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Justiciability and Theories of Judicial Review: A Remote Relationship

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JUSTICIABILITY AND THEORIES OF JUDICIAL REVIEW: A REMOTE RELATIONSHIP*

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This Article examines the traditional association of justiciability with basic ideas about judicial review and judicial restraint and concludes that the relationships are incidental and remote. It contends that, contrary to the standard articulation and conventional understanding of standing, ripeness, and the political question doctrine, these major components of justiciability are not threshold or process mechanisms for foregoing or avoiding adjudication of a constitutional claim, nor are they yardsticks for determining whether an action is private or public. Instead, they constitute a method of formulating and resolving questions of actionability or entitlement to relief. As a means of identifying and adjudicating the elements of a cause of action in the public law arena, justiciability is neither a corollary of a theory of judicial review nor a special instrument of judicial restraint in constitutional cases.[1]

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Bice, *Standards of Judicial Review under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689 (1977), was also based upon a paper prepared for and delivered at the German-American Conference. The two Articles may profitably be considered together.

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1. The author has elaborated on this perspective in an article on standing to review administrative action; in that area the claims are primarily statutory and judicial concern has been with the legal interest component of standing. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425 (1974) [hereinafter cited as Albert].

The discussion of standing in this Article focuses upon constitutional claims and the requirement of injury, rather than legal interest. Injury has been the critical element in a number of recent standing adjudications. *E.g.*, Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). The issues directly relating to third party standing are not explored here. *See* note 63 *infra*.

The customary understanding of justiciability begins with *Marbury v. Madison*.[2] The seminal 1803 decision not only established judicial authority to resolve constitutional questions, but also suggested two distinct justifications for such power: constitutional review was an unavoidable incident of deciding cases in conformity with law; alternatively, such review was part of the Supreme Court's special institutional responsibility as guardian of the complex constitutional system. Although these justifications have divergent implications for the exercise of the reviewing power, the *Marbury* ambiguity has persisted throughout our history and remains unresolved. Consequently, constitutional adjudication since *Marbury* does not neatly adhere to either theory of review. Rather, a macro perspective of such adjudication suggests a complicated blend of the two theories, an intricate tapestry of the distinct private protective and public guardian elements implied by these polar justifications.[3]

The rhetoric of justiciability, with its insistence on proper judicial business, reflects one manner in which the Court has accommodated and finessed the tension between a public guardian role and the more modest one of vindicating individual rights. By purporting to define the proper occasions for constitutional review and relief, justiciability doctrines do result in some uncertain limits on the guardian role, but they do not restrict the Court in any ascertainable manner to conventional lawsuits. Certainly twentieth century constitutional litigation does not track the model of private common law litigation.[4] Nor do these doctrines systematically or designedly operate to restrict the scope, importance, or impact of the issues the Court may decide.[5]

This Article also examines two other major strands of justiciability: ripeness and the political question. Discussion of political questions in section III is limited to domestic situations; the justiciability of issues of foreign or military affairs is not examined. It is doubtful, however, that the analysis or the conclusions would be altered by such cases.

Other doctrines associated with justiciability include the ban on advisory opinions, the requirement that judicial decisions be final, and the concept of mootness. The latter is the most important in this group, though beyond the scope of this Article. *See* note 130 *infra*.

2. 5 U.S. (1 Cranch) 137 (1803).

3. A rather impressionistic selection of cases should suffice here. *See* O'Shea v. Littleton, 414 U.S. 488 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249 (1953); Frothingham v. Mellon, 262 U.S. 447 (1923); Muskrat v. United States, 219 U.S. 346 (1911).

4. For an extensive analysis of some of the differences between common law litigation and modern public law controversies, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

5. Delicate, controversial, or far-reaching cases are familiar. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Roe v. Wade, 410 U.S. 113 (1973); Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952); Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

Nonetheless, for many years American legal commentators have regarded justiciability as the concomitant of a particular theory of judicial review, which accounts for a lively diversity concerning the content, function, and evaluation of such doctrines. Depending upon how one regards the Court's appropriate role, the concept of justiciability may represent a porous facade for the exercise of jurisdiction to vindicate essentially public values and interests or an improper obstacle to the protection of contemporary private interests or both.[6]

Conflicting justifications for judicial review became the touchstone of a significant debate some years ago when the late Professor Alexander Bickel contended that the viability and legitimacy of the Court's authority depended upon an expansive notion of justiciability—what he termed the passive virtues.[7] The power of review, Bickel argued, is functionally justified as a "process for the injection into representative government of a system of enduring basic values,"[8] that rests upon the Court's special institutional competency to articulate and develop durable and impersonal principles.[9] Accordingly, all constitutional adjudication must be rigorously and consistently principled; and principle is implicated whenever the Court resolves a constitutional issue—when it "legitimates" a government policy by upholding it as well as when it condemns it by striking it down. In a viable functioning society, however, the imperative of principle competes with the demands of expediency, the compromising arts; therefore, the acceptance, effectiveness, and integrity of principle are dependent on the appropriateness of time, place, and circumstance.[10] The many techniques of avoidance, including the matrix of justiciability, are the means by which the Court reconciles the pervasive conflict between principle and expediency while maintaining its own integrity; such mechanisms allow the Court to decline both implicating principle and approving compromise by withholding judicial judgment entirely.[11]

Hence, justiciability doctrines, in Bickel's view, are flexible, discretionary rubrics through which the Court expresses its prudential, indeed

6. *Compare* Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, LXX AM. POL. SCI. REV. 723, 739 (1976) *and* Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973) *with* Statement of Board of Governors, Society of American Law Teachers (Oct. 10, 1976) *and* Chayes, *supra* note 4 *and* Comment, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 208-13 (1976).

7. A. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962) [hereinafter cited as BICKEL].

8. *Id.* at 51.

9. *Id.* at 23-27.

10. *Id.* at 64-72.

11. *Id.* at 111-98.

political, sense that adjudication would be untimely or unwise. Since this expansive authority to deny adjudication is an essential part of the basic function and role of judicial review, it extends to all cases, including those in which jurisdiction is obligatory under article III or statutory mandates. For Bickel there could be no unyielding obligation to decide.[12] Standing and ripeness, Professor Scharpf later added, also accommodate the Court's dependency on private litigants by allowing it to select those cases that provide an adequate or better presentation of the facts and issues needed for an informed resolution.[13]

This abundance of prudential discretion was heresy for those theorists who found the power of review rooted in the constitutionally imposed judicial obligation to decide the case in accordance with the applicable law. Since the power stemmed from this constitutional duty and would not exist without it, there could be no reservoir of inherent authority to refuse the exercise of jurisdiction for prudential or other reasons. Such a nearly unbounded discretion to avoid adjudication because a case presents a constitutional issue would vitiate the very necessity from which the power of review is derived. Justiciability determinations, in this view, are themselves constitutional interpretations establishing the contours of the judicial power conferred by that instrument. Hence, the Court does not choose to decline or abstain in justiciability cases; it rules, as a matter of law, that the dispute is not a "case" or that it does not present a judicially cognizable question.[14]

The elusiveness and disorderliness of justiciability rulings permitted both of these competing and contrasting schools to claim support in the decisions of the Court. Commencing analysis with a normative theory of review, however, neither school carefully distinguished between how such doctrines had been and should have been employed. The colloquy was primarily prescriptive.

Under the influence of these macro views of justiciability and judicial review, legal theorists focused neither on the process of decision in justiciability cases nor on the questions implicitly resolved in standing, ripeness, or

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12. *Id.* at 126. *See also* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

13. Scharpf, *Judicial Review of the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 529-33 (1966) [hereinafter cited as Scharpf].

14. H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 5-10 (1961); Gunther, *supra* note 12. *But cf.* L. HAND, THE BILL OF RIGHTS 15 (1958) (at times it may be better for the matter to be resolved without an authoritative judicial solution).

Professor Wechsler observes that the general law of remedies, both statutory and decisional, also determines whether there is a "case" requiring adjudication. WECHSLER, *supra*. This additional basis for a justiciability determination is puzzling since the availability of a remedy clearly relates to entitlement to relief rather than the existence of a "case" and article III

political question rulings.[15] That inquiry was particularly deflected by a well-accepted and entrenched tradition in which standing, ripeness, and the political question are seen to pose threshold issues, subject to a preliminary inquiry distinct from and anterior to questions concerning the matter for adjudication, the merits of the claim for relief.[16] This tradition posits justiciability as an entry barrier designed to ensure adversity, concreteness, and maturity in a case and to impart legitimacy to the decision. Accordingly, justiciability is concerned with process; it resolves whether the claim can be adjudicated, without addressing whether the claim is actionable under substantive law.[17]

This Article departs from this legacy by maintaining that standing, ripeness, and political question rulings do entail adjudication of a component of the claim for relief, and contends that such rulings ultimately reflect a determination of whether substantive constitutional policies are best served by providing or denying relief. A close examination of justiciability resolutions reveals that its doctrines do not reflect exogenous general principles by which injuries, interests, or issues are categorized. Rather, standing, ripeness, or political question doctrines necessitate inquiry in each case into the particulars of the claim for relief, and resolution rests upon the constitutional provision governing actionability. Indeed, the central merit issue of constitutional validity often is decided, albeit implicitly, under the political question or ripeness rubric. Moreover, construction of the constitutional basis for the claim, not an external calculus, reveals the sufficiency of party interest and injury in standing and ripeness cases. In short, the factors controlling justiciability are identical to those governing the actionability of claims and entitlement to relief. Hence, justiciability doctrines are substantive and the questions they pose are not preliminary or threshold.[18]

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jurisdiction. It also omits the possibility of remedies created by the Constitution itself. *See* Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

15. *See, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973) [hereinafter cited as Scott].

16. Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153 & n.1 (1970); Flast v. Cohen, 392 U.S. 83, 101-06 (1968); BICKEL, *supra* note 7, at 122-25; Scott, *supra* note 15, at 670-77.

17. *See* BICKEL, *supra* note 7, at 122-25; Scharpf, *supra* note 13, at 528-35; Scott, *supra* note 15, at 670-83.

18. This view is now receiving some emphasis in the literature. *See* Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1445, 1522-29 (1971); Comment, *Standing To Sue For Members of Congress*, 83 YALE L.J. 1665 (1974). *See also* Warth v. Seldin, 422 U.S. 490, 500 (1975). In that opinion Mr. Justice Powell observed: "Essentially, the standing question in [prudential] cases is whether the constitutional or statutory provision on

This perspective facilitates an accurate understanding of the premises of a justiciability ruling, reveals the issues and factors on which these doctrines focus, reconciles some wayward inconsistencies among the cases, and allows an appreciation of some costs of implicitly deciding merit issues as threshold ones.

I. STANDING

Traditionally, a determination of whether a litigant has standing to obtain review of government action has involved two questions. The first, deemed to be associated with the case and controversy requirement of article III, requires actual injury to the plaintiff from the action he challenges. The second requires that injury be to a legally protected or cognizable interest.[19] The ripeness test, which is examined in part II, is closely related; it focuses on whether a future injury and its present impact are sufficiently defined, concrete, and certain to warrant relief.[20] Although standing includes ripeness—a plaintiff in an unripe case is also without standing—ripeness emphasizes the timing of litigation while standing focuses upon the adequacy of a plaintiff's present interest.

The origins and evolution of standing and ripeness doctrines illuminate the character of the problems with which they deal. Neither rubric was explored or elaborated in constitutional controversies during the nineteenth century.[21] These issues did not arise under the substantive law employed in such controversies. American courts had not inherited a body of public law from which rules of actionability for constitutional cases might be derived; nor did they seek to create one. Hence, there was no jurisprudence of public law governing the resolution of constitutional challenges to government action. Indeed, the Constitution itself had limited applicability to claims against government officials. It provided no affirmative rules of actionability and no principles for the determination of the legal sufficiency of the

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which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.*

19. Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186, 204, 208 (1962).

20. *E.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 148-56 (1967); International Longshoreman's Union v. Boyd, 347 U.S. 222 (1954); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

21. Although the Court had adverted to the legal rights of litigants in some early cases, *see, e.g.*, Liverpool, N.Y. & Phila. S.S. Co. v. Commissioner of Emigration, 113 U.S. 33 (1885), it had not elaborated on standing until well into the twentieth century. The classic case of Frothingham v. Mellon, 262 U.S. 447 (1923), does not discuss standing or "case or controversy" though it is viewed as the seedling of the concept. *See* Flast v. Cohen, 392 U.S. 83, 92-94, 97-99 (1968); Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818-19 (1969). Ripeness is also a late addition to the legal lexicon. *See* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Willing v. Chicago Auditorium, 277 U.S. 274 (1928); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

claim asserted.[22] Constitutional principles were relevant only to certain defensive matter in a case—the ultimate validity of the authority exercised. The other standard legal issues in a case, actionability in particular, were controlled by a distinct body of substantive jurisprudence, the familiar and well-developed Anglo-American common law that had been formulated in disputes between private persons over private rights. In short, constitutional challenges to government action had been assimilated into the established tradition of private common law adjudication, not merely in form, but as a matter of substantive law.

Accordingly, a plaintiff, in challenging official action, had to plead a recognizable common law claim, such as contract or trespass; the defendant's official authority to act was introduced as a matter of defense; and the Constitution or statute entered by way of the plaintiff's retort that the official's conduct was beyond valid legal authority.[23] Because private common law rules of actionability were relatively clear and well-defined on such matters as party interest, causation, and injury, there was no occasion to deal with who may sue, or when (litigation was mostly retrospective), save that these questions are always implicit in the determination of entitlement to relief.[24]

This common law assimilation, coupled with the unavailability of public law concepts of actionability, had a profound influence on standing decisions in the early twentieth century when increasing government intervention and regulation of the economy gave rise to new and varied claims, primarily challenges by private business to competing public enterprises and public subsidies. Injury was not in issue, since most claims involved acknowledged pocketbook harms. The common law, however, favored private competition and offered little protection against it; consequently, the

22. *E.g.*, Scranton v. Wheeler, 179 U.S. 141, 152-53 (1900); *In re* Ayres, 123 U.S. 443, 500-02 (1887). This proposition is no longer true. *See* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

23. *E.g.*, Philadelphia Co. v. Stimson, 223 U.S. 605, 620-23 (1912); Elliott v. Swartwout, 35 U.S. (10 Pet.) 46, 49-52 (1836). *See also* Hill, *supra* note 22, at 1128-31.

24. For example, it is a well-recognized requirement in litigation between private parties that a claimant may not obtain judicial relief unless he has something at stake. But the issues of injury and party interest are resolved under the substantive rules of tort or contract law, without reference to a concept of standing or ripeness. *See, e.g.*, Ultramares v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). Further, the notion of proximate cause in tort law makes clear that injury and unlawful conduct are not themselves sufficient to warrant relief. There must be "duty" or "legal cause," which are also concepts derived from policies and purposes of tort law, not requisites of justiciability. *See, e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). The question of who may sue, or when, has always been an integral part of the actionability of a private law claim.

Court held these plaintiffs to be without a legally protected interest against government-sponsored competition.[25]

This line of cases reveals no institutional or process factors supporting a discretionary refusal to decide; nor were the constitutional issues regarding the scope of federal power unfamiliar. Rather, such cases rest on a determination that competitive injury was not actionable. The decisions are problematic only in their reliance upon the private common law rather than the Constitution as the legal basis for the ruling. Otherwise they do not differ in substance from more modern and constitutionally based rulings on the sufficiency of a public law claim, *e.g.*, the Court's recent holding that reputational injury *per se* is not actionable under the due process clause of the fourteenth amendment.[26]

Concurrent with this restrictive tradition, however, there developed a standing principle that was destined to become exceedingly permissive. In a trilogy of claims in the 1920's against the Interstate Commerce Commission for competitive injuries to railroads and shippers, the Court established that members of a regulated industry would have standing as competitors where a protective intent could be inferred from the statutory provision upon which the claim was founded.[27] That is, judicial assessment of the purposes and policies of a regulatory program would determine whether a complainant had a protected legal interest against competitive injury. Finding such a protective purpose was not dispositive since there remained the issue of whether the action was unlawful—the question of official legality. But reliance on a standard that looked to the purposes and policies of the statute as the basis for establishing the boundaries of relevant interests as well as an official's duty to heed them quite plainly reflects a ruling on the actionability of a claim.

Until recently, this test of standing demanded a clear showing of protective intent[28] and generally was limited to cases brought under a statute specifically providing for judicial review; the common law standard prevailed in cases of nonstatutory review, including those directly founded upon the Constitution. The two standards interacted when the Court, influ-

25. Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); *cf.* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) (government imposition of labor requirements on businesses with government contracts did not furnish such business with standing).

26. Paul v. Davis, 424 U.S. 693 (1976).

27. Sprunt & Son v. United States, 281 U.S. 249 (1930); Chicago Junction Case, 264 U.S. 258 (1924); Edward Hines Yellow Pines Trustees v. United States, 263 U.S. 143 (1923).

28. *Compare* Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1968) *with* Barlow v. Collins, 397 U.S. 159 (1970).

enced by a common law indifference to certain harms, declined to infer a protective purpose from legal constraints on government authority, even where such a purpose was apparent.[29]

Major changes in both the injury and the legal interest components of standing occurred about a decade ago, though their scope and substance remain uncertain. The Court nominally rejected the legal interest test because it went to the merits, as indeed it did, and substituted for it a requirement that the plaintiff's interest arguably be within a zone of interests to be protected or regulated by a statute or the Constitution. This standard was extended to cases of nonstatutory review as well. The Court also stressed that injury is not limited to the familiar economic type, but includes a variety of environmental, aesthetic, and spiritual harms.[30]

Although an arguably protected interest may not seem different from a protected legal interest, the Court no doubt intended liberalization by the new formula. The Court's own applications of the formula manifest an intent to detach the inference of protection from standard statutory interpretation and to restrict the preliminary inquiry into standing.[31] Hence, any plausible suggestion of a policy recognizing the plaintiff's class, regardless of legislative history or contrary evidence, has been held to satisfy the zone standard. Moreover, the plaintiff's interest may be expressed on a very general level, thus broadening the class protected.[32] There need be no close relationship between statutory indicia of protection and the provision invoked to establish illegal action.[33] Even these loose applications of the new test, however, do not quite divorce standing from the merits, for the variety of sources establishing an arguably protected interest are an integral part of an overall regulatory program and thus relevant to the claim of illegality under accepted canons of statutory interpretation.

The more important question left open in these decisions concerns what a plaintiff under the new zone standard must go on to establish on the merits

29. *E.g.*, Perkins v. Lukens Co., 310 U.S. 113 (1940); Berry v. Housing & Home Fin. Agency, 340 F.2d 939 (2d Cir. 1965).

30. Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); *cf.* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (loss of social benefits of living in an integrated community).

31. *See* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Barlow v. Collins, 397 U.S. 159 (1970); *cf.* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (broad construction of standing under § 810(a) of the Civil Rights Act of 1968).

32. Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970).

33. Barlow v. Collins, 397 U.S. 159 (1970); *cf.* Sierra Club v. Morton, 405 U.S. 727 (1972) (users of wilderness assumed to be protected by federal laws governing national parks and forests).

in order to obtain relief. Upon satisfying the previous legal interest requirement of actual legislative protection, he had only to demonstrate that the official action was unlawful. The substitution of the zone test for the legal interest standard might be taken to imply that the necessary showing for relief remains unaltered, which would eliminate the need for a plaintiff to prove that he is actually among those with a protected legal interest.[34] Some form of injury and the easily satisfied condition of the arguably protected interest would suffice to enjoin official action.[35]

Implication alone, however, is not an adequate basis for such a major change in the requisites of a claim. That substantive result would greatly expand the scope of actionable claims against officials and would endorse a rather unique and far-reaching principle of official liability or accountability. Indeed, it would afford relief to almost anyone incidentally affected by official action and thus approximate acceptance of a public action concept —litigation whose acknowledged purpose is the policing of official conduct rather than party relief. The Court has steadfastly refused to do this.[36] Additionally, insistence on injury alone, without evaluating it under some normative standard, such as statutory protection,[37] ceases to be functional or indeed intelligible.[38] In view of the multiple, widespread, and highly incidental impacts of government action, the alluring simplicity of entitling persons significantly aggrieved to relief is illusory. The formula masks a host of nettlesome problems, including the very recognition of what is cognizable as injury as well as the consequent necessity of ranking and selecting better and best plaintiffs[39]—an undertaking that would raise serious questions of propriety for American courts.

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34. *Cf.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971) (investment company apparently entitled to relief because Congress arguably legislated against the type of competition challenged).

35. The zone standard has not been a significant barrier in the lower courts. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.07 (3d ed. 1972); cases collected in Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972).

36. *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); *cf.* Flast v. Cohen, 392 U.S. 83 (1968); Doremus v. Board of Educ., 342 U.S. 429 (1952); Frothingham v. Mellon, 262 U.S. 447 (1923) (taxpayers may not use a federal court as a forum in which to air their generalized grievances, but where there is a logical nexus between the taxpayer status asserted and the claim sought to be adjudicated, plaintiff will have standing to bring the claim).

37. Statutory protection need not be the only normative standard for determining whether a plaintiff's interest entitles him to relief. There are judicial criteria for specifying whether an interest should be protected. *See* Albert, *supra* note 1, at 456-64.

38. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 484-85, 528-31 (1965).

39. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 638 (1971) (arguing that a court may in its discretion accept jurisdiction over a suit brought by a plaintiff without a protected interest).

The Court's affirmation that actionable injury includes environmental, aesthetic, and recreational values has provoked the more enduring and troublesome issues of standing. Users of parks and the wilderness, television listeners interested in a balanced presentation of issues, and history buffs seeking to preserve a favored monument or building have all been held to satisfy this standard of injury.[40] These injuries significantly differ from the more obvious economic or physical variety in that they are highly diffuse and have a modest impact upon an individual plaintiff. Constituting an affront to sensibility, such harms are also subjective, subject to the wishes of the pleader. Not suprisingly, litigation over these injuries has been undertaken by environmental and other public interest organizations; such litigation is highly suggestive of a vindication of citizen interests and the public good.

Some of the difficulties may be seen in contrasting two environmental controversies, *Sierra Club v. Morton*[41] and *United States v. SCRAP*.[42] The Sierra Club, a prominent conservation organization, sued to enjoin construction of a ski resort in a semiwilderness area on national forest land. It claimed standing solely as an experienced, dedicated organization with a special and informed interest in wilderness preservation, without alleging harm to its members. A divided Court held that this assertion of public interest representation or ideological harm failed to satisfy the injury-in-fact requirement. In contrast, five Washington, D.C., law students in *SCRAP* challenged a comprehensive nationwide rate increase of two and one-half percent on all freight moving by rail on the ground that it would discourage the movement of recycled goods and thereby cause more refuse and waste of natural resources. For standing, the students alleged that they personally would suffer recreational and aesthetic harm as users of parks and other natural resources in the Washington area. This time a divided Court affirmed that these were sufficient allegations of injury to establish standing.

The anomalies are patent[43] and are said to arise from the Court's strained attempt to force the array of recent public interest litigation into the older narrow mold of adjudication over private or personal injury. Both candor and integrity, such critics argue, compel recognition of these modern challenges as essentially public actions, whose purpose is to check official

40. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). *See generally* Orren, *supra* note 6, at 733-37.

41. 405 U.S. 727 (1972).

42. 412 U.S. 669 (1973).

43. *See* Sax, *Standing To Sue: A Critical Review of The Mineral King Decision*, 13 NAT. RES. J. 76 (1973).

illegality and prevent harm to the general good, but not to vindicate personal interests. The injury is undifferentiated and ultimately falls upon the citizenry at large.[44] Accordingly, a new adjudicative framework is necessary to accommodate this litigation.

Although initially plausible, this position is founded on the dubious premise that American public law adjudication primarily affords protection to tangible, highly specific interests of individuals in cases without group or public interest overtones or implications. That assumption is belied by the business of constitutional litgation during this century, and quite likely the last one as well. First, legal interests, though highly fragmented and widely shared, have long been characterized as personal in American courts, as illustrated by challenges to the national income tax,[45] apportionment of Congress,[46] prayer in public schools,[47] financing of public schools,[48] and university admissions policies.[49] Second, the interests of listener, environmentalist, and consumer litigant are not quite the equivalent of the public's interest in the good society (if they were, suit presumably would not be necessary). Individuals are indeed personally affected when parks are despoiled, programming is biased, or unsafe products are sold. Third, the subjectivity of injury and the blend of ideology—vindication of society's norms—are also a notable part of American constitutional history. The judicial recognition of intangible or impalpable harms, for example, to speech, religion, or family autonomy,[50] is not of recent vintage, and organizational sponsorship and direction of litigation has been commonplace. The objection that a plaintiff's real purpose is to advance a public cause rather than his own interest also misses the mark. Such an elusive motivational distinction is a peculiar notion in American courts. Moreover, social causes have not been alien to the business of the Court.

More basically, these characteristics of constitutional adjudication are the ingredients of the Court's reconciliation of *Marbury*'s divergent theories of judicial review. They provide the wherewithal by which the Court exists in the tension between adjudication designed to police and implement constitutional norms for an entire society and adjudication designed to

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44. *See* L. JAFFE, *supra* note 38; Chayes, *supra* note 4, at 1302-10; Orren, *supra* note 6, at 736-41; Monaghan, *supra* note 6, at 1368-86.

45. Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895).

46. Wesberry v. Danders, 376 U.S. 1 (1964).

47. Engel v. Vitale, 370 U.S. 421 (1962).

48. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

49. DeFunis v. Odegaard, 416 U.S. 312 (1974).

50. *E.g.*, Burstyn v. Wilson, 343 U.S. 495 (1952); Sweatt v. Painter, 339 U.S. 629 (1950); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923).

protect highly personal interests. They, like justiciability doctrines generally, are the measures that render clear-cut and ultimate choice unnecessary. This fluid tradition of adjudication, not a rigid garden-variety private model, should be the focus of those critics who advocate a special mold for the "new" public interest litigation.

There have been exceedingly few unalterable requisites for a "case or controversy." Where, for example, constitutional values have been deemed important enough, and the personal injury requirement a real barrier to litigation (which it rarely is), the Court has relaxed, perhaps eliminated, that element of a claim. The principal occasion to date is *Flast v. Cohen*,[51] the case allowing a taxpayer to attack the use of federal funds for religious schools as a violation of the establishment of religion clause in the first amendment. The Court maintained that there was individual injury, but it is obviously obscure. Similarly, a spending claim based on the establishment clause of the first amendment provides the rare occasion when an intangible, perhaps ideological, injury to a government official has been found sufficient to allow him to challenge the validity of a program that he is charged with administering.[52] Although not so reasoned, these holdings have been limited to claims concerning separation of church and state; such claims have ranked high among basic constitutional norms.

That injury is widespread does not present troublesome standing problems—enjoining a federal permit to an unsafe atomic energy facility whose radius of danger was nationwide would not be problematic.[53] But given the general injunction against citizen suits, difficulties do arise where injury is diffuse, novel, and susceptible of being characterized as a citizen's political interest in the lawful conduct of government or the social good. Cases presenting new, intangible injuries well reveal that the recognition of whether injury is actionable rests on a normative judicial judgment. Such judgment is derived from a determination of whether the substantive law invoked creates a personal interest or right in the complainant that has been infringed by the challenged action. Injury, of course, need not be physical or economic; it may be to an interest created by statutory, constitutional, or common law, as the recent public interest litigation over environmental and

51. 392 U.S. 83 (1968).

52. Board of Educ. v. Allen, 392 U.S. 236, 241 n.5 (1968); *cf.* Coleman v. Miller, 307 U.S. 433, 444 (1939) (state senator's right to challenge the validity of a proposed amendment to the Federal Constitution upheld).

53. *Cf.* Mink v. EPA, 464 F.2d 742 (D.C. Cir. 1971), *rev'd*, 410 U.S. 73 (1973) (in their capacity as private citizens, members of Congress had standing to seek to compel the White House to disclose documents concerning nuclear tests); Committee for Nuclear Responsibility, Inc. v. Schlesinger, 463 F.2d 783 (D.C. Cir. 1971), *motion for injunction denied*, 404 U.S. 917 (1971) (conservation group had standing to seek to enjoin underground nuclear test).

aesthetic harms well attests. Indeed, this normative foundation for recognizing injury is not peculiar to novel or intangible harms.

Where injury is familiar, however, no question of whether there is an interest worthy of protection is seen to arise. The only question remaining is whether the plaintiff has actually sustained the asserted injury, as if the inquiry were solely empirical. The Court's insistence on "injury in fact" as a component of article III standing, thus seemingly beyond Congress' power to alter through the creation of new statutory interests, reinforces this empirical perception of injury. By positing a constitutional concept of injury that transcends the legal provision governing the merits, the Court obscures the nexus between the actionability of harm and its normative predicate, and thus imposes an uncertain and possibly inoperative test.[54]

Two recent cases denying article III standing are on point. In *Schlesinger v. Reservists Committee to Stop the War*,[55] members of the armed forces reserve and others attacked the membership of congressmen in the reserves as incompatible with the constitutional prohibition on persons holding office under the United States from concurrently serving in Congress. Similarly, in *United States v. Richardson*,[56] a federal taxpayer invoked the constitutional mandate for a published account of government expenditures as invalidating a statutory exception for expenditures of the Central Intelligence Agency. The Court denied standing in each case, holding that there was no concrete or particularized injury to the plaintiffs; their interest in these practices was common to all citizens. It was not merely this lack of differentiation, however, but the unfamiliar and impalpable interests asserted that led the Court to view the asserted injuries as purely intellectual or political aggrievement.

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54. Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975). *But see* Sierra Club v. Morton, 405 U.S. 727 (1972). The Court has acknowledged ample congressional power to create legal interests on which standing may be predicated. Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1972); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). The Court recently has expressed a more qualified view of the extent of this power. Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. at 41, n.22 (1976); United States v. Richardson, 418 U.S. 166 (1974). This fluctuating judicial attitude reflects uncertainty over the scope and character of an article III limitation on Congress' power to create actionable injuries. The Court has never denied effect to an act of Congress on this ground, save perhaps for the perplexing and probably discredited ruling in Muskrat v. United States, 219 U.S. 346 (1911).

55. 418 U.S. 208 (1974).

56. 418 U.S. 166 (1974); *cf. Ex parte* Lévitt, 302 U.S. 633 (1937) (because petitioner disclosed no interest other than that of a citizen and member of the bar of the Court, he lacked standing to bring a motion for leave to file a petition for an order requiring Mr. Justice Black to show cause why he should be permitted to serve as an Associate Justice of the Court).

These cases illustrate that the article III concept of "injury in fact" is neither self-defining nor empirical. Rather, its content involves a subtle judicial judgment founded upon a construction of the substantive constitutional mandate in issue. Thus, as some dissents in these cases argued, it would not be implausible to infer from the public spending clause a protected taxpayer interest in expenditure information,[57] or from the separation clause a voter's legal interest in representatives free from a potential executive influence.[58] Indeed, the latter is typical of protections afforded by standard conflict-of-interest precepts. To be sure, the Court declined so to construe these prescriptions. These provisions, in its view, gave rise to no definable legal interest, and therefore there was no immediacy or actuality to the alleged harms. But there is no objective calculus for saying that these harms are less immediate or real than injury to schoolchildren from unequal educational financing or to voters from unequal districting. What differs is the source of the judgment, the law on which the claim is founded. Hence, it was a choice between competing views of the unconstrued constitutional provisions in *Richardson* and *Reservists* that determined whether there was "injury in fact." An empirical inquiry or construction of article III would cast no light.

Recent cases focusing upon the cause and sufficiency of injury similarly illustrate the relationship between injury and the merits. These questions are posed in actions to enjoin future as well as present conduct, thus illustrating the dual aspects of the injury requirement—the plaintiff's present plight and the harm that may occur later. The issues are therefore at the intersection of standing and ripeness, choice between them depending upon which harm is emphasized by the Court.[59] Standing was the basis of decision in *Laird v. Tatum*,[60] the case in which certain political activists contended that the operation of the Army's surveillance and data-gathering system on peaceful civilian activities "with a potential for disorder" had a present inhibiting effect upon public gatherings and expression, although any present or future use of the information was unknown. In the Court's view, this claim lacked a threat of specific future harm, as well as present objective harm; the plaintiff's asserted fear of military surveillance at best amounted to a "subjective" chill on association and speech.

The line between subjective and objective is not apparent; the Court has found the requisite objective inhibition on speech and association in

57. 418 U.S. at 232-35, 239 (Douglas, J., dissenting).

58. 418 U.S. at 203-07 (Stewart, J., dissenting).

59. The Court has stressed standing rather than ripeness in recent cases. *See* Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Laird v. Tatum, 408 U.S. 1 (1972).

60. 408 U.S. 1 (1972).

scores of vague, broad, or uncertain modes of regulations and proscriptions, including government surveillance programs.[61] These infringe on expression by the very uncertainty of their scope or invocation. What differentiates *Laird*, however, is the Court's own assessment of the claim—the extent of impact from this covert, unexplored operation tacitly weighed against the consequences to the system itself from subjecting it to a searching inquiry. A "subjective" chill was obscure shorthand for saying that a first amendment calculus did not warrant the costs of exposing the Army's system of intelligence gathering or planning.

Where costs of this kind are not at stake, the Court has accepted far more speculative and tenuous claims of injury without addressing a standing problem. Consider, for example, *San Antonio Independent School District v. Rodriguez*,[62] the significant school-district finance case, in which injury to school children was said to result from unequal expenditures for public education by school districts within a state. Harm from the challenged practice therefore rested on a highly controversial relationship between relative dollar inputs and educational quality, which was both unknown and unproven in the case. Indeed, the Court noted the vagueness and uncertainty of harm as one of several weaknesses of the equal protection challenge. But it did not seek to truncate or simplify an extensive exploration of all aspects of the claim by reliance on standing. *Laird* and *Rodgriguez* are not necessarily inconsistent; the Court's invocation of an objective calculus of harm in *Laird*, however, makes them appear so.

Such generalized articulations of injury isolated from the claim invite charges of inconsistency, selectivity, and ad hoc decisionmaking; judicial expressions of skepticism about the merits, predictably commonplace in such standing decisions, provide further support for such charges. Discussion of these issues would be more coherent and edifying were the Court to address the sufficiency of injury as a question pertaining to a particular claim, an interest created by the law invoked, and not as an arching principle of standing.[63]

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61. Lamont v. Postmaster Gen., 381 U.S. 301 (1965); Shelton v. Tucker, 364 U.S. 479 (1960); Lovell v. Griffin, 303 U.S. 444 (1938); Stromberg v. California, 283 U.S. 359 (1931). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

62. 411 U.S. 1 (1973).

63. The recent ruling of the New York Court of Appeals on an applicant's challenge to a medical school's preferential admission program provides rare recognition that injury to the complainant from an unlawful practice is an essential element of one's ultimate right to relief, an integral part of the claim and hence the merits. Alevy v. Downstate Medical Center, 39 N.Y.2d 326 (1976). Noting that the complainant was 154th on a waiting list for admission, the court ruled that elimination of a preference for minority candidates would not entitle him to

II. RIPENESS

Ripeness issues, mirroring considerations similar to those of standing, are posed in pre-enforcement review proceedings, where anticipatory judicial relief is sought against some future action that a plaintiff fears may be taken against him. The Court has articulated ripeness as a dual inquiry: whether the substantive issue of validity is fit or appropriate for judicial resolution, and whether hardship to the party is sufficient to warrant adjudication.[64] Viewing ripeness as another process-oriented aspect of institutional competency, commentators stress the fitness inquiry over hardship; its function is to prevent premature judicial interference with government action and to avoid entanglement in abstract, poorly defined disputes. The mature, focused conflict not only affords the Court an informing perspective on the actual working or impact of laws, a view not available in the legislative process, but also provides the Court with greater choice among the grounds for decision, an opportunity thus to decide in the narrowest compass.

Accordingly, ripeness looks to the posture and record of a case, the need for particularized facts, specific allegations, and empirical data.[65] As legal commentators observe, the relevancy of these variables is a function of

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admission and thereupon denied relief. The court emphasized that its dismissal was not a threshold matter of standing, but was based upon a finding, after a hearing on the merits, of a fatal defect in petitioner's claim—he was not prejudiced by the preferential system. This distinction, of course, is the gist of the argument in the text. *See also* Regents of the Univ. of Cal. v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977).

As indicated, this Article does not deal with the issue of third party standing, situations in which an injured party appears to rely upon the claim and interests of others who are not before the Court, *e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961). Many of these cases rest on derivative rights, a claim by the litigant that implementation of a legal policy favoring nonparties implies a protection for him because of his relationship with the nonparties, *e.g.*, doctors invoking the protected right of women to an abortion. *See* Singleton v. Wulff, 428 U.S. 106 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972). In other cases, however, litigants more plainly assert independent third party interests. Barrows v. Jackson, 346 U.S. 249 (1953). At times the Court allows such claims as a means of better protecting the rights of nonparties, particularly where there are obstacles to suit by such persons. *E.g.*, Bantam Books v. Sullivan, 372 U.S. 58 (1963). *But see* Parker v. Levy, 417 U.S. 733 (1974). *See generally* Albert, *supra* note 1, at 464-73; Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

Cases involving third party standing have been unusually explicit on the relationship between standing and the policies underlying the substantive constitutional principles invoked. For instance, a defendant's standing to exclude evidence illegally seized from codefendants was rejected on the ground that the deterrent effect of such additional exclusion was outweighed by the need for reliable evidence at trial. Hence, the standing ruling is openly based upon competition between fourth amendment interests and other policies relating to the merits of the claim. Alderman v. United States, 394 U.S. 165 (1969). *See also* Mancusi v. DeForte, 392 U.S. 364 (1968).

64. Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

65. BICKEL, *supra* note 7, at 123-26, 139; Scharpf, *supra* note 13, at 528-32.

the Court's formulation of the appropriate constitutional standard for determination of the issue of validity. An embracing or abstract decisional principle requires far less record development or focus than a standard involving refined balancing and close distinctions.[66] Hence, a preview of the merits is an essential part of evaluating fitness of the issue. Such authors, moreover, note that seemingly inconsistent decisions can be reconciled by reference to differences in the Court's initial view of the standard governing the issue of validity.[67]

Contrary to the emphasis on fitness in the process-oriented position, the hardship issue—injury—appears to be critical in most ripeness decisions; consequently, the merits are implicated even more directly. More precisely, ripeness is more profitably viewed as a determination of whether the threat of future injury and its present impact on the plaintiff are sufficiently defined, certain, and substantial to be actionable, not in the abstract, but under the legal provision on which the claim is based. Accordingly, a ruling that a case is not ripe, like injury rulings in standing cases, is the equivalent of a dismissal for failure to state a claim for relief. Because ripeness cases involve different claims founded on diverse legal provisions, no real question of consistency among them arises.

Although discussed above for the standing question it presents, *Laird v. Tatum*[68] is also a ripeness case involving a determination that the government action—the surveillance program—did not work a present or future injury insufficient to warrant first amendment concern. That amendment's protection of expression was construed to be relatively insensitive to the impact of data-gathering alone, even though it is hypersensitive to more coercive forms of inquiry. Similarly, in the recent troublesome ruling in *Warth v. Seldin*,[69] the Court demanded an unusual showing of certainty in the causal relationship between past and future injury and the challenged conduct. Moderate and low income families charged that they were prevented from residing in an affluent suburban community by virtue of its zoning ordinances that restricted housing to expensive, single-family, detached dwellings.[70] The restriction, they alleged, was designed to exclude plaintiffs

66. Scharpf, *supra* note 13, at 530.

67. *Id.* at 529-33.

68. 408 U.S. 1 (1972).

69. 422 U.S. 490 (1975).

70. Actually, there were several classes of plaintiffs asserting a challenge: low and moderate income families seeking housing; taxpayers and property owners from a nearby city; residents of the suburban community; and firms seeking to build low-cost housing in the suburban area. This array of interested parties, particularly the builders, makes the Court's insistence on near-certain causation rather more problematic. *See* 422 U.S. at 521 (Brennan, J., dissenting).

by ensuring that housing within their budget had not been and would not be available. The Court, parsing the complaint in the manner of a common law pleading, held that these allegations failed to establish either that the plaintiffs' inability to find affordable housing had stemmed from the exclusionary practice or that judicial relief, if afforded, would result in housing plaintiffs could afford to lease or buy. Because the plaintiffs had not specified a particular housing project that would have been or would be built without the zoning restriction, they had not demonstrated the necessary connection between their deprivation and the allegedly illegal action.

As a general pleading requirement of causation between illegal action and injury, this ruling is indeed extraordinary and patently inconsistent with *SCRAP* and a host of other decisions.[71] As a special rule of causation applicable to actions against local zoning ordinances, it is at least intelligible and arguably defensible; it reflects a judicial skepticism about zoning claims that places them in a distinctly disfavored category. The Court suggested as much in its otherwise gratuitous observation that zoning laws, vital to urban planning, belong peculiarly within the province of state and local government.[72] Imposing onerous burdens of proof or certainty on a plaintiff in a disfavored action is not extraordinary,[73] but more explicitness than that

71. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). *See also* Roe v. Wade, 410 U.S. 113 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Peters v. Kiff, 407 U.S. 493 (1972); Railroad Transfer Serv., Inc. v. Chicago, 386 U.S. 351 (1967); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

The future contingencies that might affect the welfare or interests of the parties in most of these cases were no less significant or unforeseeable than those in *Warth*. They are more or less present in any action where the benefits from declaratory or injunctive relief are only anticipatory.

72. 422 U.S. at 508 n.18. *See also id.* at 520 (Brennan, J., dissenting). An exclusionary zoning claim may also involve the vexing issue of disproportionate racial impact and segregative intent. *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

73. A dissent observed that the holding in *Warth* "can be explained only by an indefensible hostility to the claim on the merits." Warth v. Seldin, 422 U.S. at 520 (Brennan, J., dissenting). For a similar line of reasoning, see Scott, *supra* note 15, at 684-85 ("concern over the decision role the court would have to assume may lead it to reject standing for a plaintiff whose injury and stake would, in a different context, pass muster").

Conversely, favored or preferred constitutional claims may lead to especially liberal rules of standing or ripeness, as can be seen in freedom-of-expression adjudications. *See* Gooding v. Wilson, 405 U.S. 518 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971).

Viewing *Warth* as a disfavored claim for relief also accounts for the Court's disposing of the causation issue on the pleadings, without opportunity for discovery or development of the facts at trial. Notwithstanding liberalized rules of pleading under the Federal Rules of Civil Procedure, a plaintiff is still obliged to set forth in the complaint a legal claim on which relief can be granted. FED. R. CIV. P. 8. The adequacy of allegations going to the legal sufficiency of the claim may always be tested, at the outset, by a motion to dismiss for failure to state a claim. FED. R. CIV. P. 12. If, as is the author's view, causation is an essential element of the claim, then it is properly subject to challenge by such a motion to dismiss. Hence, the charge that the

present in *Warth* is necessary to avoid the charge of manipulating the injury concept to suit the occasion and also to justify immunizing zoning laws in this manner.[74]

Two ripeness cases classically invoked for the fitness of the issue view of ripeness are *United Public Workers v. Mitchell*[75] and *Adler v. Board of Education*.[76] In *Mitchell*, a group of governmental employees asserted their desire to engage in local political campaigning in violation of the Hatch Act's ban on political activities by federal employees. Except for one who had been charged with a violation, the complainants had not actually engaged in prohibited conduct prior to the suit. As a result, the Court found no special injury to these plaintiffs, though it went on to adjudicate and reject the claim of the sole plaintiff who had engaged in prohibited activities. In contrast, the Court in *Adler* ruled upon an unimplemented state statute authorizing the listing of groups as subversive organizations and the dismissal of public school teachers who belonged to them. No group had yet been designated, and the complaining teachers had not specified any particular activity from which they were deterred. Instead, they asserted that the inchoate program generally inhibited their freedom of association. The Court upheld this program without adverting to ripeness. For those who view ripeness as depending on record development and fitness of the issue, these cases are distinguishable on the ground that the Court in *Adler* deemed the merits to be governed by a broad and abstract constitutional standard—state employment is merely a privilege—while in *Mitchell* the issue might

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Court was precipitous seems unwarranted. One should observe that there are ample opportunities for a plaintiff to amend the complaint, FED. R. CIV. P. 15. *See* Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972).

74. The Court imposed a very similar burden of injury causation on the plaintiffs in Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976), a statutory case strikingly parallel to *Warth*. A number of indigent plaintiffs challenged an Internal Revenue Service ruling extending favorable tax treatment as "charitable organizations" to certain nonprofit hospitals, while reducing the obligation of such hospitals to serve indigents. Injury was wanting, in the Court's view, because the plaintiffs failed to demonstrate that, but for the tax ruling, the hospitals would have provided or would provide greater health services to them. As in *Warth*, the Court revealed doubts about the merits, for the claim involved private individuals seeking to challenge the federal tax liability of someone else. Excepting certain first amendment religion challenges, such intrusions in the taxing system are virtually unprecedented. *See* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

In Linda R.S. v. Richard D., 410 U.S. 614 (1972), where a private party sought to compel the criminal prosecution of another, the Court insisted on an unusual certainty of injury and causation in the context of a highly disfavored action. As the Court suggested, privately initiated prosecutions are practically unknown in the United States. Observe that the rejected challenges in *Simon* and *Linda R.S.* were not likely ever to become "ripe" for adjudication.

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

76. 342 U.S. 485 (1952).

have been governed by a close balancing principle to which particular political conduct and enforcement policy were highly material.[77] It was not so governed, however; the Court proceeded in the *Mitchell* case itself to resolve the merits by a minimum rationality standard as broad and abstract as that in *Adler*, without regard to particularizing factors.[78]

There is no pat reconciliation. But it is plausible to observe that under first amendment doctrine prevailing at the time, the alleged injury in *Adler* was of greater established substantive concern than that in *Mitchell*. Constitutional doctrines protecting expression traditionally have been finely attuned to the *Adler*-type injury, since that injury stemmed from a vague program generating considerable uncertainty and thereby casting a cloud over associational activities. Vagueness, and later overbreadth, have been the most common grounds for invalidation in first amendment cases.[79] By contrast, in *Mitchell* the conduct proscribed by the Hatch Act—partisan political activities—was relatively clear and had not been a staple of first amendment adjudications. Hence, the interests asserted in *Mitchell* were far less recognizable under prevailing doctrine. Though this does not wholly explain *Mitchell*, it does allow us to deal with a more recent case, *United States Civil Service Commission v. National Association of Letter Carriers*,[80] where the Court once again upheld the Hatch Act, but this time at the behest of certain plaintiffs who, at the time of suit, had not engaged in conduct violative of the Act.

Although the pre-enforcement plaintiffs in *Mitchell* and *Letter Carriers* were similarly situated, the Court did not acknowledge a ripeness problem in *Letter Carriers*. There are two underlying reasons for this difference in treatment: first amendment jurisprudence had developed considerably in the intervening decades, and the impact of broad statutes on

77. Scharpf, *supra* note 13, at 531-32.

78. 330 U.S. at 94-103 (1947). The Court did discuss some particularizing facts about the single viable plaintiff, but only for the purpose of differentiating him from the other rejected complainants on the issue of standing. These facts, however, are entirely irrelevant to the Court's exceedingly broad and general reasons for upholding the Hatch Act; the ban on political activities was valid because it had some conceivable relationship to legitimate governmental objectives.

The Court's recent decision reaffirming the validity of the Hatch Act is far more discrete and cautious. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

79. *E.g.*, Smith v. Goguen, 415 U.S. 566 (1974); Elfbrandt v. Russell, 384 U.S. 11 (1966); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. Irvington, 308 U.S. 147 (1939); Stromberg v. California, 283 U.S. 359 (1931). *See generally* Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

80. 413 U.S. 548 (1973).

protected activity now presented a far more standard claim of injury.[81] Second, unlike *Mitchell*, the constitutional claim in *Letter Carriers* rested on grounds of vagueness and overbreadth, thus delineating well-established and significant first amendment interests.[82] Hence, injury in *Letter Carriers* posed no question of adequacy under the first amendment and therefore no issue of ripeness.

Ripeness issues in cases of statutory review of final administrative action, usually agency regulations, are similar to those in cases of constitutional review of statutes, save that the derivation of relevant injury from a regulatory program is more problematic. The statute on which a plaintiff relies for the claim of illegality is often uninformative on the scope of actionable injuries. Administrative regulations have multiple and diffuse impacts, and the governing statutes rarely reflect legislative concern with a spectrum of potential injuries.[83] Hence, the Court apparently relies on its own notions of legitimate harm and interests deserving of protection, and perhaps also places greater weight on the fitness of the issue. These factors are not easily separable in many cases.

A characterization of unfitness for review, however, manifests yet another direct interaction between ripeness and the merits; a determination that an administrative regulation is not ripe seems equivalent to a ruling that the regulation is generally, or facially, valid. Since the prematurity ruling requires a record of actual enforcement and specific application as prerequisites to adjudication, it necessarily posits that validity depends upon how the regulation is administered. But that is to hold, at least implicitly, that the regulation is consistent on its face with the agency's enabling statute and therefore valid in its application to the standard foreseeable situations, the paradigm cases.[84] Since a pre-enforcement plaintiff almost always attacks a regulation in its standard applications, or on its face, the ripeness ruling is, therefore, a rejection of the claim for relief. Although a full resolution of the merits, that ruling is made offhandedly and at the threshold, before the Court openly confronts and explores the claim.

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81. The overbreadth doctrine in first amendment adjudications particularly flourished in the 1960's. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

82. 413 U.S. 548 (1973).

83. *See* Vining, *supra* note 18. *Compare* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) *with* Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

84. *See* Vining, *supra* note 18, at 1522-29. This analysis would not apply where there is no standard foreseeable application or where all illustrations appear to be hypothetical.

III. POLITICAL QUESTION

Legal scholars have regarded the political question doctrine as the classic technique of judicial avoidance, a way of allowing a governmental decision to stand without involving the Court in support of its legitimacy.[85] As an assertion that final decisionmaking competency over an issue rests with another branch of government, the political question formulation stands in clear opposition to a judicial inquiry into constitutional validity and thus constitutes an exception to the judicial duty "to say what the law is."[86] *Marbury v. Madison* established that constitutional questions were subject to judicial inquiry; the political question rubric posits that some are not. Because the political question ruling attaches to a substantive issue rather than the particular parties or timing of a case, it also posits an enduring form of restraint.[87] Despite these doctrinal manifestations of judicial abstention, the political question machinery does not operate as a decision not to decide. Indeed, it works even more clearly as a delineation and construction of claims for relief, for it directly adjudicates the validity *vel non* of government action under the Constitution.

The several ingredients of a political question were explored in *Baker v. Carr*,[88] the case holding that legislative districting presented a justiciable issue. Constitutional commitment of a decision to the President or Congress, lack of judicially discoverable and manageable standards, and respect for coordinate branches of government are the most important elements in the Court's explication of the doctrine. Two recent celebrated cases, *Nixon v. United States*[89] and *Powell v. McCormack*,[90] well illustrate the current approach to the notion of constitutional commitment to another branch and its close relationship to judicial standards for decision.

After the indictment of several former Presidential aides for Watergate-connected offenses, the Special Prosecutor caused a subpoena duces tecum to be served on President Nixon, requiring production of tapes and writings

85. BICKEL, *supra* note 7, at 183-98; Scharpf, *supra* note 13, at 535-38.

86. Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344 (1924).

87. Scharpf, *supra* note 13, at 535-38.

88. The Court provided the following summary of the elements:

> Prominent on the surface of any case held to invoke 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 embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962).

89. 418 U.S. 683 (1974).

90. 395 U.S. 486 (1969).

of specified meetings between the President and his aides. In seeking to quash, President Nixon asserted two separate defenses. First, he contended that the production order presented a political question because article II, properly construed, commits the decision over disclosure of a President's conversations and meetings to the President alone. Given the President's exclusive authority to decide these matters, any issue regarding executive privilege is nonjusticiable. Alternatively, he argued that article II, properly construed, gives rise to an absolute executive privilege or, at a minimum, a privilege sufficiently broad to prevail over the Special Prosecutor's subpoena.[91]

Although the first claim sounds in jurisdiction—competency to decide as between Court and President—and the second in the merits—conceding power in the Court—the Court in *Nixon* considered and rejected these claims together. In requiring production, it relied upon the needs of the judicial process for evidence material to pending prosecutions and also upon the delphic observation in *Marbury* that it is "the province and duty of the judicial department to say what the law is."[92] This statement apparently provides the basis for rejection of the President's claim to exclusive constitutional authority over disclosure. But it is responsive to such a commitment claim only on the premise that *Marbury* established the Court as the authoritative interpreter of the Constitution with the final say on all constitutional issues. Therefore, competency was in the Court, not the President, to establish the boundaries of an implied executive privilege. That premise is not only an exceedingly broad reading of *Marbury*, but, taken seriously, it repudiates any concept of constitutional commitment as a basis for a political question ruling. There is a limiting factor, however, in *Nixon v. United States*: the President's political question and merit claims both rest upon nearly identical considerations of confidentiality and autonomy, and hence they are easily merged in deciding the case.

That was not true, however, in *McCormack*, an earlier decision with a more extensive exploration of the constitutional commitment claim. Acting pursuant to article I, section 5—"Each House shall be the judge of the . . . qualifications of its own members"—the House, upon sustaining allegations of serious misconduct during previous terms in office, refused to seat Representative Adam Clayton Powell after his re-election to Congress. In a suit against sundry House officials, Powell claimed that his exclusion from the House violated the constitutional mandate that representatives shall be

91. 418 U.S. at 692-93, 705.
92. *Id.* at 704-05.

elected by the people. He contended that the House's decision was constitutionally unauthorized since the requirements of age, citizenship, and residency prescribed elsewhere in article I constitute the exclusive legal qualifications for admission to the House.[93]

The commitment question turned on whether article I, section 5 conferred exclusive and final authority upon the House to judge and rule on the qualifications of elected representatives. Resolution of that issue, in the Court's view, required an inquiry into what the House legally may consider in judging eligibility—specifically, whether the House is limited to the prescribed minimum qualifications of age, residency, and citizenship, or whether it may also consider such other factors as character and past conduct. After a searching examination of the relevant constitutional materials and policy considerations, the Court adopted the more restrictive interpretation of section 5, concluding that there was "no discretionary power in Congress to deny membership by a majority vote."[94] There was no textual commitment since the House's ruling was not authorized by the relevant text of section 5.[95]

This reasoning has understandably provoked criticism that the Court confused jurisdiction—who has competency to decide—with the merits—the ultimate correctness of the House's decision. After initially posing the proper question, commitment, the Court proceeded to answer another: whether the section 5 qualifications were limited to the minimum qualifications specified in section 2. Since that issue was the mainstay of Powell's claim for relief, the Court decided Powell's entitlement to relief before deciding whether his claim was justiciable.[96]

This is an accurate description, but one may ask how, or indeed whether, the Court intelligibly could determine if there was a textual commitment and, if so, just what was committed, without an examination of the scope and content of section 5. For example, would the same section 5 inquiry be equally inappropriate had Powell been excluded for past failures to vote with the Democrats or to support Administration proposals? Alternative sources for resolving the commitment issue, other than the standard mode of constitutional interpretation and construction of the relevant provision that the Court employed, are not apparent. The text of the Constitution

93. 395 U.S. 486, 493 (1969).

94. *Id.* at 548.

95. 395 U.S. at 547-50. Decisions to *expel* a member of Congress during his term of office require a two-thirds vote of the respective House. U.S. CONST. art. I, § 5. The justiciability of expulsion decisions was not decided by the Court in *Powell*.

96. Sandalow, *Comments on Powell v. McCormack*, 17 U.C.L.A. L. REV. 172-73 (1969).

does not demarcate or even suggest that areas or issues are political or beyond judicial power; an express delegation of power to Congress or the President does not support such an inference.[97]

Beginning with *Marbury*, issues concerning the scope of executive or legislative authority have been staples of constitutional review; almost all federalism and separation of powers challenges have been found to be justiciable.[98] Hence, as a textual matter, section 5 is no more indicative of commitment of exclusive authority than, for example, the clauses delegating to Congress the power to regulate commerce or to tax. Beyond the text, constitutional history or the intent of the framers cannot be said to illuminate commitment issues. That historical background reflects scant consideration of the Court's general power to review congressional and executive decisions.[99] It is therefore not likely to shed more light on particular issues or powers intended to be beyond the reach of judicial review. Accordingly, constitutional commitment must be inferred from some characteristic of the subject matter or ruling in issue.

The critical characteristic is implicit in the Court's formulation in *Nixon* and *McCormack* of the relevant question for resolution of the commitment claims. In both cases the controlling question is whether appropriate constitutional interpretation gives rise to standards or criteria for judging the exercise of the executive or legislative power in issue. Under this approach, commitment rulings are derived from a lack of applicable decisional standards bearing upon the decision of a political branch, while justiciability and review follow from a formulation of relevant constitutional constraints.[100] Since resolution of the claim on the merits always involves precisely this determination—whether a relevant constitutional standard has been violated—the notion of textual commitment becomes nominal. If the Court decides that the Constitution does not establish limiting criteria—that the challenged decision falls within an area of broad executive or congressional discretion—there is no meritorious claim for relief. The commitment rhetoric is superfluous, and the notion of competency—that the issue is not

97. *Cf.* Rezneck, *Is Judicial Review of Impeachment Coming?*, 60 A.B.A.J. 681, 682-83 (1974) (read in isolation, § 5 may allow the inference that some issues are political questions, but this interpretation does not hold up in light of such decisions as *Nixon* and *McCormack*).

98. *E.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Champion v. Ames, 188 U.S. 321 (1903).

99. *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 105-07, 115-18, 120 (1973). *See generally* L. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT (1967).

100. *Cf.* Karst & Horowitz, *Presidential Prerogative and Judicial Review*, 22 U.C.L.A. L. REV. 47, 52 n.26 (1974) (propriety of judicial review may turn on a balancing of two factors: (1) the degree to which the process approximates a legal proceeding, and (2) the political factors involved in the process).

meet for adjudication—is illusory. These conclusions have no practical or heuristic significance; they do not precede, but follow, the Court's legal inquiry into the governing constitutional norms. Moreover, they follow only if the Court decides that the challenged action was within the authority conferred by the Constitution and that it does not violate any legal constraint on that power.[101]

That judicial undertaking is plainly not to deny or forego judicial review. Upon concluding that there is no conflict with the Constitution, the Court may then state that the challenged ruling is political, since the Constitution places it within the lawful authority of a political branch of government. But that assertion is different in kind from the nonjusticiability predicate of the political question doctrine.

In characterizing questions as political, however, the Court has not distinguished between a true political question case, where the issue is not subject to inquiry, and the spurious kind, where the issue is found to be within the lawful discretion of the political branches. A good number of political question rulings, however, appear to be spurious, resting as they do on a judicial determination of permissible discretion in the political branches. The decisional considerations in such cases reflect familiar factors and doctrines of constitutional adjudication that operate to validate the authority of the political branches in the ordinary justiciable case. Thus, many so-called political question cases are not exceptional; they reflect a standard constitutional construction establishing that the challenged political decision is lawful and therefore final.[102]

Well-established constitutional doctrines and standards of review afford ample room for the lawmaking and administrative powers of Congress and the President.[103] Consequently, no special political question rubric is needed to allow for appropriate judicial deference to legislative and executive authority. Moreover, judicial recognition of such authority need not be covert. Where the Court finds that an executive or congressional ruling is within an area of delegated discretion warranted by the Constitution, it is not apparent why the Court should not say so and explicitly dispose of the case

101. *Cf.* Henkin, *supra* note 13, at 605-06 (dismissal of case because the act complained of was within the power conferred upon the executive branch by the Constitution essentially has nothing to do with the political question doctrine).

102. Chicago & S. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); Coleman v. Miller, 307 U.S. 433 (1939); Luther v. Borden, 48 U.S. (7 How.) 1 (1848). *Compare* United States *ex rel.* Johnson v. Shaughnessy, 336 U.S. 806 (1949) *with* Harisiades v. Shaughnessy, 342 U.S. 580 (1952) *and* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). *See also* Cousins v. Wigoda, 419 U.S. 477 (1975); O'Brien v. Brown, 409 U.S. 1 (1972).

103. *See, e.g.*, FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976); Fry v. United States, 421 U.S. 542 (1975).

on the merits, dismissing it for failure to state a claim, without the beclouding imprimatur of the political question doctrine. There is nothing per se illegitimate or suspect about the exercise of discretionary political authority, as, for example, in the President's power to select or fire cabinet members.

The characteristic ambiguity of a political question ruling may be seen in *Coleman v. Miller*,[104] a case with notable nonjusticiability credentials. Several Kansas legislators asked the Court to annul that state's ratification of a constitutional amendment on the ground that it occurred after the Kansas legislature had once rejected it and over thirteen years after Congress had proposed the measure, pursuant to its article V power. The Court declined, ruling that both claims posed political questions for Congress to resolve. Though a valid ratification had to occur within a reasonable time after proposal, that determination entailed a broad range of complex factors suitable for legislative, not judicial, appraisal. Similarly, the legal consequence of a prior legislative rejection was also for Congress to adjudge. In light of the political question emphasis in the opinion, many read it to hold that issues concerning the amendment process are nonjusticiable; article V commits them to Congress, or they are not subject to a judicially manageable standard.[105] But that may be an unduly expansive reading.

Observe that the Court itself chose to adopt the unmanageable reasonable time criterion as the appropriate constitutional period for ratification.[106] That choice was a concomitant of the Court's general construction of article V affording Congress broad legislative authority to regulate the amending process. Pursuant to that authority Congress initially might have established a specific time limit for ratification and prescribed a rule governing prior rejection.[107] Though Congress had not settled these matters, its power to do so surely persists throughout the amending process and may be exercised at the final stage of acceptance. Such continuing supervisory authority in Congress is particularly appropriate in view of the fair number of unanticipated issues that might arise during the protracted course of state by state ratification. In light of this construction of article V, a judicial resolution of the timing and rejection issues in the first instance, however, would be flatly inconsistent with the recognition of continuing discretion in Congress. In that limited sense the issues presented in *Coleman* were political, and the Court's decision reflects a not unusual respect for the

104. 307 U.S. 433 (1939).

105. C. WRIGHT, THE HANDBOOK OF THE FEDERAL COURTS 53 (3d ed. 1976); *see, e.g.*, Scharpf, *supra* note 13, at 570, 587-89.

106. *Cf.* Dunn v. Blumstein, 405 U.S. 330 (1972) (residence requirements of fixed duration violated equal protection).

107. *See* Dillon v. Gloss, 256 U.S. 368 (1921).

separation of powers and lawmaking powers of Congress. Indeed, the Court shows similar deference to an administrative agency with jurisdiction to decide in the first instance.[108] So interpreted, the *Coleman* holding does not establish an extraordinary immunity for article V issues; nor does it indicate that Congress' actual exercise of power under article V is itself nonreviewable or that all issues concerning amendments are nonjusticiable.[109]

McCormack and *Nixon* also refer to some prudential strands of the political question doctrine, particularly the respect due to coordinate branches of government and the enforceability of the Court's mandate. The Court summarily dismissed the former by observing that interbranch conflicts arising from divergent interpretations of the Constitution do not involve a lack of respect for a coordinate branch, even where judicial construction concerns a matter peculiarly related to the affairs of Congress or the President. The resolution of those conflicts is a necessary and ordinary incident of judicial review.[110]

It is now clear that want of power to enforce a judicial decree, or the possibility that a mandate might not be obeyed, is similarly irrelevant to justiciability. Hence, enforcement problems were barely addressed in these two cases even though the Court was without coercive power in both, and at least one posed a serious possibility of defiance.[111] As these cases also indicate, the contemporary importance or political temperature of an issue, at least without more, has not been a prudential ground for nonjusticiability; the Court has adjudicated a large number of momentous, controversial, and divisive issues.[112]

Judicially manageable standards and their kin, the availability of material information, are more amorphous political question elements and not easily encapsulated. Like the preview of the merits under ripeness, their invocation quite directly rests on the Court's view of the appropriate substantive rule for resolution of the claim. The apportionment controversy well reveals the complex interactions of an apparently intractable social issue, discovery of a manageable standard, and availability of relevant information.

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108. *See, e.g.*, Meyers v. Bethlehem Shipbldg. Corp., 303 U.S. 41 (1938). *See generally* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

109. *Accord*, Leser v. Garnett, 258 U.S. 130, 132 (1922); Dillon v. Gloss, 256 U.S. 368 (1921).

110. 418 U.S. at 703-05; 395 U.S. at 548-49.

111. 418 U.S. at 706-07, 713-16; 395 U.S. at 517-18.

112. *See* note 5 *supra*.

Prior to *Baker v. Carr*[113] in 1962, legislative districting had been assumed to pose a political question.[114] Because of the relationship between districting and ongoing legislative representation, apportionment also presented a situation on which the political branches would not act. Hence, the Tennessee apportionment in *Baker* reflected severe population disparities resulting from over fifty years of legislative inertia. Predictably, the Court was asked to break the political stalemate, and it responded, very modestly, in *Baker*. The majority held that a voter's equal protection challenge to population disparities in legislative districting was justiciable. While disclaiming any view of the merits, the Court stated that familiar principles of equal protection—*e.g.*, minimum rationality—obviated any problem of judicially manageable standards and also suggested that Tennessee's ancient plan might not reflect any intelligible policy.[115]

Although indeed moderate, this was not a wholly adequate response to the dissent of Justice Harlan, who argued that if an apportionment plan embodies an intended distribution of political power among legitimate interest groups, it must always be found to have a rational basis.[116] More basically, Justice Frankfurter rejected the possibility of a manageable standard by viewing apportionment as a complex political process resting on numerous elusive adjustments for demography, economic and social groupings, mechanisms of party control, legislative leadership, traditional alliances, as well as population. He also stressed that neither history nor the structure of American institutions nor prevailing contemporary practice lent credence to a principle of equal population among districts and admonished the Court against rhetoric and empty promises.[117]

The Court did answer these dissents two years later when it established, in *Reynolds v. Sims*,[118] a strict standard of substantial population equality among districts for both Houses of a state legislature. Justice Stewart, in dissent to a companion case, argued that the Constitution prohibits "the systematic frustration of the will of a majority of the electorate," but does not demand one man-one vote.[119] More recently, the Court has reinterpreted substantial equality to allow the states some deviations, ten percent or so, without a reason, and larger ones where justified by traditional district lines

113. 369 U.S. 186 (1962).

114. Colgrove v. Green, 328 U.S. 549 (1946); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

115. 369 U.S. at 226.

116. *Id.* at 330-38 (Harlan, J., dissenting).

117. *Id.* at 267-70, 299-302, 323-25 (Frankfurter, J., dissenting).

118. 377 U.S. 533 (1964).

119. Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 753-54 (1964) (Stewart, J., dissenting) (*Lucas* is one of several companion cases to *Reynolds* decided the same day).

or some other explanation.[120] The Court also has declined to scrutinize political gerrymandering[121] and has approved supermajority voting requirements[122] as well as certain limited franchise elections.[123]

What emerges from these cases is the observation that there was no dearth of standards available for the apportionment issue. Moreover, the judicial inquiry and task in formulating the appropriate constitutional rule were not different from the Court's undertaking in defining the contours of free expression, privacy, or racial equality.[124]

As the opinions reveal, the several alternative standards included a demand for minimum rationality, a requirement that a plan legitimately reflect the many factors listed in Justice Frankfurter's dissent, or a condition that it not systematically frustrate majority will. These standards suggest a relatively permissive approach pursuant to which most apportionment plans, save perhaps the Tennessee crazy-quilt variety, would have been upheld. But any objection to that result must be based upon one's view, on the merits, that apportionment plans should be subjected to a more demanding standard.

Some standards, no doubt, are more manageable than others, and Justices Frankfurter's and Stewart's views of legitimacy in apportionment offer formidable problems of judicial administration and seemliness. They contemplate an extensive fact-oriented inquiry into the actual political configuration in a state, including data on voting blocs, bosses, party control, and the like.[125] The Court might rely on presumptions and other means to alleviate these difficulties, but it also initially might choose a more workable standard. The formulation of constitutional principles to take account of difficulties of administration, application, and proof, as well as apparent legitimacy, is not unique to apportionment. Such considerations have played a substantial role in the foundation of constitutional doctrine. Thus, first amendment jurisprudence is replete with substantive principles shaped by administrative and prophylactic concerns.[126] Furthermore, the Court rapidly abandoned a showing of psychic harm by persons challenging separate

120. *See* White v. Regester, 412 U.S. 755 (1973); Mahan v. Howell, 410 U.S. 315 (1973).

121. Gaffney v. Cummings, 412 U.S. 735 (1973).

122. Gordon v. Lance, 403 U.S. 1 (1971). *See also* Whitcomb v. Chavis, 403 U.S. 124 (1971) (multimember districts).

123. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

124. *See* notes 126-27 and accompanying text *infra*.

125. *See* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 246-47 (1968).

126. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 75-85, 89-115 (1960).

public facilities in the great desegregation decisions.[127] Similarly, the Court's special equal protection standard nominally demanding a "compelling state interest" may be responsive to intractable problems in choosing among multiple legislative purposes and in weighing sundry social and economic policies.

Hence, it is indeed likely that the formulation in *Reynolds* was responsive to problems of manageability and information posed by alternative standards, which may account for the Court's not rigorously extending the logic of one man-one vote to other issues of political responsiveness and equality. It may also explain the leeway afforded states to deviate from population equality; an unqualified commitment to an embracing majoritarianism need not have been the sole decisional consideration in *Reynolds*.

Some would argue that this concession admits that while numerical equality may be a defensible principle, it competes with a number of other relevant but unprincipled factors in legislative districting. Accordingly, the Court should have abstained from applying the equality principle and also from approving the expedient factors. Instead, it should have held the issue to be a political question so that government may continue to take account of the extra-legal factors, without the Court's lending its legitimacy to those matters.[128]

The problem with this reasoning is obvious—if it is proper for the political branches to rely upon factors other than population, why should the Court not say so by fashioning a constitutional standard that allows for appropriate flexibility and discretion? Conversely, if social or political compromises are improper in districting, causing illegitimate deviations from equality, then what is the objection to application of the one man-one vote principle? Surely judicial acknowledgment of a world of social, economic, and political realities does not impeach the Court's prestige or legitimacy.

These considerations render it difficult to conceive of a domestic constitutional issue that should be deemed a political question because of the absence of judicially manageable standards. In *Gilligan v. Morgan*,[129] however, the Court reached essentially this conclusion. Following the shooting of several persons at Kent State University by members of the

127. *Compare* Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954) *with* Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) *and* Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam).

128. BICKEL, *supra* note 7, at 191-97.

129. 413 U.S. 1 (1973).

National Guard, some students filed an action claiming that the Guard had been so poorly trained, equipped, and commanded as to make the reckless use of force inevitable. Some members of the Court thought the case moot because the students had graduated by the time of review and the Guard had since adopted new and different rules and training practices governing the use of force.[130] The majority seemed to agree,[131] but went on to stress that

130. 413 U.S. at 12.

The mootness doctrine is closely related to standing and ripeness, as well as the ban on advisory opinions. Though concerned with party interest and injury, the mootness issue arises from events occurring after the initiation of litigation, specifically, factual or legal changes which alter the nature of the dispute, injury, or the plaintiff's benefit from relief.

The general mootness rule is that an actual live controversy must continue to exist at all stages of litigation, not merely at the outset. It thus reflects a narrow role of judicial review focusing upon the vindication of individual party interest. But the relaxation of this rule, evidenced by its frequent exceptions, strongly suggests a broader, more issue-oriented function of review. Mootness decisions are more erratic than other aspects of justiciability, and the legal literature is less substantial.

Golden v. Zwickler, 394 U.S. 103 (1969), a standard instance of mootness, involved an attack on a law proscribing anonymous handbills, which prevented the plaintiff from distributing literature in future campaigns of a named congressman. During the litigation the congressman was appointed to a longterm judgeship, and the Court dismissed the case as moot; it was "wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing" handbills. *Id.* at 109. *See also* Craig v. Boren, 429 U.S. 190 (1976).

The most important and vexing qualification on mootness is for issues "capable of repetition, but evading review." Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). There are two elements in this formulation—a likelihood of future recurrence of harm to the plaintiff or the group he represents, and a probability that future cases similarly will evade appellate review by the passage of time.

Some complexities of this doctrine remain. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974); Roe v. Wade, 410 U.S. 113 (1973). The abortion challenge in *Roe* was initiated by a pregnant, unmarried woman, pseudonymed Miss Roe, seeking to terminate pregnancy, and a childless, married woman, not then pregnant, pseudonymed Mrs. Doe, seeking to avoid the possibility of future childbirth for health and personal reasons. Though Miss Roe was no longer pregnant when the case reached the Supreme Court, the Court held that her claim was not moot, since pregnancy "often comes more than once," and pregnancy litigation would never survive beyond the trial court. *Id.* at 125. But Mrs. Doe's claim was not ripe; future injury to her from a restrictive abortion law was too contingent and speculative. The alleged present injury, an interference with a normal martial sex life, was deemed insubstantial. *Id.* at 128. In *DeFunis*, however, a narrowly divided Court found no threat of further harm to DeFunis from a law school's preferential admissions procedure—DeFunis was then in his last term of law school—and also no inherent evasiveness in the issue—the next challenge would reach the Supreme Court more quickly.

Some distinctions are possible, though not entirely persuasive. *DeFunis* was not formally a class action, and the Court recently has excepted mootness issues from the general ongoing requirement that a class plaintiff must be a live, representative member of the class. For mootness purposes, it is enough that the plaintiff was a proper class representative at the outset or early stage of the litigation. *See* Sosna v. Iowa, 419 U.S. 393, 402-03 (1975). But class action status did not figure in the decision in *Roe*. One may also observe that the recurrent harm in *Roe*, pregnancy, might affect the named plaintiff, whereas DeFunis himself could not be prejudiced again by the admissions process. The injury distinction between Miss Roe and Mrs. Doe, however, seems unsupportable on any notion of quantum or likelihood of present or future harm. Perhaps one can say that the issue in *Roe* is inherently more evasive of review

this was not an action to seek damages or to enjoin some specific Guard action; rather, it sought continuing judicial surveillance and regulation over the Guard to assure adequate training and compliance with the new rules. The majority ruled that the relief sought presented a political question, because Congress and the President jointly are responsible for the training and weaponry of the Guard and also because courts have no competence over these matters.[132]

In so holding, however, the Court made clear that specific activities of the Guard, past or future, were subject to judicial review in a suit for damages or an injunction.[133] This qualification, suggested by past cases,[134] demonstrates that there are constitutional standards by which to judge the legality of Guard training and operations, including its intended use of force. It is also irreconcilable with the assertion that control over the Guard has been committed to the political branches. Moreover, had a state been contemplating sending the Guard into a prison or university under orders to use deadly force when appropriate for good order or discipline, clearly the Court would have had no difficulty formulating a constitutional principle for determining whether such instructions or previous training presented an unreasonable hazard to life. This decision is doubtlessly overkill. It expresses, however, the Court's more defensible judgment that, absent some specific threat, defined activity, or unlawful instructions, there should be wide discretion in the political branches over matters of Guard training and riot control. For this reason the Constitution does not demand or warrant continuous judicial scrutiny. As we have seen earlier, the labeling of such a holding as a political question ruling is not only needless, but also misleading.

CONCLUSION

Having explored how standing, ripeness, and the political question doctrine operate in a particular case and the issues they necessarily pose and resolve,

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than that in *DeFunis*—mootness in the latter, after all, arose from a chance victory in a lower court, which ordered his admission, whereas pregnancy cannot in any case persist through the protracted appellate process.

But these are quibbles, and it appears that mootness has less principled content than other doctrines of justiciability; it may be manipulated to allow or forestall adjudication. As a federal official is said to have characterized the *DeFunis* principle, "Difficult cases are moot." D. CURRIE, FEDERAL COURTS CASES AND MATERIALS 107 (2d ed. 1975). The public as well as private orientation of public law adjudication, however, is indeed mirrored in the curious course of mootness decisions. *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974).

131. 413 U.S. at 5.

132. *Id.* at 10-11.

133. *Id.* at 11-12.

134. *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 15-16 (1972); Duncan v. Kahanamaku, 327 U.S. 304 (1946).

we may now explicitly address some larger themes: justiciability doctrines as the underpinning for a theory of judicial review and as a special mechanism of judicial restraint.

The conclusion, succinctly put, is that these doctrines do not follow from or support any particular theory of judicial review; nor do they have any exceptional role as a restraint or limitation on judicial power. To be sure, they do relate to these subjects, but they do so in the same manner as substantive constitutional rules. Constitutional principles of actionability, formulated on a case-by-case basis in response to a large variety of claims, do not specifically reflect or support a comprehensive theory of judicial review. Viewed as a body of jurisprudence, however, such rules may indeed illuminate the scope and character of constitutional adjudication. As an integral part of this jurisprudence, standing, ripeness, and political question decisions may shed some light on the theory or practice of judicial review. But justiciability cases are not a peculiar source of learning in this regard.

Similarly, a number of substantive doctrines in constitutional law, *e.g.*, the minimum rationality standard or the presumption of validity, are manifestations of judicial restraint. So too is the requirement of party interest and injury in standing and ripeness invocations or the recognition of congressional or executive discretion in political question situations. But this restraining effect is also an ordinary feature of rules of actionability.

These intersections of justiciability doctrines with notions of constitutional review and restraint are perhaps sufficient to lend an initial plausibility to the received tradition that such are the *raison d'etre* of the standing, ripeness, and political question matrix. The error of overstatement, however, results from a failure to recognize that the intersections are a characteristic of substantive constitutional principles, and not a special feature of a distinct category of justiciability principles.

One may ask whether an inquiry into the justiciability-merit nexus is merely nominal or scholastic, since a court does resolve the substantive issue, whatever the rubric. But concepts do have significance in the judicial process. The justiciability rubrics invite both court and parties to engage in shadowboxing—to discuss and decide party interest and issue adjudicability in the abstract, as if the particulars of the claim before the court have no bearing upon the matter. There being no workable criteria separate from the claim, precedents seemingly announcing general principles of justiciability are invoked as the relevant learning on the issue. This process is not very helpful or enlightening; indeed, the very attempt is both distracting and

productive of poorly articulated decisions. As we have seen, justiciability rulings are often question begging, obscure, or misleading. They are plainly not exemplars of judicial candor, for the determinant of a ruling, the actionability of the claim, cannot be appropriately articulated at the threshold stage of deciding to decide. Discussion of the claim is therefore summary and impressionistic, as befits an assessment prior to direct exploration of the merits. Moreover, justiciability decisions, because they purport to rest on general principles, often appear to decide considerably more than they do, as in *Warth*[135] or *Gilligan*.[136] Such breadth and implications are indeed a curious feature of rules supposedly designed to limit the issues and avoid reverberations.

Party interest, injury, and causation are meaningful and relevant concepts when used to evaluate a claim for relief, public or private. Difficulties arise from the attempt to detach such concepts from the particulars of a claim and thus to transform them into a general recipe for making a case. Such an attempt necessarily founders upon several familiar features of constitutional adjudication. Constitutional litigation presents too many interactions in variant circumstances to be susceptible to prefabricated formulas of general applicability. Embracing principles of justiciability are no more feasible or desirable than other sweeping or absolute standards governing resolution of the merits,[137] say, for example, the right-privilege dichotomy.

Not only are the protean concepts of standing and ripeness shaped by the contexts in which they are applied, but their assessment in any case is largely a matter of intensity and degree. No single standard is likely to persist because the degree and intensity of interest, harm, and causation in constitutional disputes fall upon a lengthy spectrum. At one end are those constitutional proscriptions protecting against highly palpable harms where causation and victim are easily discerned—such as a fourth amendment claim against a police officer for brutality. At the other end are those mandates protecting against spiritual deprivations where neither cause, harm, nor victim are easily identifiable—such as a first amendment challenge to

135. 422 U.S. 490 (1975).

136. 413 U.S. 1 (1973).

137. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). Reliance on broad standards is not often successful, *cf.* Broadrick v. Oklahoma, 413 U.S. 601 (1973) (improbable construction of Oklahoma statute). *Compare* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) *and* Marsh v. Alabama, 326 U.S. 501 (1946) *with* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

practices aiding religious institutions[138] or a fourteenth amendment attack on racial classifications in jury-member selection.[139]

There is yet another reason why evaluation of claims for relief figures large in standing and ripeness adjudication. It is familiar knowledge that some constitutional interests present stronger credentials for recognition than others; certain liberties are borne by a "momentum of respect lacking" in others.[140] The elements of selection are subtle, no doubt. But the hierarchy of constitutional values behind such selection does not rest upon a foundation of standing or ripeness concerns. Any correlation between the standing-ripeness variables, such as quantum of injury, intensity of individual interest, and certainty of causation, and the relative importance of a constitutional claim is fortuitous.[141] Consider the intensity of these variables, for example, in the context of apportionment or racial gerrymandering challenges. Accordingly, even if it were possible to apply a fixed justiciability threshold, it would be costly to do so, since such a practice would distort recognition and accommodation of an ordering of constitutional values.

Courts do accommodate such an ordering, but, with few exceptions,[142] do not acknowledge that the justiciability threshold varies in accordance with the claim asserted. As a result, justiciability adjudication appears enigmatic, and legal pundits have been free to develop diverse explanations of it.

For example, the Board of Governors of the Society of American Law Teachers recently asserted that the Burger Court has systematically reformulated or misapplied Warren Court jurisdictional requisites so as to impede or restrict federal court adjudication of civil rights litigation, especially in cases involving minorities or the poor.[143] Not surprisingly, the evidence is unruly; a fair number of both Warren and Burger Court decisions do not support this theory of general or selective restrictiveness.[144] Moreover, the

138. *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

139. *See* Peters v. Kiff, 407 U.S. 493 (1972).

140. Kovacs v. Cooper, 336 U.S. 77, 95 (Frankfurter, J., concurring) (1949).

141. *See* Carey v. Population Servs. Int'l, 97 S. Ct. 2010 (1977); Wooley v. Maynard, 97 S. Ct. 1428 (1977).

142. *E.g.*, Craig v. Boren, 429 U.S. 190 (1977); Alderman v. United States, 394 U.S. 165 (1969); Flast v. Cohen, 392 U.S. 83 (1968); Barrows v. Jackson, 346 U.S. 249 (1953).

143. *See* Statement of the Board of Governors, Society of American Law Teachers (Oct. 10, 1976).

144. The Burger Court has handed down a number of expansive opinions in the area of ripeness. *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 188-89 (1973); Lake Carriers Ass'n v. MacMullen, 406 U.S. 498, 506-08 (1972). It has displayed the same liberality in regard to mootness determinations. *Compare* Sosna v. Iowa, 419 U.S. 393 (1975) (Burger Court) *with* Golden v. Zwickler, 394 U.S. 103, 109-10 (1969) (Warren Court). The Burger Court has

observation contributes to an erroneous understanding of justiciability and stimulates unpromising attempts at reform.

Hence, one public interest group seeks to relax standing requirements by substituting the term "effects" for "injury," as if substantive issues of legal interest and cognizable injury were simply problems of nomenclature.[145] Other statutory reform efforts rely on similarly talismanic terms such as "indirect" or "incidental" cause or interest.[146] Such semantic exercises may convey an attitude, but they are not responsive to troublesome decisions that provoke reform, such as *Warth* or *Richardson*. Indeed, all of these attempts to draft a statutory formula appear to ignore the extensive experience over several decades with the standing mandate in the Administrative Procedure Act, which has not contributed to a constant or coherent approach to the elaboration of standing.[147]

Finally, the failure to confront questions about who may sue, when, and over what issues as matters of actionability has inhibited the growth of a body of public law for constitutional controversies. Standing and ripeness issues have not been a notable feature of private law litigation because the common law has carried the burden of resolving them under the formulation

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expanded the concept of standing in certain instances. *See* Carey v. Population Servs. Int'l, 97 S. Ct. 2010 (1977) (third party standing); Singleton v. Wulff, 428 U.S. 106 (1976) (third party standing). *Compare* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) *with* Younger v. Harris, 401 U.S. 37 (1971) (comity). Abstention was similarly viewed by both Courts. *See* Reetz v. Bozanich, 397 U.S. 82 (1970); Harrison v. NAACP, 360 U.S. 167 (1959). *See also* Snyder v. Harris, 394 U.S. 332 (1969) (Warren Court declined to augment federal jurisdiction).

145. *See* Proposal of Public Citizen Litigation Group, Remedial Standing Legislation (Sept. 9, 1975) (submitted to the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary).

146. For example, a recent formulation by the Staff of the Subcommittee on Citizens and Shareholders Rights and Remedies provides for public interest standing in all persons "who may benefit directly, indirectly, or incidentally" from enforcement of a law of the United States. It also mandates that any act that "directly, indirectly or incidentally contributes toward jeopardizing any . . . benefit [to the plaintiff] shall be deemed to have caused injury in fact." *See* STAFF OF THE SUBCOMM. ON CITIZENS AND SHAREHOLDERS RIGHTS AND REMEDIES OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., DRAFT, CITIZENS' ACCESS TO THE COURT ACT OF 1977 (1977). Although one can appreciate the difficulty of drafting legislation on standing and causation, a plethora of adverbs does not provide a solution.

147. [E]xcept to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law . . . [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Administrative Procedure Act § 10, 5 U.S.C. §§ 701-02 (1970). The judicial approach to standing under this provision reflects considerable variation and transformation since enactment of the Act in 1946. *See* Barlow v. Collins, 397 U.S. 159, 165-67 (1970); Scanwell Laboratories v. Thomas, 424 F.2d 859, 865-73 (D.C. Cir. 1970); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 931-34 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955). *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.00-3(4), 22.00-5 at 726 (Supp. 1970); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 528-30 (1965); Albert, *supra* note 1, at 451-52, 475.

of actionable claims. Without underestimating the difficulty of the task, there is no inherent reason why a body of public law rules cannot do the same in constitutional controversies. Such an approach, at a minimum, would introduce some order and coherence to the intellectual disarray of justiciability adjudications.