeing with the President's action. If that resolution were passed, then

135. Henkin canvasses the arguments prior to Vietnam thoroughly in L. HENKIN, *supra* note 10, ch. VII.

136. *See generally* Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407 (1984).

137. 444 U.S. 996 (1979).

138. *Id.* at 1003 (Rehnquist, J., concurring) (quoting Dyer v. Blair, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

139. *Id.* at 1004.

140. *Id.* at 997-98 (Powell, J., concurring).

the Court would be presented with an inter-branch dispute calling for decision on a new set of facts. Now the Court would be ruling on the efficacy of the Senate's action rather than the President's action. Both the Rehnquist and Powell positions effectively rule on the President's ability to act unilaterally while explicitly holding open the question of what would happen if the Senate disapproved.[141]

3. *The Vietnam War Cases and the Criteria of Political Questions*

Many cases brought during the Vietnam War challenged the authority of the President to conduct a war without congressional declaration of war or in violation of various treaty obligations.[142] The lower courts dismissed these cases, usually on the basis of the political question doctrine, and the Supreme Court steadfastly denied certiorari.[143]

If the dismissals were premised on a constitutional commitment of the question to the President, then in essence the courts held that the President's conduct of the war was within his constitutional powers—a decision on the merits. On the other hand, if the question of the validity of executive authority was committed for primary consideration by Congress, then the dismissals appear to be based on a lack of ripeness. The courts would be saying that what the President has done is acceptable until Congress says otherwise. What would happen if Congress ordered the President to cease hostilities and he refused? At that point the issue of the President's compliance with the law of Congress would be squarely presented and unavoidable. This, however, would not be a holding with respect to the constitutional powers of the President because that issue had already been decided in the case by deferring to Congress, and the

141. A similar analysis presents itself with respect to the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982), repassed over the veto of President Nixon in 1973. The Act requires the President to report military excursions to Congress and to withdraw forces sixty days later unless Congress passes an authorizing resolution. A suit challenging an initial foray would probably be met with the contention that Congress is implicitly acquiescing unless it passes a disapproving resolution. On the sixty-first day, the same result would still prevail. If Congress did finally pass a disapproving resolution, then the Court would have a nonconstitutional basis of decision. At that point, of course, it would need to pass on the ability of Congress under the Constitution to order the President to withdraw the forces. But the critical question on the constitutional authority of the President to act in the absence of congressional action would have been answered back when the Court deferred to congressional action. *See* Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984); Note, *supra* note 136.

142. *See, e.g.,* McArthur v. Clifford, 393 U.S. 1002 (1968); Holmes v. United States, 391 U.S. 936 (1968); Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam,* 46 TEX. L. REV. 1033 (1968).

143. Holtzman v. Schlesinger, 414 U.S. 1304 (1973); Velvel v. Nixon, 396 U.S. 1042 (1970); Mora v. McNamara, 389 U.S. 934 (1967).

current case would require only a statutory decision.[144] Thus, even the decision to defer initially to Congress would be a final decision that the President may continue to act so far as the Constitution is concerned.

In *Orlando v. Laird*,[145] the Second Circuit held that the executive use of force in Vietnam constituted a justiciable question at the behest of an enlistee seeking an injunction against being sent to Vietnam. The standard on the constitutional issue was held to be the extent of legislative involvement in authorizing or acquiescing in the executive action.[146] After reviewing the legislative record, the court found that appropriations, the draft, and various congressional resolutions were sufficient to meet the test.[147] By contrast, in *Mitchell v. Laird*,[148] the District of Columbia Circuit held the issues to be nonjusticiable, citing difficulties in obtaining facts and the necessity of deferring to the discretion of the President in foreign affairs. It is difficult to construe the holding in *Mitchell* as anything other than a ruling that the President has unfettered discretion, so far as the judiciary is concerned, to do as he or she wishes in making war.[149] Although the court professed to leave open the ques-

144. Of course, the resolution of Congress might then be subjected to scrutiny under INS v. Chadha, 462 U.S. 919 (1983). *See* Note, *supra* note 136, at 1433.

145. 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

146. *Id.* at 1043.

147. In DaCosta v. Laird, 448 F.2d 1368 (2d Cir.), *cert. denied*, 405 U.S. 979 (1971), the court reread *Orlando* as a political question holding, and then held that repeal of the Tonkin Gulf Resolution did not change anything.

The same court also dealt with a number of late challenges to bombing and mining of harbors. In DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), the court held that it could not review the mining of harbors or bombing in North Vietnam because it was up to Congress to determine whether those were unauthorized acts and to express its will accordingly. The court hinted that an unauthorized creation of new war conditions might be reviewable. *Id.* at 1156. In Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974), plaintiffs challenged the bombing of Cambodia in the face of congressional resolutions calling for deescalation. Congress enacted an August 15, 1973 cutoff date for the bombing to end and President Nixon acceded to that limit. Thus the court reached the issue of whether bombing constituted a usurpation of congressional authority even though the case would be moot within one week after it was argued. Judicial review could not include, in the court's view, the tactical decisions of the Executive. Whether the Executive had made a "change in the character of the war's operations" within the strategic purview of Congress was said to be political rather than judicial. *Id.* at 1310. Congress' ability to determine the facts and express itself strategically was held by the court to alleviate the need for judicial review.

148. 488 F.2d 611 (D.C. Cir. 1973).

149. [A] court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise, a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations.

Id. at 616.

tion of what would happen if the President abused that discretion in bad faith, it is hard to see how the court would ever make such a ruling in light of the breadth of its holding in this case. *Mitchell* must be as much a decision on the merits as *Orlando*, but without the explanation that *Orlando* provides.

Professor Henkin agrees that the Supreme Court never has and could not possibly avoid decision on a foreign affairs issue.[150] Some commentators disagree with Professor Henkin and contend that there is a special rule of judicial abstention appropriate for foreign affairs cases.[151] Professor Redish maintains that Professor Henkin is entirely too soft on the doctrine, which in his view exists and should be repudiated.[152] The differences among the three positions, ultimately, are semantic. But semantics are what the law is about. Law is expressed in words that stand as symbols for concepts. The concept that makes the most sense in the foreign affairs area is that a court's decision should resolve the dispute

150. The doctrine of political questions is constitutionally significant only as an ordinance of extraordinary judicial abstention, particularly if it prevents judicial review of a claim that the federal political branches have failed to live up to constitutional requirements or limitations. In such a case the courts would say, in effect: "It may be that, as the petitioner claims, the political branches have indeed violated the Constitution, but in this instance their action raises a question not given to us to review; only political remedies are available."

Despite common impressions and numerous citations, there are in fact few cases, and apparently no foreign affairs cases, in which the Supreme Court ordained or approved such judicial abstention from constitutional review or from deciding some other question that might have led to a different result in the case. In the foreign affairs cases commonly cited the courts did not refrain from judging political actions by constitutional standards; they judged them but found them constitutionally not wanting. If the Court sometimes spoke of the special quality of foreign relations and the need for the nation to speak with one voice, it did so not to support judicial abstention but to explain the broad constitutional powers granted the President or Congress. In no case did the Court have to use the phrase "political questions," and when it did, it was using it in a different sense, saying in effect: "We have reviewed your claim and we find that the action complained of involves a political question, one that is within the powers granted by the Constitution to the political branches to decide. The act complained of violates no constitutional limitations on that power, either because the Constitution imposes no relevant limitations, or because the action is amply within the limits prescribed. We give effect to what the political branches have done because they had political authority under the Constitution to do it."

L. HENKIN, *supra* note 10, at 213-14 (footnotes omitted). *See also,* Henkin, *supra* note 111.

151. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1985).

152. Though respected scholars have for years debated the scope and wisdom of the political question doctrine, none to date has fully explained why the doctrine should be given the total and complete repudiation it so richly deserves. Ultimately, neither Wechsler's "classical" form of the doctrine nor Bickel's "prudential" version is valid—the "classical" form because, at least as applied by the Court and commentators, it represents a fundamentally flawed view of the concept of judicial review, and the "prudential" form because, quite simply, its moral, social, and political costs outweigh its speculative benefits.

Redish, *supra* note 12, at 1033 (footnotes omitted).

first before attempting to establish law in the form of judicial precedent. Redish's position differs from Henkin's by focusing on the basis of the court's decision rather than on the outcome. As Redish states, the doctrine should be repudiated in favor of judicial review when a case is before the court. As Henkin asserts, however, it should also be recognized that the effect of adjudication is the same regardless of how the court labels its result.

II. The Rationales and Significance of Justiciability

All of the foregoing has been premised on two propositions. First, it assumes that the Court has accepted jurisdiction of a "case" in the sense of having granted certiorari or noted probable jurisdiction; in the case of a lower federal court, the jurisdictional question might be more acute. Second, it implies that there are no "prudential considerations" which would properly motivate a court to hide its rationale, giving itself maximum flexibility. It is time now to deal explicitly with these propositions.

A. The Jurisdictional Limitation

Some kinds of proceedings are not judicial in nature.[153] Further, it is conceded that some nonjusticiable issues call for political judgment with-

153. One of the earliest decisions regarding the judicial role was the letter from the Supreme Court Justices, refusing to answer "extra-judicially" President Washington's questions regarding the obligations of the United States under various treaties and rules of international law. 3 H. JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (1891). The premises of refusal were that the courts should leave themselves free to decide the same issues if they later arose in litigation and that the Constitution explicitly placed the responsibility for giving advice to the President in other executive branch officers.

There are, of course, "controversies" that would require the court to perform a nonjudicial role, such as answering questions outside the format of a judicial proceeding, or attempting to have a court set rates for public utilities. These problems, however, are easily distinguished by the structure of the proceeding itself. A judicial proceeding is characterized by two connected elements: (1) the presentation of questions in a "Yes-No" format; and (2) the presence of articulable standards for decision. In a judicial proceeding, either the plaintiff or the defendant is right on the law; one side must win what another loses in a "zero-sum" game. The reasons for insisting on a "judicial" structure are many and familiar. They include the lack of staff and other resources for selecting among an infinite range of solutions for social problems, the lack of taxing authority for funding new solutions, the unelected source of the judiciary's authority, and the character of the standards to be applied by the judiciary.

Even though some of these concerns have spilled over into the justifications for other nominal forms of "justiciability," we need not pause long on this branch of the doctrine. In its classic form, justiciability has presented few significant difficulties in application. *Compare* Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923) (Supreme Court lacks jurisdiction to review acts within legislative discretion of public utility commission) *with* United States v. First City Nat'l Bank of Houston, 386 U.S. 361 (1967) (permitting judicial review of bank mergers approved by the Comptroller of the Currency).

out judicial standards to guide a decision.[154] In both those instances, a court would not accept jurisdiction.

Those cases are the very paradigm of how the courts should decide a constitutional right is absent. If someone brings a lawsuit to challenge the level of her taxes because she thinks they are too high, she loses on the merits of the constitutional issue because she has no constitutional right to lower taxes. No matter how much she might scream that the current level is confiscatory, she loses unless she can point to a constitutional provision such as the First Amendment that is violated by the government's use of the money. She loses because her view of the law was wrong, not because she never got into court.

On the other hand, there are some dismissals that are truly jurisdictional in nature. In the case of *Rescue Army v. Municipal Court*,[155] the Court dismissed a challenge to municipal ordinances regulating charitable solicitations because the ordinances were so intertwined with other provisions not before the Court and so vaguely interpreted by the state courts that the Court could not make sense of the merits of the case. Although the dismissal was phrased in terms of a discretionary refusal to exercise jurisdiction, there was no case on which the Court could rule. The dismissal was truly jurisdictional in the sense that the same parties could bring the same case back to the Court after clarification, free of any issue or claim preclusion.

B. The Separation of Powers Rationale

A number of recent writings have described the standing doctrine as a question of separation of powers.[156] Judge, now Justice, Antonin Scalia states that "the judicial doctrine of standing is a crucial and inseparable element of [the separation of powers] principle, whose disegard will inevitably produce—as it has in the past few decades—an overjudicialization of the processes of self-governance."[157]

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154. *See supra* notes 128-134.

155. 331 U.S. 549 (1947).

156. This is merely a play on words if the question is whether constitutional prohibitions should be adjudicated more readily when a statute is challenged than when administrative action is challenged. In the case of a challenge to administrative action, the first question is whether the action is within the legislated authority of the agency. Asking this question first recognizes separation of powers in the sense that it is up to the Legislature to describe the limits of the agency discretion. If the court moves to constitutionality, however, separation of powers no longer has anything to do with the issue.

157. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983). Justice Scalia goes on to point out that wrapping the question of whether a plaintiff has suffered injury to a "legal right" in "prudential" standing language makes it seem as if the Court itself is deciding not to adjudicate, rather than making it clear that the Legislature has decided that the claimed right does not exist. *Id.* at 886.

In *Allen v. Wright*,[158] the Court specifically invoked separation of powers as the reason for denying standing to challenge IRS practices with regard to tax exemptions for segregated schools. The Court stated in a footnote that "we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement."[159] The Court seems to be saying that it is solely an executive function to determine whether the Executive has caused harm to a citizen, a rather ludicrous result. The Court also states that it is an executive, not a judicial function, to "take Care that the Laws be faithfully executed."[160] The requirement of faithful execution itself could be a vehicle for judicial review if the Court were willing to enforce the duty of faithful execution.[161] *Allen* has nothing to do with separation of powers but instead with whether there is a judicially enforceable duty on the part of the Executive to enforce the laws. When the Court decides that there is not, then the plaintiff is held to have no right to judicial enforcement.

Another reading of the Court's insistence that standing is built on separation of powers, is that judicial review is an appropriate judicial function only when the Court is forced to exercise it because government itself has initiated the judicial process. This limited view of judicial review actually could be squared with the opinion in *Marbury* by focusing on Justice Marshall's reading of the necessity of a court's choosing the law to apply in a given case.[162] Under this view, the law of justiciability becomes a part of the law of remedies; the Constitution could be read in many instances not to create an affirmative right to relief but only a shield against government action.[163] The proponents of a separation of powers rationale, however, purport to go much further.

Justice Scalia observes that many of the Burger Court standing cases involve allegations that the government is acting against the interests of a majority of the people or is ignoring legislative mandates. Justice Scalia elaborates the separation of powers theme in the following way:

> [W]hat is wrong with having [judges] protect the rights of the majority as well? . . . The answer is that there is no reason to believe they will be any good at it. In fact, they have in a way been specifically *designed* to be bad at it—selected from the aristocracy of the

158. 468 U.S. 737 (1984).

159. *Id.* at 761 n.26.

160. *Id.* at 761 (citing U.S. CONST. art. II, § 3).

161. This, however, usually is not an enforceable duty. *See supra* notes 51-62 and accompanying text.

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

163. *Cf.* Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

> highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result, and (just in case any connection with the man in the street might subsist) removed from all accountability to the electorate. That is just perfect for a body that is supposed to protect the individual against the people; it is just terrible (unless you are a monarchist) for a group that is supposed to decide what is good for the people. . . . It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the *genuine* desires of the people to be given effect; but those are not the premises under which our system operates.[164]

Justice Scalia's assumption that a court is "supposed to decide what is good for the people" highlights the very sort of thinking that leads to the justiciability myth in the first place. That is exactly what a court is not supposed to decide; that is the nonjusticiable issue. What the court is supposed to decide is whether the people's representatives have transgressed the limits set in the organic document. It is when judges start thinking that they are supposed to decide what is good for the people that they violate separation of powers and then feel the need for some protection from having to make that decision in some instances. There is no need for the myth if the judge's role is carefully observed.[165]

The Scalia version of separation of powers is simply one more statement of the antimajoritarian objection to judicial review itself. What he seems to advocate is that the majority can change the organic law, a notion fundamentally at odds with the nature of a written constitution.[166] The majority may be able to waive their "rights" but it is diffi-

164. Scalia, *supra* note 157, at 896-97 (emphasis in original).

165. The only sense in which standing can rationally implicate principles of separation of powers is in statutory interpretation. When the court decides that a party does not have "standing" to make a claim under a federal statute, it says only that Congress did not pass a law protecting that person. This is an exercise in separation of powers only in the sense that Congress has made the law for the court to interpret and enforce. It is certainly not an exercise in justiciability or any other special doctrine. Another way of looking at the separation of powers issue is to ask who can change the result if the Court is wrong about a case. If the Court decided that an administrative decision either was within both statutory and constitutional authority or exceeded statutory authority, an unhappy Congress could change the result by changing the statute. If the Court decided that either a legislative enactment or an administrative decision was in violation of the Constitution, Congress would not be free to change the result without submitting the issue to the people for ratification of a constitutional amendment. These factors argue in favor of the Court's being more explicit about the basis of its decision when reviewing administrative action. A decision on the basis of standing, as Justice Scalia would advocate, leaves Congress little on which to act because the Court has not identified the basis of its holding. The practical effect is to uphold the administrative decision, but Congress would be able to change the result only by the initial increment of authorizing standing to sue.

166. Doernberg, *supra* note 6, at 96. There is a very different proposition that would allow representatives to make a decision free of equal protection constraints when they provide unequal benefits to a minority. This view does not postulate that the majority can change the rules

cult to see how they can waive the rights of the minority just by affecting them in the same way.

C. The Concreteness and Representational Issues

Professors Brilmayer and Tushnet have engaged in a debate over the utility of allowing a plaintiff who has no "stake" in the litigation to challenge a statute or practice. Brilmayer contends that people without a sufficient stake in the litigation might not present the issues with seriousness of purpose or could bind other litigants unfairly.[167] Tushnet argues that the ideological plaintiff may bring tremendous resources to bear on a problem and will often do a better job than someone who accidentally gets caught up in the litigation process.[168] Professor Tushnet should have the better of the argument, in that the "public interest" litigant often will have the resources to make the better arguments and clarify the issues more cleanly than the poor person accidentally caught up in litigation.

But what these arguments really prove is that the question is irrelevant. The real debate is over whether the court used the proper factors in determining that this person had no constitutional right. The language of standing does nothing but mask those considerations.

D. The Husbanding of Judicial Credibility

One argument that is often made with justiciability issues is that the Court must husband its resources and credibility. In the words of the second Justice Harlan, the "powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government."[169] Justice Frankfurter argued that intervention into political controversies could "impair the Court's position" through loss of "its moral sanction."[170]

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of the game but that the rules contemplate an apportionment of unequal benefits to the minority against the interests of the majority. *See* Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723 (1974); McCormack, *Race and Politics in the Supreme Court:* Bakke *to Basics*, 1979 UTAH L. REV. 491.

167. Brilmayer, *supra* note 7, at 306-10.

168. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1717-21 (1980).

169. Flast v. Cohen, 392 U.S. 83, 131 (1968) (Harlan, J., dissenting).

170. [Judicial intervention] may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entangle-

Even Justice Brennan could be cited as supporting this point of view. The last four of his *Baker v. Carr* indicia refer in one fashion or another to extreme cases for deference to another branch of government. The avoidance of "multifarious pronouncements by various departments on one question," avoiding a "lack of the respect due coordinate branches," and an "unusual need for unquestioning adherence to a political decision"[171] probably were intended as explanations of why the Constitution should be interpreted to give finality to certain decisions of other branches, such as whether a particular foreign government should be recognized as legitimate by the United States, but they sound extremely amorphous and discretionary.

There can be no more formidable an array of authority than aligning these Justices on the same side of an issue, but their authority does not make the position any more tenable. To accept that position is to assert that courts should use their authority only when it does not matter very much. If the Court becomes timorous when faced with a monumental challenge, then its moral force is less in the run-of-the-mill case and most of our constitutional rhetoric about the bulwarks of liberty is meaningless.

Perhaps it is fortunate that neither side of this argument can be demonstrated empirically. That demonstration could only occur if the Court's authority in fact were lost, at which point the argument would not be worth winning. Suffice it to say that the timorous position has never gained dominance nor even, so far as can be determined, a majority of the Court.

E. The Biding Time Argument

Closely related is the notion that the Court can gain credibility on a problem by accepting certiorari to attract the attention of the political branches, dismissing a few cases on justiciability grounds to exert pressure on those branches, and finally deciding the issue if those branches do not resolve it. One argument against the biding time position is, of course, that it does not exist; the Court must overrule its prior holdings to reach a new one. Another argument looks at the impact on those individuals who are forced to forego constitutional rights in the meantime. It is tempting to contend that these costs are outweighed by the value to the system in having the political processes put their houses

ments and by abstention from injecting itself into the clash of political forces in political settlements.

Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

171. 369 U.S. at 217.

in order themselves, the self-education argument, but ultimately that argument fares no better than the husbanding of credibility argument. All depend on a highly speculative assertion about the good of the system. Weighed against demonstrable constitutional claims, the speculative nature of that claim takes on diminishing significance.

F. Enforceability of Judicial Decrees

An argument that is sometimes made in informal discourse but rarely finds its way into judicial opinions or scholarly writings is that the courts should stay away from controversies in which there is a fear that a decision might be ignored by one party. The Court faced this problem in *Cooper v. Aaron*,[172] in which the Court responded vigorously to resistance to judicial school desegregation orders. President Eisenhower used federal marshals and the national guard where necessary to enforce those decrees. Enforcement of court decrees has always depended on the willingness of the Executive or ultimately the people to accept the judicial mandate. Thus the argument on enforceability in the final analysis is the same as the argument on judicial credibility.

Indeed, the Court's greatest losses of credibility have occurred when its decrees have been obeyed, as in *Dred Scott*[173] and during the New Deal era. At least in the long run, the Court lost more credibility in giving up in *Ex parte McCardle*[174] than it did when President Lincoln refused to obey the writ of habeas corpus issued by Chief Justice Taney in *Ex parte Merryman*.[175]

The most serious recent challenge to the enforceability of the Court's mandate was presented in *United States v. Nixon*.[176] When the Watergate Special Prosecutor sought the Nixon White House tapes for use against indicted co-conspirators, the President claimed that executive privilege protected the tapes from disclosure, and did not promise to obey any court mandate that they be produced.[177] The Supreme Court

172. 358 U.S. 1 (1958).

173. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). It has been said that a "question which involved a Civil War can hardly be proper material for the wrangling of lawyers." A. BICKEL, *supra* note 11, at 185 (quoting Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 243 (1925)). The implication of that comment seems to be that the Court should not have heard the case, which might have been possible if the concept of certiorari had existed at the time. But once the Court had jurisdiction over the case, it could not avoid the controversy. *Dred Scott* damaged the credibility of the Court not because it decided the case, but because it decided the case so badly.

174. 74 U.S. (7 Wall.) 506 (1868).

175. 17 F. Cas. 144 (C. Ct. Md. 1861).

176. 418 U.S. 683 (1974).

177. In the face of recent, repeated reassertions by the Supreme Court of the exclusiveness of judicial power to expound the Constitution, how could a lawyer of James

did not even hesitate, to consider the enforceability of its decree, before rendering a unanimous decision that the tapes must be handed over. The President complied.

If a court begins to worry about the enforceability of its decrees, then it has already lost the foundations of legitimacy on which the judicial process rests in its entirety. The greatest protection of the Court's credibility and thus its authoritative force, lies in the inevitability of its role. If the Court claims a self-protective discretion to refuse decision, then it must accept the consequences of public rejection when it does decide a case that the Executive or the people do not want to enforce. The appearance of discretion would mean that the Court is only one voice with no greater claim to legitimacy than any other.

Conclusion

The biggest problem with the justiciability doctrine is that it is dishonest. In every instance of its use, the Court in fact decides some important constitutional issue but pretends that it "has not heard the case." Thus the litigants and their supporters are diverted from the central theme of their challenge.

At one level, the Court actually decides the basic underlying issue presented by the litigants. The clearest examples of this type of decision are (1) *Valley Forge*,[178] in which the Court virtually overruled *Flast*[179] to decide that the Establishment Clause does not prevent gifts of property to religious schools; (2) *Allen*,[180] in which the Court held that government is not required to deny tax exemptions to racially discriminatory schools; and (3) *Warth*,[181] in which the Court held that residents do not have a right to have low income or minority coresidents. In these cases, the Court's dishonesty is troubling in itself. It is also troubling in that it

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D. St. Clair's ability seriously contend in oral argument before the Supreme Court on behalf of President Nixon that "This matter is being submitted to this court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution."

. . . .

For this nation, however, this issue presumably has been settled. Somehow or other, the courts have come into possession of the authority to resolve constitutional issues with finality. Although the intellectual operation entailed is like that used in the exercise of "judicial review," the function is altogether distinct. Exercise of the power of "constitutional review" places the courts in a relation with the other two branches totally different from that grounding "judicial review."

Strong, *President, Congress, Judiciary: One Is More Equal Than the Others*, 60 A.B.A. J. 1050, 1050-52 (1974) (citation omitted).

178. 454 U.S. 464 (1982). *See supra* notes 24-28 and accompanying text.

179. 392 U.S. 83 (1968). *See supra* notes 22-23 and accompanying text.

180. 468 U.S. 737 (1984). *See supra* notes 36-37 and accompanying text.

181. 422 U.S. 490 (1975). *See supra* notes 42-46 and accompanying text.

leads to a misunderstanding of basic rules of law because the "rule of decision" has not been stated and therefore is difficult to apply to the next case. It is even more difficult to apply in political debates. The "debate value" of the constitutional provision has been rendered virtually null.

At another level, the Court may hold that the challenged action was within the bounds of the challenged actor's authority. The clearest example of this phenomenon is *Goldwater v. Carter*,[182] in which the Court held that the President is free to terminate a treaty at least until Congress tells him not to do so. In other "political question" cases, the Court purports to leave open the possibility that a constitutional constraint exists but that its contours and application are up to another branch, as when the Court decided that Congress was the sole judge of whether to impose a deadline on ratification of the Child Labor Amendment.[183]

When the Court holds that it is up to another branch to decide the meaning of a constitutional term, it has exercised judicial review. For example, deciding that Congress must determine what is a "republican form of government" and deciding that Congress may regulate the states when they affect interstate commerce, are two instances of the same decisionmaking authority. The Court has not refused to decide "the issue"; it has decided the issue by holding that another branch has final authority.[184]

Deciding that a constitutional provision is merely hortatory may be appropriate in some instances, such as recognizing that Congress is the final judge of some qualifications of its members or that the Tenth Amendment is a tautology. When this happens, however, the decision must be made with conscious attention to the reasons for so deciding and for the consequences. The result is a decision on an important issue of constitutional law, not an avoidance of anything.[185]

182. 444 U.S. 996 (1979). *See supra* notes 137-141 and accompanying text.

183. Coleman v. Miller, 307 U.S. 433 (1939).

184. To Professor Redish, this amounts to "a play on words." It may be, but it is important to identify the word play so that the Court's game can be called. Redish, *supra* note 12, at 1036.

185. The final question is whether a hortatory provision might nevertheless be part of the law of the Constitution. At least with regard to constitutional constraints, law must exist apart from the enforcers, because there can be no such thing as unenforceable law. To this degree, we are all positivists if we want the political branches to be constrained by something external to themselves. Otherwise, the game is given completely to the politicians, who have become judges with no external constraints, at which point constitutional law would become nonlaw.