1983

Expository Justice

Girardeau A. Spann
Georgetown University Law Center, spann@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1939


This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Courts Commons
EXPOSITORY JUSTICE*

GIRARDEAU A. SPANN†

Introduction

The task of the federal judiciary is seriously complicated by the fact that it has to play one role while pretending to play another. We ask the courts to pretend that they are resolving disputes between parties, but what we really want them to do is tell us how to conform our behavior to our fundamental values. Society needs a branch of government to implement its fundamental values, and the federal judiciary is well suited to that task because it possesses the precise balance of autonomy and public accountability needed to perform the function properly.

However, the dispute resolution charade is counterproductive. It frustrates proper implementation of our values by diverting judicial energies to consideration of extraneous, dispute-related concerns. Accordingly, courts should adopt a new model of adjudication more in tune with their important social function.

Under the traditional, dispute-resolution model of adjudication, courts are expected to decide cases by ascertaining the material facts and applying to those facts general principles of law. In theory, such a process promotes unbiased decisionmaking which will be perceived by the parties as legitimate, but it also results in the exposition of legal principles as they are applied to more and more different factual situations. Nevertheless, under the traditional model, exposition is merely an incidental consequence of the process of principled decisionmaking; dispute resolution is viewed as the primary objective.

An alternative model of adjudication can be fashioned under which the exposition that occurs during the adjudicatory process constitutes the primary functions of courts—at least article III courts. Such a model assigns to the courts a social role that is far more important than

---

* Girardeau A. Spann 1982. All rights reserved. Permission to reprint this article must be obtained directly from the author.
† Assistant Professor of Law, Georgetown University. A.B. 1971, Princeton University, J.D. 1974, Harvard University. I would like to thank the people who helped me to develop and express the ideas contained in this article, including Chuck Abernathy, Abe Chayes, Dick Chused, Linda Donaldson, Frank Flegal, Deirdre Golash, Steve Goldberg, Steve Jenkins, Duncan Kennedy, Victor Kramer, Alan Morrison, Linda Rodd, Mike Seidman, Angelyn Spaulding, Mark Tushnet and Si Wasserstrom. Research for this article was supported by a writer's grant from the Georgetown University Law Center.
the role contemplated by the dispute-resolution model. When statutes are involved, exposition provides useful information to the executive and the legislature. This information facilitates proper operation of the legislative process in a way that is consistent with separation-of-powers safeguards.

When constitutional principles are involved—principles that supersede mere majority concerns—the court performs its truly important function. By relating those principles to the facts of particular cases, the judiciary advises us of the meaning of our fundamental values at particular points in our social evolution. Because the pressure of immediate concerns can make it easy to lose sight of our values and to resist the recognition that those values compel actions that may at times be distasteful, effective exposition can be quite difficult. When done properly, however, judicial exposition produces attitude change and facilitates social progress. Under the expository model, when a court dispenses justice it does far more than prescribe outcomes in litigated cases. It dispenses understanding of the terms of our social contract—understanding that permits an appreciation of why those outcomes are just.

Because disputes can be resolved adequately by article I tribunals, the special characteristics of article III courts are best understood as safeguards for effective exposition. Among those safeguards are the doctrines that comprise the law of justiciability, and an expository model of adjudication has serious implications for those doctrines. Because we use justiciability doctrines to confine the judiciary to appropriate judicial conduct, “proper” development of the law of justiciability necessarily depends upon one’s view of the “proper” judicial function. Present justiciability doctrines reflect the traditional, dispute-resolution model of adjudication and are intended to limit the judiciary to those activities necessary to redress an injury suffered by one of the disputants. If, however, exposition is viewed as the essence of the judicial function, certain changes in the law of justiciability become desirable.

The injury-orientation that characterizes the present formulation of justiciability doctrines has generated serious confusion due to the lack of any coherent concept of injury. Injury-orientation should be replaced by a set of concerns more closely related to the objectives of an expository judiciary. Because exposition poses some risk of encroachment upon legislative authority, justiciability rules should be used to advance separation-of-powers concerns that have been built into our constitutional form of government. In addition, justiciability doctrines should be designed to maximize the likelihood that judicial exposition will be carefully considered and will benefit society.
This Article advocates a conceptual shift from the dispute-resolution to the expository model of adjudication for article III courts. Part I describes the traditional, dispute-resolution model and discusses its incorporation into American jurisprudence. Part II describes the expository model of adjudication, and explains why it more accurately defines the proper role of the federal judiciary. Part III explores the consequences that adopting the expository model of adjudication would have on the law of justiciability.

Part III,A traces how current justiciability rules have emerged from the traditional model with their heavy emphasis on the concept of injury, and suggests that current dissatisfaction with the law of justiciability stems from the absence of any intelligible concept of injury. Part III,B considers how the law of justiciability should be reformulated in order to correspond to the expository function of courts.

Part III,B,1 emphasizes that reformulated justiciability doctrines should reflect our concern with proper maintenance of the constitutional separation of powers. In many respects, our present, injury-oriented, justiciability rules have developed in a perverse manner that may actually encourage courts to exercise legislative policymaking functions while deterring Congress from exercising those functions. Reformulated doctrines, therefore, should induce courts to avoid usurpation of legislative functions, whether that usurpation is manifest in undue judicial activism or, as may frequently be the case, in undue judicial abstention.

Part III,B,2 suggests that reformulated doctrines should focus both on the context in which cases arise and on the likelihood that parties will adequately present the issues in an adversary manner, in order to reduce the likelihood of "erroneous" exposition. In addition, reformulated doctrines should recognize that, in some circumstances, the need for judicial exposition might not be sufficiently high to outweigh the dangers attendant to exposition, and should permit courts honestly to withhold the exercise of jurisdiction for that reason.

Because the dispute-resolution model of adjudication does not accord with current demands placed upon the judiciary, the present law of justiciability is in serious disarray. Irreconcilable Supreme Court precedents confuse litigants and promote ill-considered lower court decisions. Proper appreciation of the expository function of courts permits an intelligible reformulation of justiciability doctrines and, therefore, will facilitate a consistent, principled approach to justiciability within the federal judiciary.
I. THE TRADITIONAL MODEL OF ADJUDICATION

A. Dispute Resolution and Principled Decisionmaking

The American legal system is premised largely on the theory that the proper function of federal courts is to resolve disputes between litigants who are unable or disinclined to resolve their differences themselves. Under this theory, the traditional model of adjudication portrays the court as an attentive, unbiased apparatus for the production of just results which the litigants will perceive as legitimate and authoritative. Adjudication satisfactory to the litigants, in turn, promotes social order and harmony by precluding the need for recourse to other, socially undesirable methods of conflict resolution.

The legitimating aspect of the traditional model of adjudication is the process of principled decisionmaking. The court ascertains the facts giving rise to a dispute, and then explains how generally accepted

---


2 Recognition of the importance of perceived legitimacy appears to underlie commentary on desirable features of the adjudicatory process. For example, Professor Fuller has suggested that essential elements of that process include party participation and adherence to a principled mode of decisionmaking. Fuller, supra note 1, at 369. Presumably, these features are deemed essential precisely because they increase perceived legitimacy, thereby increasing the likelihood that parties will acquiesce in judicial determinations. See infra notes 4-5 and accompanying text.

3 See Fuller, supra note 1, at 372; cf. Fiss, supra note 1, at 18 (noting that the “ultimate . . . focus of the judicial inquiry is . . . a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition”).

4 The factfinding process is permeated with procedural safeguards designed to maximize its reliability. Factfinders are chosen, in part, on the basis of their capacity for impartiality. They are instructed to ignore their own biases. They are carefully insulated—often isolated—from uncontrolled communications concerning the dispute, and they are authorized to consider only evidence that survives filtration through an elaborate screen of evidentiary rules. These procedural safeguards probably increase the reliability of the factfinding process. See generally Butz v. Economou, 438 U.S. 478, 512 (1978) (noting that features of the judicial process such as its adversary nature, the screening of jurors to remove those who may be biased, and the cross-examination of witnesses enhance reliability of information gathering at trial). Even if these safeguards do not actually increase the reliability of factfinding, they do serve to increase the perceived legitimacy of the process. The active role that the parties play in proceedings further enhances legitimacy. See generally Fuller, supra note 1, at 369 (discussing the parties’ participation in adjudication).

Moreover, the degree of procedural formality accorded litigants is arguably set at precisely that level which optimizes, within the bounds of efficiency, social concerns with perceived legitimacy. Cf. Chayes, supra note 1, at 1287 (accuracy of factfinding limited by the requirement that all facts be stated in the pleadings).
principles of law, as applied to those facts, dictate the proper result. The principles help to insulate any given dispute from both the prejudices of the decisionmaker and from salient aspects of the dispute itself that might attract undue attention. Moreover, a properly applied legal principle logically correlates the result in a particular dispute to the accepted social order, which preexists the dispute. By making a result more than the product of one individual decisionmaker operating at one particular time, principled decisionmaking enhances legitimacy by vesting the result with the authority of a system that has, over time, confronted many similar disputes and evolved the proper institutional response.

B. Marbury: A Questionable Foundation for the Traditional Model

The Supreme Court's decision in \textit{Marbury v. Madison},\footnote{5 U.S. (1 Cranch) 137 (1803).} exemplifies the traditional model's emphasis on dispute resolution. Chief Justice Marshall declared that the function of the judiciary was to remedy the unauthorized invasion of legal rights.\footnote{5 U.S. (1 Cranch) at 163, 166.} The invasion of a right im-

\footnote{The literature relating to the character and proper application of "legal principles" is a vast one, much of which raises fundamental questions of legal philosophy. See, e.g., R. Dworkin, \textit{Taking Rights Seriously}, 22-45 (1977); Wellington, \textit{supra} note 1. Consideration of those fundamental questions is beyond the scope of the present discussion. For present purposes, it is sufficient to emphasize that the principles applied to the facts must be accepted by the parties as valid if they are to enhance deference to the adjudicatory tribunal.}

\footnote{For a sophisticated discussion of the interplay between factfinding and application of legal principles—appreciation of which is likely to affect one's perception of the legitimacy of the judicial process—see H. Hart & A. Sacks, \textit{supra} note 1, at 373-85.}

\footnote{When discussing the legitimacy of judicial decisionmaking, a colleague of mine is fond of saying, "Don't forget about the robes," thereby suggesting that ritual is likely to be as potent a factor in affecting the public perception of legitimacy as is the actual effectiveness of the principled-decisionmaking process.}

\footnote{5 \textit{U.S. (1 Cranch)} at 163, 166. Chief Justice Marshall's opinion in \textit{Marbury v. Madison} stated that Marbury had a vested legal right to delivery of his commission as justice of the peace for the District of Columbia, \textit{id.} at 162, that the laws of the United States accorded Marbury a remedy for the violation of that right, \textit{id.} at 163, and that mandamus was an appropriate writ for securing that remedy, \textit{id.} at 173. Marbury was ultimately denied relief, however, because the Court held that the Supreme Court did not have jurisdiction under article III of the Constitution to issue the writ. \textit{Id.} at 175-80. Although § 13 of the Judiciary Act of 1789, 1 Stat. 73, 80-81, was construed as congressional authorization for issuance of the writ by the Supreme Court, the Court declared that statutory provision to be unconstitutional, see \textit{Marbury}, 5 \textit{U.S. (1 Cranch)} at 176-}
plies the existence of a dispute, and *Marbury* established that judicial resolution of such disputes was proper. Further, the opinion expressly excluded conflicts not involving the abrogation of legal rights from the category of matters appropriate for judicial action. *Marbury*, thus, has come to stand for the proposition that dispute resolution, and the necessary incidents thereto, constitute inherent limitations on the scope of the judicial function. A federal court, therefore, is precluded from elaborating upon the meaning of legal principles, except to the extent that such elaboration is necessary for proper resolution of a dispute before the court. Nonessential elaboration constitutes the issuance of prohibited advisory opinions.

---

80, thereby establishing the propriety of judicial review of the acts of coordinate branches of government—the proposition for which *Marbury* is often cited. See, e.g., G. *Gunther*, * supra* note 6, at 15-25; J. *Nowak*, * supra* note 6, at 2-7.

8 *5 U.S. (1 Cranch) at 167.

9 *Id.* at 170-71.


11 The view that judicial activity that would be impermissible in isolation is, nevertheless, permissible in the proper context, constitutes a rudimentary concept of federal justiciability. See infra text accompanying notes 130-203.

12 When, in 1793, the Justices of the Supreme Court were asked to supply President Washington with answers to a series of abstract international law questions relating to the proper role for the United States as a neutral country in the pending war between France and England, the Justices declined to comply with the President's request, finding the desired advisory opinions to have been "expressly" and "purposely" precluded by the framers. See *Hart & Wechsler*, * supra* note 10, at 64-66. The Supreme Court has frequently reaffirmed the absence of federal court jurisdiction to render advisory opinions, deeming this prohibition to be inherent in the "case" or "controversy" language of article III, § 2 of the Constitution. See, e.g., Muskrat v. United States, 219 U.S. 346, 361-62 (1911); see also *Flast* v. *Cohen*, 392 U.S. 83, 95-96 (1968).

The rationale behind the prohibition on advisory opinions has been traced to concerns about the proper separation of powers, L. *Tribe*, * supra* note 6, § 3-10, at 57; infringement on the Court's judicial review function, *Hart & Wechsler*, * supra* note 10, at 7-8; and creation of an adequate context in which the judiciary performs its adjudicatory function, United States v. Freuhauf, 365 U.S. 146, 157 (1961); see also L. *Tribe*, * supra*, § 3-10, at 57.

There are suggestions that the prohibition is not absolute. For example, the English courts, from which the federal judiciary emerged, routinely issued advisory opinions. See Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 *Yale L.J.* 816 (1969); Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 *Geo. L.J.* 785, 786-87 (1962). Many state courts, which like federal courts emerged from the English tradition, are authorized to issue advisory opinions. *Hart & Wechsler*, * supra*, at 69-70.

Even Supreme Court Justices have taken actions that fairly can be categorized as the issuance of advisory opinions. See *id.* at 68-69 (1790 letter from Chief Justice Jay to President Washington asserting unconstitutionality of having Supreme Court justices "ride circuit"); 1862 letter from Chief Justice Taney to the Secretary of Treasury asserting unconstitutionality of a tax on salaries
Although *Marbury* is the case traditionally offered as the progenitor of the dispute-resolution model,\(^5\) what that case says is quite different from what it does. At issue in *Marbury* was the right of an appointed justice of the peace to delivery of his commission. Although the Court held that it lacked jurisdiction to order delivery of the commission,\(^6\) the *Marbury* opinion is replete with discussions concerning the validity of the petitioner's appointment,\(^7\) his right to delivery of his commission,\(^8\) the inconsequential nature of the fact that his commission had been withheld,\(^9\) and the fact that mandamus was an appropriate writ for a court with jurisdiction to use in requiring delivery.\(^10\)

The *Marbury*-based dispute-resolution model appears to compel the conclusion that the *Marbury* Court's own pronouncements were improper. Lacking constitutional jurisdiction to provide *Marbury* with any relief, the Court also lacked jurisdiction to opine as to otherwise pertinent principles of law.\(^11\)

The political context out of which the *Marbury* decision arose\(^12\) renders it even more inconsistent with the traditional model. Much of the discussion in the case seems to have been intended to accomplish partisan, political objectives—arguably ones that offend the principle of

---

*\(^5\)* Responsibility for perpetuating the dispute-resolution model of adjudication cannot be attributed entirely to *Marbury*. Although the language of the opinion supports a dispute-resolution restriction on judicial actions, it is the use that subsequent courts and commentators have made of the landmark decision that has crystalized the restriction. *See* authorities cited supra note 10.

*\(^6\)* 5 U.S. (1 Cranch) at 175-76.

*\(^7\)* Id. at 154-61.

*\(^8\)* Id. at 161-66.

*\(^9\)* Id.

*\(^10\)* Id. at 168-73.

*\(^11\)* See P. BREST, supra note 6, at 49 (noting Republican criticism of the Court for examining the merits when it conceded that it lacked jurisdiction); cf. Van Alstyne, supra note 6, at 6-8 (criticizing Marshall for addressing the merits before jurisdiction but suggesting the justification that Marshall was demonstrating the need to reach the constitutional question and to overturn an act of Congress). A possible justification for the Court's actions within the confines of the dispute-resolution model is that courts properly can expound legal principles pertinent to any legal right that is asserted, whether the asserted right is ultimately upheld or not. The Court's actions in *Marbury* might alternatively be justified under the now-prevailing doctrine that courts should avoid the unnecessary adjudication of constitutional issues, *see* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring)—a doctrine that had not yet developed when *Marbury* was decided. Under this view, the Court's dicta was necessary to ensure that adjudication of the constitutionality of § 13 of the Judiciary Act of 1789, 1 Stat. 73, 80-81, could not be avoided. *See* Van Alstyne, supra at 7-8. The dicta in *Marbury* arguably increases comprehension of the major proposition of the case: that courts possess the power to undertake judicial review. Perhaps the Court was trying to illustrate the potency of its holding by emphasizing that even though Marbury possessed all of the dictum-based rights discussed in the opinion, the Court was still powerless to provide any relief under an unconstitutional grant of jurisdiction.

*\(^12\)* See authorities cited supra note 6.
separation of powers. Moreover, the Court apparently lacked any serious concern with the rights of the parties before it. The Court may well have sacrificed Marbury's right to his commission precisely because it wished to establish a principle of judicial independence, which was of immediate political concern to the Federalists.

A realistic explanation of the Marbury Court's conduct is that the Court's primary objective was to make statements about the legal issues that it addressed—to expound on principles of law including the nature of judicial review. In so doing, the Court defined the role of the article III judiciary in the American system of government more concretely than the text of the Constitution had. The Court gave explicit meaning to the general terms and structure of the Constitution. Ironically, Marbury itself suggests that exposition may be a more significant aspect of the judicial function, both in terms of motive and effect, than the mere resolution of disputes between individuals.

II. THE EXPOSITORY MODEL OF ADJUDICATION

The exposition of law that occurs during the process of adjudication serves an important governmental function, which should be viewed as the primary function of courts rather than as a mere incident to the resolution of disputes. By explaining how legal principles produce particular results in particular factual contexts, courts give operational meaning to principles that would otherwise remain abstract, rhetorical and elusive.

Legal principles can emanate from statutes or constitutional provisions, and their origin affects the function served by exposition. Where statutes are involved, exposition provides useful information to the executive and feedback to legislative policymakers, thereby permit-

---

21 To the extent that courts engage in "improper" exposition of the law, they may, in effect, be "legislating" in a manner that offends the principle of separation of powers. See infra notes 205-57 and accompanying text.

22 See M. SHAPIRO, AMERICAN CONSTITUTIONAL LAW 30 (5th ed. 1979); see also M. COHEN, THE FAITH OF A LIBERAL 178-80 (1946).


24 See infra note 37. By explaining how legal principles produce particular results, courts generate a body of precedent that illuminates the meaning of each principle through reference to particular factual contexts. The successive refinement that characterizes adjudication can establish, for example, that the general principle that the taking of a human life is unlawful is not offended in cases of self defense, unless there was use of excessive force, unless the use of excessive force was unintentional, unless, although unintentional, the use of such force was negligent, and so on. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 19 at 108-12 (4th ed. 1971). As more and more cases are decided, the meaning of the principles being expounded becomes clearer.

25 See infra text accompanying notes 27-66. Legal principles can also be articulated in treaties, administrative regulations or rulings, and in common law decisions. To the extent that such principles are subject to legislative modification, they can be viewed as statutory principles.
ting the legislative process to operate at the level of generality called for by separation-of-powers principles. Where constitutional provisions are involved, exposition serves an even more important function. Constitutional exposition gives meaning to those principles we view as so fundamental that they should be placed beyond the reach of direct majority control. For a variety of institutional reasons, we place them in the custody of article III courts, which are particularly well-qualified to oversee their development.

Given the importance of the courts' expository role in the federal legislative process and of their role as the guardians and interpreters of fundamental rights, exposition rather than dispute resolution should be viewed as the primary function of the courts. Unlike dispute resolution, which could be performed adequately by purely private parties through arbitration, exposition is central to the process by which society provides for its long term growth. The dispute-resolution model of adjudication views exposition as a mere incident to dispute resolution, failing to recognize the importance of a court's expository role within the federal government. It should, therefore, be replaced by a model that better recognizes the benefits and dangers of exposition.

After developing such a model through the exploration of both the nature of statutory and constitutional exposition and the competence of the judiciary to expound, this Article describes in part III how adherence to an expository model of adjudication can result in justiciability doctrines that are more coherent than the confused doctrines now existing under the traditional, dispute-resolution model.

A. Statutory Exposition

Judicial exposition of statutes is essential to proper operation of the legislative process. Consistent with separation-of-powers principles, the body that makes law should not be the body that applies it. By separating the policymaking functions of government from the implementing functions, the likelihood of abuse of power is reduced. Because no single branch of government possesses all of the authority needed to govern, dangerous concentrations of power are avoided that otherwise would permit the government to exploit underrepresented, minority in-

28 The distinction between legal principles—such as those embodied in statutes—that are established and controlled by the majority, and legal principles—such as those embodied in constitutional provisions—that are placed beyond the reach of direct majority control reflects a basic dichotomy of legal philosophy that has been discussed by a variety of commentators. See, e.g., R. DWORKIN, supra note 5, at 81-130; H.L.A. HART, THE CONCEPT OF LAW 77-88 (1961); H. HART & A. SACKS, supra note 1, at 155-60; Wellington, supra note 1, at 222-29.
In order for separation of powers to be an effective check on abuse of power, the legislature, which makes governmental policy, must operate at the proper level of generality. If legislative enactments are too specific, the legislature effectively exercises governmental power alone, because executive implementation becomes merely ministerial and cannot serve as a check on legislative abuses. Accordingly, statutes should be directed at categories of conduct rather than individuals. If legislative enactments are too general, however, the executive is granted such broad discretion that it can effectively exercise all governmental power at the implementation stage without any legislative check on its exercise of power.

Separation of powers is not the only way a degree of legislative generality reduces governmental abuses. When legislatures formulate general policies, rather than act in an ad hoc way on isolated matters, the quality of their enactments is likely to be improved. Their actions are less likely to be arbitrary, and more likely to be carefully considered, simply because more is at stake. Generality also reduces the potential for legislative disregard of the interests of underrepresented minorities. The procedures and procedural safeguards of the legislative process do not lend themselves to meaningful participation by individuals or politically powerless groups. Legislating with respect to categories of conduct that are likely to affect a broader range of interests than enactments directed at specific individuals or groups, subjects legislative

---

27 The doctrine of separation of powers is intended generally to advance the objectives of impartiality, uniformity and predictability in the enactment and application of law. For a concise introduction to the principles of separation of powers, see S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 37-39 (1979). Professor Ely has constructed an entire theory of constitutional law around the problems that can result from the underrepresentation of certain groups in the legislature. See J. ELY, DEMOCRACY AND DISTRUST (1980); see also L. TRIBE, supra note 6, § 10-1, at 474-77; Wright, Professor Bickel, The Scholarly Tradition, and the Supreme Court, 84 HARV. L. REV. 769, 787-89 (1971); Note, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 YALE L.J. 330 (1962).

28 See S. BREYER & R. STEWART, supra note 27, at 37-39. Because it is quite difficult to specify with any degree of precision what level of generality best promotes separation-of-powers objectives, the generality requirement cannot, as a practical matter, be judicially enforceable except in extreme cases. The goal of legislating at the proper level of generality, however, remains a worthwhile aspirational objective for legislative policymakers.

29 Most legislation results from the balancing of competing interests. For example, endangered-species legislation, such as that discussed infra, text accompanying notes 38-43, might well result from balancing the costs of protecting certain species of life against the environmental, aesthetic or scientific benefits such protection might produce. Presumably, many of the potential future benefits cannot be known at the time that the legislation is enacted. Accordingly, the proper cost-benefit balance requires some legislative sensitivity to unspecified, potential future gains. Such sensitivity is likely to be reduced where the unknown potential benefits of a particular species are balanced against the known costs of a particular project. If Congress fails to act on a level of generality permitting meaningful weight to be given to the possibility of potential future benefits, the primary purposes of endangered-species legislation could well be lost.
policies to a more rigorous test of popular support. Avoidance of the abuses that can result from overly specific legislation lies at the core of the bill-of-attainder prohibition in the Constitution and is also reflected in the prohibition on enactment of ex post facto laws, the nondelegation doctrine, and our preference for rulemaking rather than adjudication for certain types of administrative agency actions.

Judicial exposition of statutes facilitates operation of the legislative process in two ways. First, exposition can “save” a statute that would otherwise be too general to serve as a check on executive power by “explaining” the limitations on implementation that the legislature necessarily intended, even though they might not appear in any salient way on the face of the statute. In so doing, the court gives to a statute meaning that it would not otherwise have, but such exposition is not necessarily objectionable, as long as the court does not usurp policymaking functions from the legislature. In this regard, exposition aids the executive in proper implementation of legislative enactments.

Second, exposition also provides the legislature with important information about the meaning of its enactments. Because legislative policymakers, operating at the proper level of generality, do not participate in the implementation of their policies, they do not know what the precise consequences of their enactments will be. They cannot anticipate every situation to which their generic statutes will apply; nor, under separation-of-powers theory, should they try. Rather, it is the function of the judiciary to give meaning to the general, often abstract, policies adopted by the legislature, through reference to specific factual contexts. The legislature is then free to use the feedback obtained through judicial exposition of statutes to modify or repeal them if their judicially acquired meaning does not accord with the legislature’s policy preferences. Consistent with separation-of-powers principles, however, legislative modifications, like initial enactments, should be made at the proper level of generality.

An example of the manner in which statutory exposition plays a

---

80 See H. HART & A. SACKS, supra note 1, at 708-13; L. TRIBE, supra note 6, § 10-5, at 491-99.
81 U.S. CONST. art. I, § 9, cl. 3. See L. TRIBE, supra note 6, § 10-5, at 491-99; Note, supra note 27.
82 U.S. CONST. art. I, § 9, cl. 3. See L. TRIBE, supra note 6, § 10-5, at 499.
83 See L. TRIBE, supra note 6, § 5-17, at 284-91.
86 See infra text accompanying note 223.
87 See S. BREYER & R. STEWART, supra note 27, at 37-39.
role in the legislative process is provided by the snail darter case, Tennessee Valley Authority v. Hill. There, the Supreme Court held that the Endangered Species Act required abandonment of a government sponsored construction project in order to protect the snail darter from threatened extinction. As construed by the Court, the Endangered Species Act reflected such a strong societal policy favoring protection of endangered species that construction of a $100 million hydroelectric plant had to be halted in order to protect a three-inch aquatic animal that serves no discernible social purpose. Although one might question whether Congress intended that result in enacting the statute, such a policy is certainly rational. Whether one believes that the termination of any life form is inherently immoral or suspects that snail darter eggs may someday prove to be the cure for cancer, a legislature could justifiably choose to adopt a policy favoring the snail darter over the dam. In reality, it is unlikely that Congress ever contemplated the precise question posed by the snail darter case when it considered the legislation. Legislative intent is largely a fiction, and it is quite likely that different legislators had very different concerns in mind when they voted for the Act. The "true" meaning of the statute was the meaning the Court gave it through statutory exposition.

Congress is, of course, free to modify its legislation if it disapproves of the meaning given a statute by the judiciary, and Congress did precisely that with respect to the Endangered Species Act. Congress first amended the Act to provide procedures for determining whether ongoing projects should be subject to strict compliance with the requirements of the statute—a modification arguably made at the proper level of legislative generality. When, however, those new procedures failed to permit completion of the dam, Congress simply exempted it from the Act in an amendment to an appropriations bill—an action almost certainly taken at an improper level of generality. Regardless of one's views about the propriety of congressional conduct in amending the Endangered Species Act, the amendments do illustrate the manner in

---


See 437 U.S. at 156-73.


43 The suggestion that legislatures should adjust their statutes as courts provide them with more data concerning how the statutes operate does not mean that legislatures should simply overrule specific judicial decisions as Congress did with respect to Tennessee Valley Auth. v. Hill. In responding to judicial decisions, Congress should not abandon the goal of legislating with the degree of generality necessary to preserve separation-of-powers safeguards. If Congress disap-
which judicial exposition affects the legislative process.

Statutory exposition, therefore, is more than a mere step in the dispute-resolution process. It is part of the process of governing. The meaning that the courts give to legislative statements of general policy both permits the executive to implement legislative policies and the legislature to modify its statutes in ways that are consistent with separation-of-powers principles.

B. Constitutional Exposition

Unlike statutes, constitutional provisions reflect more than mere majoritarian policies subject to modification by the legislature. The principles embodied in the Constitution are generally thought to reflect our fundamental values. Although not immutable, constitutional principles are insulated from direct majority control. As a result, when courts expound on constitutional rather than statutory provisions, the judicial function takes on added significance.

Like statutes, constitutional provisions tend to be general and aspirational in nature, taking their operative meaning from the factual contexts to which they are applied. For example, the first amendment provides that free speech should not be abridged, but its language proved of the result in Tennessee Valley Auth. v. Hill, it properly should have refined the categories of competing interests that were balanced during enactment of the Endangered Species Act, or provided for neutral procedures to temper the consequences of the Supreme Court's decisions. By singling out the Tellico Dam Project, the project at issue in Tennessee Valley Auth. v. Hill, as the sole object of remedial legislation, Congress violated separation-of-powers principles. See generally H. HART & A. SACKS, supra note 1, at 800-08 (discussing legislative options for responding to judicial decisions).

A constitutional provision cannot be modified by a majority of Congress. Rather, two-thirds of each House of Congress or of the state legislatures are required to propose amendments to the Constitution, and those proposals become effective only after ratification by the legislatures or conventions of three-fourths of the states. U.S. CONST. art. V.

As used in the present context, fundamental values are values that supersede mere majoritarian desires. The Constitution, of course, is not the only repository of our fundamental values. Other social institutions, such as churches, schools, television networks and the like, also develop and transmit fundamental values.

It is important to emphasize that constitutional provisions can be changed if the populace desires the change enough to endure the arduous amendment process and to amass the required supermajorities. As such, constitutional principles are not, strictly speaking, "fundamental"; they are, rather, supermajoritarian. It is unlikely, however, that a viable society could ever develop principles that were absolutely "fundamental." The terms "fundamental" and "supermajoritarian" are here treated as synonymous.

Some constitutional provisions are, of course, more specific in nature, such as the provision requiring ratification of proposed constitutional amendments by three-fourths of the states. U.S. CONST. art. V. Even the more specific provisions present unanswered questions, however, such as whether a state can revoke its ratification of a proposed amendment—the question presented to the Supreme Court in Idaho v. Freeman, 507 F. Supp. 706 (D. Idaho 1981), cert. granted sub nom. NOW v. Idaho, 102 S Ct. 1273 (1982). Such issues properly are resolved through recourse to the aspirational objectives of the provision in question.

The Constitution provides that "Congress shall make no law . . . abridging the freedom
alone does not determine whether a particularly salacious book can be banned without violating the principle of free speech.\textsuperscript{40} Likewise, the fifth and fourteenth amendments’ commandment that equal protection of the laws should not be denied\textsuperscript{40} does not alone determine whether the principle is violated by subjecting men but not women to a military draft.\textsuperscript{51} Moreover, changing social circumstances can render proper application of a constitutional principle uncertain. The principle of free speech, which may initially have contemplated politicians making speeches and distributing leaflets to small crowds, can be quite difficult to apply in the context of a commercial television advertisement designed by psychologists to have subconscious effects upon millions of viewers. Society has assigned to the judiciary the task of determining how constitutional provisions apply in particular circumstances.\textsuperscript{52}

When courts expound constitutional provisions, they restate society’s fundamental values in concrete, understandable terms, enabling individuals and institutions to incorporate those values into their conduct.\textsuperscript{58} For example, the Supreme Court in \textit{Brown v. Board of Education}\textsuperscript{54} reduced the aspirational equal protection principle to an operational level in the context of public education by instructing us that, as a society espousing the value of equality, we could no longer maintain racially segregated school systems.\textsuperscript{55}

\hspace{1cm}of speech, or of the press.” U.S. CONST. amend. I.
\textsuperscript{40} The degree of first amendment protection properly accorded forms of expression viewed by many as offensive raises questions that have continually plagued the Supreme Court. \textit{See generally} L. TRIBE, \textit{supra} note 6, \S 12-16, at 656-70.\textsuperscript{50} The Constitution provides that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, \S 1. Although the fourteenth amendment, by its terms, applies only to the states, the Supreme Court has asserted that equal protection principles should also be read into the due process clause of the fifth amendment, making equal protection constraints applicable to the federal government as well. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). For a critical analysis of the legitimacy of this assertion, see Hutchinson, \textit{Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958}, 68 GEO. L.J. 1, 44-50 (1979).
\textsuperscript{51} This question was presented to, and resolved in the negative by, the Supreme Court in Rostker v. Goldberg, 453 U.S. 57 (1981).
\textsuperscript{52} \textit{See generally} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{53} For general discussions of the judicial process as something that relates more to the implementation of social values than to the process of traditional dispute resolution, see G. GUNTHER, \textit{supra} note 6, at 1605-06; J. VINING, \textit{LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW} (1978); Chayes, \textit{supra} note 1; Fiss, \textit{supra} note 1; Jaffee, \textit{The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff}, 116 U. PA. L. REV. 1033 (1968); Monaghan, \textit{supra} note 10.
\textsuperscript{54} 347 U.S. 483 (1954).
\textsuperscript{55} The Court’s decision rejected the then-prevailing view, exemplified by its earlier decision in \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896), that the Constitution tolerated state maintenance of separate-but-equal facilities. \textit{See Brown}, 347 U.S. at 493-95. Under a narrow reading, \textit{Brown} stands for the proposition that state-sanctioned racial segregation in public education is unconstitutional. Under a broader reading, \textit{Brown} stands for the proposition that any legislative classification based upon race that fails to meet exacting standards is unconstitutional. This broader reading seems to have served as the basis for the Court’s later decision in \textit{Loving v. Virginia}, 388 U.S. 1
When Brown was decided, the nation’s majority may well have favored maintenance of racially segregated schools. In such situations, where judicial interpretations of our fundamental values are not in harmony with the majority view, the risk of popular rejection makes constitutional exposition a particularly difficult judicial function. The art of constitutional exposition involves determining when a particular meaning should be ascribed to a constitutional value. It would be naive to believe that constitutional provisions mean the same thing—compel the same conduct—at all points in time. Societies evolve, and fundamental-value changes accompany social evolution. Although the Brown decision would have been unthinkable 100 years earlier, by the time Brown was decided, society arguably was ready to accept the meaning the Court then ascribed to the equal protection principle of the Constitution. Part of the judicial function, then, is to monitor the evolution of social attitudes and to translate the language of the Constitution into

(1967), in which a Virginia statute prohibiting racial intermarriages involving white persons was held unconstitutional. Id. at 11-12.

68 Cf. S. Wasby, A. D’Amato & R. Metrailler, Desegregation from Brown to Alexander 95-96 (1977) (discussing public opposition to Brown). Public hostility to Brown was, of course, especially strong in the South, where by 1960 only six percent of all black pupils were attending integrated schools. M. Konvitz, A Century of Civil Rights 130-31 (1961).

67 The organic nature of constitutional provisions is illustrated by the developments in equal protection law between the Plessy and Brown decisions. See supra note 41. The issue is presented in a particularly tantalizing form by the question of whether Supreme Court constitutional decisions should be given only prospective effect, or should be given some degree of retroactive effect as well. As Professor Mishkin points out, Supreme Court articulation of a prospective-only rule bears more resemblance to legislation than it does to the process of adjudication under the traditional, dispute-resolution model. Mishkin, The Supreme Court 1964 Term: Foreward: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965); see also Mackey v. United States, 401 U.S. 667, 679-81 (1971) (Harlan, J., concurring). As a result, Professor Mishkin disagreed with the Supreme Court’s recognition of a power to issue prospective-only decisions, upheld in Linkletter v. Walker, 381 U.S. 618 (1965), precisely because such recognition would eliminate an important constraint limiting the judiciary to “proper” judicial activity. Mishkin, supra, at 62-72. Although Professor Mishkin offered an alternative justification for the Linkletter decision, grounded in the nature and function of the writ of habeas corpus, id. at 79-92, the commonly perceived need to facilitate Supreme Court development of constitutional law in a way that will have primarily prospective impact supports the propriety of an expository model of adjudication. See infra text accompanying note 81-120. Consistent with this view, some commentators have criticized recognition of an emerging good-faith exception to the fourth amendment exclusionary rule precisely because such an exception would reduce judicial development of fourth amendment law, thereby providing less prospective guidance to law enforcement officials. See Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 401-06, 431-33 (1981).

65 This characterization of the degree of social acceptability of the Brown decision may be too optimistic. Opposition to mandatory desegregation persists today, nearly 30 years later, even on the part of minorities who arguably were the intended beneficiaries of Brown. See D. Bell, Race, Racism and American Law 424-51 (2d ed. 1980).

Most contemporary opposition, however, is directed not at the issue of school desegregation itself but at the use of busing to achieve desegregation. This is evidenced by the large number of antibusing bills introduced in the 97th Congress. See Sager, The Supreme Court 1980 Term: Foreward: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 18 n.3 (1981).
prescriptions for behavior that stimulate, or at least keep pace with, social evolution. 69

The effectiveness of constitutional exposition will turn not only upon the accuracy of the court's assessment of prevailing social attitudes, but upon the persuasiveness of the court's opinions as well. For example, the more effectively a court can link the conduct at issue to other conduct that society has already accepted by relating both forms of conduct to the same constitutional principle, the more likely the court's decision will be to secure popular acceptance. Similarly, the ability of the court to articulate a relationship between the popular meaning of constitutional language and the language's application in a given case will increase an opinion's persuasiveness. 60 If an opinion, however, is not based persuasively on precedent, constitutional language or the apparent intent of the framers, popular acceptance is less likely. The exposition behind a court's judgment, therefore, may be more important than the judgment itself.

The judgment disposes of the case before the court by resolving the dispute between the parties, but it is the exposition of the opinion that increases society's understanding of the principles involved. As people better understand principles, they incorporate them more readily into their conduct. On one level, this assimilation occurs because legal enforcement usually accompanies judicial recognition that a principle compels particular conduct. For example, it is now generally recognized that because burning people at the stake is inconsistent with the principle proscribing cruel and unusual punishment, 61 it is likely to result in the imposition of legal sanctions. There is, however, another more durable level on which constitutional principles can be incorporated into conduct. Because fundamental principles represent, by hypothesis, basic, socially accepted values, application of a principle to conduct should be self-executing to some extent as the principle becomes better understood. The relative rarity of barbaric forms of punishment in our cul-

69 Under a particularly activist view, the judiciary spearheads social development by perceiving the need for social change well before that need is recognized by most members of society and by subjecting the masses to norms espoused by advanced social thinkers at the earliest moment that popular acceptance becomes possible. Under a less activist view, the judiciary is more of a follower than a leader, functioning to ensure that recalcitrant elements in society keep pace with social developments that have already been guided down the path of majority acceptance by other social institutions. As is developed infra text accompanying notes 67-120, the unique attributes of a properly selected judiciary, in terms of skill, institutional constraints, and accountability, render the judiciary a desirable leader in the process of evolving social norms. Cf. Fiss, supra note 1, at 9-17 (arguing judges are in a good position to give meaning to Constitutional values).


61 The Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
ture results less from the fear of legal sanctions than from internalization of the belief that burning people at the stake is wrong.62

The text of the Constitution provides the general framework under which our society operates. The principles contained therein underlie the rules of our society, but those rules change as social circumstances change. Constitutional exposition by the federal judiciary permits the change to be orderly as the court develops new constitutional norms. Compliance with these developing norms, theoretically, is obtained through the threat of legal sanctions. Realistically, however, if a judicial order is sufficiently unpopular, legal enforcement will simply be withheld by the executive,63 which, under the separation of powers, has control of the enforcement mechanisms needed to compel compliance with rules enunciated by the courts. The only enforcement mechanism at the disposal of the judiciary itself is the "resource of rhetoric."64 But

62 Other examples also exist. Before the Civil War, black slaves were not entitled to receive an education at public expense, and frequently were even prohibited by law from learning to read or write. See A. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR—RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 198, 250, 258, 308 (1978). Even if Brown v. Board of Educ. has not achieved complete popular acceptance, see supra note 58, at the very least, society has internalized the belief that blacks have a fundamental right to a publicly financed education. Likewise, the Supreme Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963) that certain criminal defendants have a constitutional right to the assistance of counsel regardless of their ability to pay has probably been accepted and internalized to such a degree that the threat of legal sanctions is no longer a significant factor in government acquiescence in the requirement.

Social psychologists have propounded a theory of cognitive dissonance that helps to account for the type of internalization described herein. See L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); see also J. BREHM & A. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962). According to this theory, individuals are able to tolerate only a small degree of dissonance between their attitudes and their behavior. If behavior is controlled initially—for example, by threatening imposition of legal sanctions for noncompliance—attitudes will change to parallel the controlled behavior in order to reduce cognitive dissonance. See L. FESTINGER, supra; J. BREHM & A. COHEN, supra. If such a theory properly can be extrapolated from individuals to societies, the threat of legal enforcement would appear to become largely superfluous after an appropriate period of time. Social attitude change—evolution of the pertinent social value—will be sufficient to incorporate the new constitutional norm.

63 The most glaring example of such a reaction arose during Supreme Court adjudication of the various Cherokee Cases, when both the State of Georgia and President Jackson seemed determined to ignore any Supreme Court order that would have hindered Georgia from removing the Cherokee from their tribal lands. See Burke, The Cherokee Cases: A Study in Law, Politics and Morality, 21 STAN. L. REV. 500, 506 (1969). In the end, a crisis was averted when the litigation was dropped. Id. at 530. Nevertheless, these cases did give rise to Andrew Jackson's supposed remark, "John Marshall has made his decision. Now let him enforce it." See G. GUNThER, supra note 6, at 30.

Defiance of unpopular judicial decisions can also take more subtle forms. For example, the controversy that continues to surround busing as a means of desegregating public schools, see supra note 58, has done much to undermine the Supreme Court's command that schools be desegregated "with all deliberate speed." Brown v. Board of Educ. (II), 349 U.S. 294, 301 (1955).

64 The phrase "resource of rhetoric" has been used by Professor Bickel to suggest that, aside from the power of judicial review, the Supreme Court possesses a very real power to affect political actions merely by commenting upon them. See A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 188 (1962). Presumably, the Court's esteem gives its comments some degree of coercive impact.
because the federal judiciary possesses the authority to act as final expeditor of the Constitution, its rhetorical power can be quite potent. Controversial rulings by the judiciary place society on the horns of a dilemma. Society must either accept the norms that the court prescribes, or be guilty of violating its own fundamental values. Therefore, by accurately monitoring the nature and intensity of social attitudes and skillfully crafting its opinions, the court can expound in a way that permits this dilemma consistently to be resolved in accordance with the court's construction of the constitutional principle at issue. In order to do this, however, the court must prescribe norms that are not so distasteful that society as a whole would rather reject the fundamental value relied on by the court than conform to the prescribed norm. A judiciary concerned with exposition, and possessing the skill and vision necessary to mold societal attitudes, is able not only to maneuver acceptance of particular decisions, but in the long run to foster organic growth of the Constitution and to facilitate social progress.

C. Judicial Competence to Expound

Statutory and constitutional exposition are important governmental functions, and, within the scheme of separated powers, the judiciary is particularly well-qualified to perform those functions. The federal judiciary is well-qualified because article III courts operate within an elaborate set of constraints that act as safeguards against imprudent exposition and create the proper balance between independence and political accountability for an institution entrusted with the expository function of government.

63 See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[i]t follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land").

64 Cf. supra note 62 (discussing the theory of cognitive dissonance). "Social progress" is a term which, of course, is not value-free. As used in the present context, the term means nothing more than social change that, over the course of time, will generally be viewed as a step in the right direction. With the benefit of hindsight, most would agree that the abolition of slavery constituted "social progress," although such a characterization would have been hotly contested in 1865. Brown v. Board of Educ. probably also constituted "social progress," although some would undoubtedly question that characterization even at the present time.

65 Cf. R. DWORKIN, supra note 5, at 86-88, 123-30 (past political decisions, political responsibility, and personal morality underlie judicial decisionmaking); Monaghan, supra note 10, at 1368 ("[T]he Court rather than the political branches is uniquely suited for this task [of interpreting the Constitution], [but] it is by no means evident that it should be a function of ordinary litigation concerning private rights.").

66 Article III vests the judicial power of the United States in the Supreme Court and in the inferior courts created by Congress pursuant to art. I, § 8, cl. 9 of the Constitution. U.S. CONST. art. III, § 1. Article III judges are accorded a degree of independence from other branches of government. Id. In addition, article III courts are subject to certain specified limitations on their jurisdiction, most notably, the limitations embodied in the "case" and "controversy" provisions of article III. Id. § 2; see infra text accompanying note 121.
The most salient of the article III constraints stems from the general proposition that courts exist merely to construe laws, not to make them. The federal judiciary does not have carte blanche to rewrite statutes or construct constitutional principles out of thin air; its rulings must have some independent external genesis, either explicit in the statutory or constitutional text itself, or implicit in the provision under consideration. Courts also customarily refrain from constitutional exposition if another basis for decision is available. This constraint not only reduces the likelihood that judicial determinations will conflict with popular desires but precludes unnecessary judicial exposition as well.

The doctrine of stare decisis also operates as a constraint. Courts are required to advance a principled explanation for their actions and to remain relatively consistent in their application of principles. Since today's pronouncements will constrain tomorrow's actions, the judiciary has an incentive to consider carefully the wisdom of every proposed disposition and to make each disposition as narrow as circumstances permit. Other constraints imposed by the justiciability doctrines discussed in part III of this Article ensure that the context in which a decision is made is adequately developed and that both sides of the issue are adequately presented, enabling the court to reach a well-reasoned decision.

Perhaps the most significant constraint operating upon the judiciary, however, arises from the need to retain institutional legitimacy. Credibility is essential to successful performance of the judicial function. The loss of perceived legitimacy that results from repeated issu-

---

69 The Supreme Court has emphasized that:

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.


70 There is spirited debate over what degree of adherence to the text of the document being construed is necessary to ensure that the judiciary does not transcend the judicial function. See G. Gunther, supra note 6, at 23-25. It is likely, however, that virtually everyone would agree that some degree of adherence to the text, history, or structure of the document, or to the intent of the drafters is desirable.


72 For general discussions of the tension between adhering to precedent and modifying legal principles as necessary see H. Hart & A. Sacks, supra note 1, at 587-89; R. Brilmayer, supra note 10, at 811-14; Pound, Survey of the Conference Problems, 14 U. Cin. L. Rev. 324, 330-31 (1940) (address to conference on status of the rule of judicial precedent).

73 See infra text accompanying notes 121-25.
The judiciary has no coercive power of its own, and must rely on the power of the executive to enforce judicial orders. See The Federalist No. 78 (A. Hamilton). Executive enforcement may be withheld in some circumstances, see supra note 63, thereby precipitating an inter-branch conflict, which is unseemly at best, and at worst poses a threat to the continued structure of government. If, for example, President Nixon had refused to give the “Watergate” tapes to the Special Prosecutor after the Supreme Court ordered him to do so in United States v. Nixon, 418 U.S. 683 (1974), a constitutional crisis could well have resulted.

If Congress or the President were to defy the Supreme Court by refusing to comply with or to enforce the Court's mandate, the stakes of the ensuing conflict would be quite high. Aware of the stakes involved, each branch of government is likely to take great care to avoid precipitation of such a conflict. Neither Congress nor the President, in modern times, could be expected to defy the Court in the absence of compelling political reasons. Moreover, if such political reasons were to exist, the Court most likely would avoid issuing an order prompting defiance. Accordingly, the judiciary can be termed a “political” branch of government to the extent that political considerations inherent in the courts' desire for self preservation and preservation of our constitutional form of government play a part in judicial decisionmaking.

There is evidence that Supreme Court recognition of the practical need to defer to potent political pressures can cause the Court to forsake its fidelity to the process of principled decision-making. In Naim v. Naim, 350 U.S. 891 (1955) (per curiam), and 350 U.S. 985 (1956) (per curiam), the United States Supreme Court was asked to invalidate on constitutional grounds a Virginia miscegenation statute that the Virginia Supreme Court of Appeals had permitted to be used to annul a marriage between a white woman and a Chinese man. The United States Supreme Court—vacated the Virginia court's decision and remanded for clarification of the record. 350 U.S. 891. The Virginia Supreme Court of Appeals, however, merely reaffirmed its earlier decision and refused to clarify the record. Naim v. Naim, 197 Va. 734, 90 S.E.2d 849 (1956) (per curiam). Nevertheless, when the petitioner moved the United States Supreme Court to recall or amend the mandate, the Court denied the motion, finding that the constitutional question had not been "properly presented." 350 U.S. at 985. The Virginia court's decision remained in effect. See id.

The actions of the United States Supreme Court were unprincipled in two respects. First, because Naim v. Naim came before the Court after its decision in Brown v. Board of Educ., 347 U.S. 483 (1954), see supra note 55, the Virginia miscegenation statute was almost certainly unconstitutional, as it was so declared eleven years later in Loving v. Virginia, 388 U.S. 1 (1967). Failure to invalidate the statute in Naim v. Naim without distinguishing Brown was a failure of principled decisionmaking. Second, because Naim v. Naim came before the Supreme Court on appeal from the highest court of the Commonwealth of Virginia, the Supreme Court did not have discretion to decline to resolve the case on the merits. 28 U.S.C. § 1257(a) (1976); see also Hicks v. Miranda, 422 U.S. 332, 334 (1975). The Court, therefore, ignored a congressional command without offering any principled justification for doing so. The Supreme Court's practice of dismissing mandatory appeals for want of a "properly presented" federal question, however, has become commonplace. See Hart & Wechsler, supra note 10, at 656-62. In many respects, this technique for avoiding the exercise of jurisdiction is similar to the justiciability devices discussed infra text accompanying notes 121-310.

The Court surely anticipated that its conduct in Naim v. Naim would result in some loss of esteem by those who understood what the Court had done. Cf. Gunther, The Subtle Vices of the "Passive Virtue"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 11-13 (1964); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 34 (1959) (dismissal of the miscegenation case was "wholly without basis in the law") [hereinafter cited as Wechsler, Toward Neutral Principles], reprinted in H. Wechsler, Princ-
Trust in the federal judiciary is enhanced by the common perception that the judiciary is a nonpolitical branch of government. This perceived lack of political accountability, in turn, has generated the equally common perception that the judiciary operates in a manner that is countermajoritarian. Both perceptions, however, are flawed.

Although federal judges cannot be removed from office or have their salaries reduced for political purposes, the judiciary is not entirely nonpolitical. Its political accountability is simply less immediate than that of the other branches of government. The political pressures to which the judiciary is subject enable the majority to maintain a certain degree of leverage over judicial actions. For example, when a court construes a statute, the court's determination can be nullified by a politically accountable legislature, which can repeal or amend the legislation to achieve a result consistent with theoretical majority desires. Even when a constitutional provision is involved, the judicial process is not completely insulated from majoritarian pressures because the Constitution can be amended by a supermajority.

---

75 PLES, POLITICS AND FUNDAMENTAL LAW 3-48 (1961). The Court, however, appears to have determined that the loss of esteem which would accompany its actions in Naim v. Naim was preferable to the likely political repercussions of invalidating Virginia's miscegenation law in the post-Brown climate, where it had already been predicted that school desegregation would lead to "mongrelization of the race." A. BICKEL, supra note 64, at 174.

76 Cf. Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1127-28 (1977) (suggesting that sensitivity to majority desires is likely to increase, rather than decrease, the political nature of the judiciary).

77 U.S. CONST. art. III, § 1. These provisions are intended to promote judicial independence. See THE FEDERALIST NO. 78 (A. Hamilton); L. TRIBE, supra note 6, at 49; Kaufman, The Essence of Judicial Independence, 80 COLUM. L. REV. 671, 686 (1980). Although life tenure does not absolutely preclude removal of a federal judge, it may well preclude removal by any means other than through the cumbersome process of impeachment compelled by art. II, § 4 of the Constitution. See L. TRIBE, supra, at 49 n.5. See generally R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973). Some proposals have been made to remove federal judges by a process other than impeachment, but the constitutionality of the proposals is uncertain. See L. TRIBE, supra, § 3-6, at 49 n.5.

78 Any constitutionally mandated decision of the Supreme Court is subject to direct revision for purely political reasons through the constitutional amendment process. See supra note 44. That process has been used successfully to overturn unpopular decisions on four occasions. See L. TRIBE, supra note 6, § 3-6, at 51 n.8. In addition, the majority can affect judicial decisions in more subtle ways. For example, the political contexts giving rise to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), see supra note 6, and Naim v. Naim, see supra note 74, suggest that tacit political considerations can be dispositive in cases pending before the Supreme Court. Congressional control of the budget can also be used to exert political pressure on the Court. Moreover, Congress has—at least nominally—the power to regulate the jurisdiction of federal courts, Sheldon v. Sill 49 U.S. (8 How.) 441 (1850), and the appellate jurisdiction of the Supreme Court. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). But see Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953) (suggesting that the power of Congress to regulate federal court jurisdiction is less than absolute), reprinted in HART & WECHSLER, supra note 10, at 330-60. The mere introduction of a bill to restrict federal court jurisdiction is likely to exert some degree of political pressure on the Court. For a list of such bills introduced in the 97th Congress, see Sager, supra note 58, at 18-19 nn.3-5. Further, political considerations surely play an important role in the process of selecting federal judges—a process that requires both nomination by a popularly elected President and confirmation for a list of such bills introduced in the 97th Congress, see Sager, supra note 58, at 18-19 nn.3-5.
It is also inaccurate to assert that the judicial function is countermajoritarian. As a society, we identify constitutional principles and the values they reflect as being so important that we wish to have a less political branch of government serve as their guardian. We ask the courts to monitor our activities and to tell us when those activities are inconsistent with our fundamental principles. We do this precisely so that our principles will not be sacrificed in the heat of political controversy. As long as the majority continues to agree that such a strategy constitutes a desirable method of safeguarding fundamental values, the judicial process cannot be viewed as countermajoritarian; rather it is extramajoritarian: the majority agrees that supervision of its fundamental values should be removed from direct majority control.

Perceived legitimacy is essential to the judiciary's function as an expositor of constitutional norms. Because the public perceives the court as a nonpolitical, countermajoritarian body, the judiciary must be especially cognizant of conditions that might jeopardize its creditability. In this regard, the judiciary will be forced to monitor and respond to the political climate in which it operates. The importance of maintaining institutional legitimacy, therefore, serves as a formidable constraint on a court's use of discretion in expounding statutory and constitutional principles.

Because of the constraints under which the judiciary operates, it is better equipped than the more political branches of government to perform an expository governmental function and to oversee the development of our fundamental principles. For example, if Congress, in 1954, had decided to desegregate public schools through legislation, public opposition might well have resulted in prompt repeal of the desegregation laws. Because the Supreme Court in Brown v. Board of Education was able to explain convincingly that society could no longer maintain segregated schools and purport to adhere to the principle of equality, the abolition of de jure segregation has endured. Moreover, as a result of such exposition, society has progressed not only beyond acceptance of segregated public school education, but beyond tolerance of virtually all racially based legislative classifications.
D. Support for the Expository Model

The creation and operation of the federal judiciary are more comprehensible under an expository model of adjudication than they are under the traditional, dispute-resolution model. The special independence accorded article III judges can be better understood as safeguarding exposition than as protecting disputants seeking redress of injuries. Moreover, recent Supreme Court development of the doctrine of finality supports the expository model, but is difficult to explain under the dispute-resolution model. The prospective nature of many landmark Supreme Court decisions also betrays a predominant interest in exposition rather than dispute resolution.

1. Exposition as the Basis for Article III Judicial Independence

Article III of the Constitution vests federal judges with a substantial degree of independence. Federal judges are given life tenure and their salaries cannot be reduced while they hold office. These protections are typically thought to protect both individual judges and the judiciary as an institution from interference by the other branches of government. The need for judicial independence stems from the important federal interests that underlie the enumerated categories of cases to which the federal judicial power extends.

See supra note 76 and accompanying text.
See id. Correspondingly, judicial immunity doctrines can be viewed as according a measure of protection from retaliation by disappointed private litigants. See Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871); Kaufman, supra note 76, at 692.

Article III provides in pertinent part:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2. The enumerated categories of proceedings arguably can be divided into two groups differentiated by the source of the federal interest. "Cases" identifies those proceedings in which the United States has a strong interest because of the nature of the law involved—federal, admiralty or maritime. "Controversies" identifies those proceedings in which the United States has a strong interest because of the identity of one or more of the parties. Cf. THE FEDERALIST NO. 80 (A. Hamilton). This symmetry is broken only by the extension of article III
The need for judicial independence is more easily explained under the expository model than under the dispute-resolution model of adjudication. Although orderly dispute resolution is important to society, and unbiased arbiters are necessary for the effective operation of dispute-resolution tribunals, the article III provisions concerning judicial independence do not guard against the types of threats to independence that are likely to impair resolution of disputes—at least not in modern times. Those provisions are directed at threats to independence posed by other branches of government rather than the threats of bias with which a private litigant would be concerned under the traditional model of adjudication. In fact, it now appears that due process rarely, if ever, requires that the safeguard of article III independence be accorded an individual disputant, even when something as important as her or his liberty is at stake. Most disputes could be resolved by article I courts, or by state courts not subject to article III safeguards. More-

jurisdiction to “cases” affecting ambassadors and other foreign officials. Because the interest of the United States in proceedings to which such officials are parties probably results more from their status as foreign ministers than from the nature of the law likely to be applied, article III might well have termed proceedings involving those officials “controversies” rather than “cases.” Note, however, that principles of international law, such as diplomatic immunity, could be dispositive in proceedings involving foreign ministers, thereby preserving the offered distinction between “cases” and “controversies.”

Such a distinction suggests that the framers may well have intended the terms to have different meanings. Perhaps “controversies”—connoting some adversary relationship—were required only when party status served as the source of the federal interest, while any “case”—whether or not of an adversary nature—was deemed sufficient to trigger federal jurisdiction simply because a federal law was likely to be construed. The Supreme Court, however, has not treated the “case” and “controversy” requirements as distinct. Rather, it has evolved a single “case or controversy” requirement embodying the concept of justiciability, which—measured by the concept of injury, see infra note 130—serves as the “irreducible minimum” for article III jurisdiction. See Flast v. Cohen, 392 U.S. 83, 94-97 (1968); Muskrat v. United States, 219 U.S. 346, 356-57 (1911); see also Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 64 (1976) (Brennan, J., concurring). Nevertheless, it seems clear that all of the “cases” and “controversies” enumerated in article III do impinge upon some important federal interest.

Cf. THE FEDERALIST NO. 78 (A. Hamilton); Neuborne, supra note 75, at 1127-28 (suggesting that life tenure does enhance the protection of individual rights).

True, the life-tenure provision, U.S. CONST. art. III § 1, can be accounted for as an effort to insulate federal judges from popular retaliation for their decisions—as opposed to retaliation by a coordinate branch—by making it unnecessary for them to run for reelection. Such a motive, however, does not explain the inclusion of a provision protecting judicial salaries from reduction. See id.

For a forcefully articulated contrary view, asserting that article III itself, rather than the due process clause, limits the scope of judicial activities that can be undertaken by article I courts, see Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional, 70 GEO. L.J. 297 (1981).

An article I court is a tribunal created by Congress pursuant to some power other than its art. I, § 8, cl. 9 power to create article III courts. Arguably, all administrative agencies possessing adjudicatory powers are article I courts. Article I judges do not possess the constitutionally based independence of article III judges, because the Constitution does not accord them life tenure or salary protection. As a result, despite Palmore v. United States, 411 U.S. 389 (1973) (upholding
over, private litigants are actively encouraged to utilize alternative
tools of dispute resolution, such as arbitration, that do not offer
such generous measures of independence.88

Viewing the judicial function as primarily expository, the need for
article III independence becomes evident. Although primarily private
disputes are unlikely to spark the interest of a coordinate branch of
government, primarily public disputes could well produce such a result.

The circumstances surrounding the *Dred Scott* 89 decision provide
a particularly striking example. Nominally, *Dred Scott* presented the
question of whether a particular person held as a slave was entitled to
freedom under the Missouri Compromise enacted by Congress in 1820.
The suit was between the slave and his owner, but the case is famous
because of the Supreme Court’s pronouncements on congressional
power to prohibit slavery.89 Although the Court held that it lacked ju-
risdiction to entertain Dred Scott’s suit because Scott was not a “citizen”
for diversity purposes, Chief Justice Taney, nevertheless, went on
to conclude that Congress’s Missouri Compromise was unconstitu-
tional.91 Congress had hoped that the Compromise would help to re-
solve the volatile slavery issue, and there is evidence that the President
felt strongly enough about the subject matter of the suit to attempt to
influence the Chief Justice.92 It is unlikely, however, that either branch
had any interest in the personal fate of Dred Scott. As the case illus-
trates, it is the Court’s expository function, more than its dispute-reso-
lution role, that is likely to spark the interest of other branches of gov-
ernment in a way that might tempt them to interfere with judicial
independence.93

---

88 Where private disputes are involved, many advocate greater reliance on nonjudicial meth-
ods of dispute resolution. Such advocates include Chief Justice Warren Burger, consumer advocate
Ralph Nader, The Department of Justice, The American Bar Association, and The Ford Founda-
tion. See *Dispute Resolution*, 88 YALE L.J. 905 (1979) (symposium on alternate methods of dis-
pute resolution); see also Fiss, supra note 1, at 30-31. See generally Private Alternatives to the
Judicial Process, 8 J. LEGAL STUD. 231 (1979) (proceedings of a seminar on alternate methods of
dispute resolution).


92 See S. PRESSER & J. ZAINALDIN, supra note 90, at 507-08.

93 Where matters of public concern are before the courts, the danger of interference with
judicial independence is greatly increased. The “Watergate” era provides examples of instances in
which the Nixon Administration may have attempted to influence ongoing judicial proceedings.
John Dean’s Senate testimony in the Watergate hearings indicates that the Nixon White House
may have exerted pressure on Judge Charles R. Richey to delay proceedings in a post-break-in
civil suit filed by the Democratic National Committee in order to minimize the adverse impact that
2. The Finality Doctrine

Related to article III independence is the doctrine of finality, which also seeks to prohibit the other branches of government from interfering with properly exercised judicial functions. Under this doctrine, the judiciary is precluded from exercising jurisdiction if it appears that another branch of government may change the result that the judiciary decrees. Consistent with the traditional model, the finality doctrine provides a measure of assurance that a judgment redressing the injury of a victorious plaintiff will not be undone by another branch of government. Although such a view of the finality doctrine is consistent with the dispute-resolution model, it is not consistent with the case law.

In *United States v. Sioux Nation of Indians*, the Supreme Court substantially undercut the doctrine of finality as formulated above, when, at the insistence of Congress, it permitted relitigation by the same parties of an issue that had already been "finally" resolved by the Supreme Court in a prior action. In order to explain that result, the


On April 3, 1973, President Nixon's assistant John Ehrlichman met with Judge William M. Byrne at the President's home in San Clemente, Cal. to discuss Byrne's possible appointment to the post of Director of the Federal Bureau of Investigation. The meeting occurred while Judge Byrne was presiding over the "Pentagon Papers" trial of Daniel Ellsberg and Anthony Russo—a matter which was of great presidential concern. Judge Byrne ultimately declared a mistrial based on other cited government misconduct. See *N.Y. Times*, July 26, 1973, at 28, col. 6; *id.* July 27, 1973, at 10, col. 6; see also *WATERGATE AND THE WHITE HOUSE* 186, 188, 191 (E. Knappman ed. 1973).

*In Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), five of the six Justices of the Supreme Court, in separate opinions issued in their capacities as circuit justices, adopted the view that Congress could not require the federal judiciary to take actions that were nonfinal in that they were subject to revision by the executive. *Id.* Issuance of nonfinal decisions was viewed as inherently nonjudicial, thereby abrogating the constitutional separation of powers.

*Id.* But see *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), discussed infra text accompanying note 97. Curiously the finality doctrine prevents interference with the judiciary not by imposing a direct prohibition on the representative branches, but by imposing a limitation on the jurisdiction of the federal judiciary—the branch to be protected.

In this regard, the doctrine of finality bears some resemblance to the doctrine of res judicata. Both doctrines can be viewed as measures of protection to litigants who obtain favorable judgments.

*In Sioux Nation*, the Supreme Court was called upon to determine whether Congress had the power to provide for de novo review of a previously adjudicated claim asserted by the Sioux nation against the United States. In 1868, the United States signed the Fort Laramie Treaty with the Sioux, giving the Sioux occupation rights to certain land, including the Black Hills of South Dakota. Pursuant to the terms of the Treaty, the concurrence of 75% of the members of the tribe was required for future alienation of the land granted under the Treaty. Shortly thereafter, gold was discovered in the Black Hills and the United States successfully "re-negotiated" the treaty with 10% of the tribe's members. Under the revised agreement, the Sioux exchanged their right to the Black Hills for subsistence rations. Congress enacted the revised agreement into law in 1877. See *id.* at 374-84.

The bulk of the Sioux Nation claimed that the 1877 revision violated, inter alia, the 75%
traditional model would have to tolerate a considerable amount of strain. It is easy, however, to account for the Court's decision under the expository model.

In *Sioux Nation*, the Supreme Court undermined finality by permitting relitigation of a substantive issue of constitutional law on the alienation provision of the original Treaty, and that the revision, therefore, constituted an unconstitutional "taking" of the tribe's property without just compensation. The doctrine of sovereign immunity, however, precluded the tribe from asserting this claim against the United States. When, in 1920, Congress responded to mounting political pressure to deal more fairly with Indian claims by waiving sovereign immunity the Sioux filed suit in the Court of Claims. Ultimately, in 1942, that court rejected the tribe's claim, holding that it did not have jurisdiction to question the adequacy of the compensation given the Sioux in exchange for the Black Hills. In 1943, the Supreme Court denied certiorari. See *id.* at 384-88.

Political pressure continued to mount, and in 1946, Congress created the Indian Claims Commission to deal with grievances such as those asserted by the Sioux. The Commission reexamined the tribe's claim for just compensation, and ruled in 1974 that the 1877 Treaty revision, in fact, constitute a "taking" within the meaning of the fifth amendment, thereby entitling the tribe to 5% interest on 17.1 million dollars over 100 years. On appeal, however, the Court of Claims held that its earlier 1942 decision barred reexamination of the claim under the doctrine of res judicata. Once again, the Supreme Court denied certiorari. See *id.* at 384-88.

In 1978, Congress enacted another statute, this time providing for de novo reexamination by the Court of Claims of the "taking" claim, without regard to the doctrines of res judicata or collateral estoppel. In 1979, after the statutorily prescribed reconsideration, the Court of Claims, en banc, held that the 1877 Treaty revision had constituted a "taking." See *id.* at 388-89. Review of that 1979 decision of the Court of Claims was before the Supreme Court in *Sioux Nation*.

The Supreme Court affirmed the Court of Claims decision, rejecting two constitutional arguments that had been offered to bar relitigation of the "taking" claim. First, it had been asserted that the doctrine of finality rendered the 1975 and 1942 decisions of the Court of Claims incapable of judicial reexamination. Second, the 1978 Act of Congress directing the Court of Claims to disregard the doctrines of res judicata and collateral estoppel, was challenged as invalid under the doctrine of United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), a case that is customarily viewed as prohibiting Congress from prescribing a rule of decision in a case pending before the courts, because the statute prescribed resolution of the res judicata and collateral estoppel issues. See *Sioux Nation*, 448 U.S. at 392-407. The Supreme Court held that neither doctrine was offended because the statute did not direct the Court of Claims to enter any particular ruling on the merits of the "taking" issue, but rather authorized the Sioux to present to the court for enforcement a new legal right created by the statute. See *id.* at 406-07.

In *Sioux Nation*, the Court equated the doctrine of finality with the doctrine of res judicata and held that, because the United States was the beneficiary of the prior judgment at issue, it was free to waive the benefits of those doctrines through congressional enactment of a statute authorizing relitigation. See 448 U.S. at 395-407. If equation of the two doctrines is valid, the result can be explained in traditional, dispute-resolution terms: the prevailing party in a dispute simply chose not to take advantage of a beneficial and potentially dispositive doctrine.

The problem with this explanation is that the two doctrines are not identical. Res judicata is subject to waiver because it exists for the convenience of the litigants and the courts. See *id.*; cf. *id.* at 432 (Rehnquist, J., dissenting). Unlike res judicata, however, the doctrine of finality is jurisdictional, reflecting an article III limitation on the scope of the judicial power that is rooted in the doctrine of separation of powers. See Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). Accordingly, finality is not properly subject to waiver—not even by Congress. Therefore, the result in *Sioux Nation* cannot be adequately explained by equating the two doctrines.

The Court's disposition of the *Klein* rule-of-decision issue, see *supra* note 98, is equally unsatisfying. The Court held that Congress had not impermissibly prescribed a rule of decision, because it had not prescribed the result on the merits. See 448 U.S. at 406-07. Congress did, however, prescribe the result with respect to the res judicata and collateral estoppel issues. Moreover, the prescribed resolution of those issues proved to control the outcome of the entire case. The Sioux nation ultimately won the case, but only due to congressional prescription of the threshold issues.
merits. The federal judiciary, however, had not been told by Congress either how to resolve the merits or, more importantly, how its opinion was to read. In fact, the court of Claims was perfectly free to reissue the original opinion word-for-word if it so desired. The finality of the prior decision was completely undermined in traditional, dispute-resolution terms because the United States was deprived of a “right” to which the court had found it to be entitled. Under an expository model, however, such an abrogation of finality is inconsequential. The type of independence that is pertinent to the expository model is preserved as long as a representative branch of government does not attempt to usurp the judicial function of stating what the Constitution means—of expounding. Because no such usurpation occurred in Sioux Nation, the doctrine of finality was not offended.

In essence, the expository model renders the requirement of finality nonexistent, leaving Congress free to compel relitigation of any case as long as it does not prescribe a constitutional rule of decision. However, there does not appear to be any need for a bare finality requirement, as distinct from a prohibition on congressional prescription of constitutional rules of decision. Properly formulated res judicata rules should be adequate to protect any interests that the parties have in avoiding relitigation. Because the expository function requires reexposition in subsequent cases as circumstances change or new considera-

100 But see supra note 99.

101 See 448 U.S. at 407 (“[t]hat court was left completely free to reaffirm its [earlier] judgment . . . .”)

103 One might argue that no harm was done by Congress in requiring relitigation of the merits of the “taking” claim. See supra note 98. Precisely the same finality and rule-of-decision analyses would apply, however, if Congress had required relitigation after an initial decision in favor of the Sioux. Proper application of those separation-of-powers based doctrines does not turn on who wins and who loses. It follows from Sioux Nation that if private litigants are to be protected from congressional abrogation of federal court judgments entered in their favor, that protection must come from the due process clause or some other provision of the Constitution—not from article III. For a discussion of whether due process accords such protection, see HART & WECHSLER, supra note 10, at 316-24.

105 In statutory cases, the rule prohibiting Congress from prescribing a rule of decision in cases pending before the courts, see United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), is also arguably unnecessary insofar as it relates to finality concerns, although under the expository model the rule-of-decision prohibition has a firm basis in the separation-of-powers preference for legislative generality, cf. supra notes 27-37 and accompanying text.

With regard to the finality aspect of the rule-of-decision prohibition, Congress is always free, within the bounds of due process and other constitutional restrictions, to change the result of a statutory adjudication merely by changing the underlying statute. Under this view Congress should arguably be able to direct a court to construe a statute in a way that would produce the same result. But see supra notes 27-43 and accompanying text (discussing legislative generality). Note that under this view, the Klein case itself, which was a case of statutory construction, appears to be incorrectly decided.

In constitutional cases, however, the Klein doctrine serves the function of precluding Congress from expounding constitutional values where Congress cannot change the underlying substantive law, the Constitution itself.
tions emerge, the very notion of "finality" is inconsistent with the nature of exposition.

The only interesting question that remains is whether a finality doctrine is required in order to prohibit reexposition in a case that has already been adjudicated. As long as the interests of the parties in preserving the results of the original adjudication are adequately protected through the res judicata and due process doctrines, and Congress has not prescribed a constitutional rule of decision, even reexposition in a previously adjudicated case, while unlikely, is unobjectionable absent possible efficiency concerns. In accordance with the prescriptions of expository adjudication, the finality doctrine seems to have been abandoned defensibly in Sioux Nation.

3. Prospective Judicial Decisions

Further support for the expository model is provided by the prospective nature of many well-known judicial decisions. The dispute-resolution model instructs courts to operate retrospectively, limiting the scope of their opinions to that which is necessary to protect legal rights, but that is certainly not what courts do. A large part of what courts do is craft opinions—like the Marbury opinion—that are consciously designed to have prospective, rather than retrospective effect.

The judiciary does more than resolve disputes. As a practical matter, no judiciary vested with the degree of procedural formality that we presently find desirable could bear the burden of resolving even a fraction of the disputes that arise in our society. Instead, judicial opinions serve as precedents, precluding the need for future adjudication of simi-

---

104 It is difficult to perceive why relitigation under such circumstances would be desirable. The Sioux Nation case, however, falls within the described circumstances, and Congress did desire relitigation in that case. It may be that political considerations made relitigation of the merits desirable. Perhaps an outright congressional grant of the money claimed by the Sioux nation would have been too politically unpopular to command a majority in each House of Congress. A strategy under which the judiciary would order satisfaction of the tribe's claim, with Congress acting only to remove a legal technicality, may well have been politically more popular. Such a strategy would raise interesting questions concerning the degree to which Congress properly can take actions designed to reduce its own political accountability.

105 Congressionally compelled relitigation could become quite objectionable if used merely as a means of coercing a court to reach a particular result on the merits. This might be the case if Congress continually required relitigation after the court repeatedly reached the same result in a particular case. At least in constitutional cases, such congressional pressure might well offend the doctrine of separation of powers by undermining judicial independence. It is difficult, however, to distinguish between such impermissible pressure and the type of political pressure that is desirable in order to give the judiciary the proper degree of political accountability. See supra notes 75-78 and accompanying text.

106 See supra text accompanying notes 6-12.

107 5 U.S. (1 Cranch) 137 (1803); see supra notes 14-19 and accompanying text.

108 See supra notes 20-23 and accompanying text.
lar disputes. The precedents send signals to absentees, permitting them to structure their transactions to avoid potential disputes and permitting out-of-court settlement of many disputes that, nevertheless, do arise. Because of the importance of precedent, most judges do not issue opinions without first giving substantial consideration to the prospective effect that their opinions will have on the conduct of absentees. In fact, the United States Supreme Court considers precedential impact in determining whether certiorari should be granted.

Some of the more famous decisions rendered by the Supreme Court belie the accuracy of the traditional model of adjudication. In Brown v. Board of Education, the Court certainly was preoccupied with the prospective impact of its decision. The Topeka Board of Edu-

---

109 One explanation for why decisions establishing a new principle of law are not given full retroactive effect is that at the time the new principle is announced it is too late to affect behavior that has already occurred. Accordingly, limited retroactive effect is often accorded new principles of law where it is still not too late to affect behavior prospectively.

For example, in Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court declined to give full retroactive effect to the four-year-old rule of Mapp v. Ohio, 367 U.S. 643 (1961), requiring state courts to exclude from criminal trials evidence seized in violation of the fourth amendment. Rather, the Court chose to apply the exclusionary rule only in cases where the state criminal proceedings had not yet become final when Mapp was decided. See 381 U.S. at 622. Presumably, the exclusionary rule was applied only where it would have some prospective impact upon the behavior of the state courts.

The degree of retroactivity given by the Court to the exclusionary rule fails to coincide with one of the primary purposes that the Court found to be served by the rule. The Court stated that the exclusionary rule was intended to deter the police from violating fourth amendment rights. Id. at 636-37. Under that rationale, the rule should have been applied only in cases where potential police misconduct had yet to occur. Cf. id. at 637. A deterrent does not serve its purpose if those whom it is intended to deter are unaware of it.

However, the Court also alluded to another purpose served by the exclusionary rule—that of protecting the integrity of the judicial process. Id. at 637. Presumably, the judicial process is tainted by knowing reliance on unconstitutionally seized evidence. Such reliance could be avoided without undue administrative burden in proceedings which had not yet become final. This explanation of the Court's actions in Linkletter still places that case within the scope of the suggested principle that courts are motivated primarily by a desire to affect prospective behavior. The general question of how offered justifications for the exclusionary rule bear upon the distinction between the dispute-resolution and expository models of adjudication is discussed infra note 116 and accompanying text.

110 The classic example of this arises in the context of the fourth amendment exclusionary rule which the Court has held to exist because of its deterrent effect rather than by constitutional compulsion. See infra note 116.

Professor Brilmayer has suggested that article III justiciability ought to turn, in part, upon the degree to which unrepresented absentees are likely to be affected by a court's decisions, particularly to the extent that such effects are a factor in the orderly operation of stare decisis. See L. Brilmayer, supra note 10, at 306-15. Professor Tushnet disagrees, see Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 HARV. L. REV. 1698 (1980), arguing not only that such determinations are too elusive to serve as a basis for justiciability doctrines, see id. at 1708-13, but questioning the very desirability of using justiciability rules to resolve fundamental legal issues relating to self-determination, which would be better addressed in connection with the merits. See id. at 1724. Both views, however, seem to rely on the premise that the important feature of a judicial decision is its prospective impact.

111 See U.S. SUP. CT. R. 17.1(c).

cation was not simply ordered to permit the plaintiff to attend an integrated school. Rather, the entire school system was ordered desegregated—something arguably unnecessary to resolve the plaintiff’s dispute and, therefore, improper under the dispute-resolution model.118 Similarly, in Miranda v. Arizona114 the Court issued a prospective rule designed not to dispose of the Miranda case itself but, rather, to affect future police conduct.118 Likewise, if the fourth amendment exclusionary rule is viewed as a rule of deterrence rather than a rule that is constitutionally compelled,116 the rule’s very existence offends the dis-

118 See Brown v. Board of Educ. (II), 349 U.S. 294 (1955). It is possible to explain Brown in dispute-resolution terms. If the equal protection clause gives blacks the right to attend meaningfully integrated schools, as opposed to predominately white schools, the plaintiff’s rights could be protected only by fully integrating the school that she attended.

114 384 U.S. 436 (1966). In Miranda, a 5-4 majority announced the fifth amendment exclusionary rule. Pursuant to Miranda, incriminating statements made by criminal defendants are presumed to have been obtained in violation of the defendant’s fifth amendment privilege against self-incrimination unless, prior to making such statements, the defendant was advised: (1) that he or she had a right to remain silent; (2) that any statements made could be used as evidence against the defendant; and (3) that the defendant had a right to counsel, even if he or she were unable to afford one. If, after receiving those warnings, a defendant knowingly and intelligently waived his or her Miranda-based rights, incriminating statements were admissible at the defendant’s trial. However, in the absence of either a Miranda warning, or an intelligent waiver of Miranda rights, incriminating statements could not constitutionally be admitted into evidence at the defendant’s trial. See id. at 478-79. Miranda is noteworthy for its lack of concern with whether, as a factual matter, particular defendants were or were not coerced into making incriminating statements. The presence or absence of a fifth amendment violation turned directly on whether a Miranda warning had been given and a knowing and intelligent waiver made. See id. at 491-99.

118 The only way to account for Miranda, as well as for the fourth amendment exclusionary rule, discussed infra note 116, under the dispute-resolution model is to conclude that the exclusionary rule is coextensive with the constitutional violation at issue, and that the tarnished integrity of the judicial process that would result from introduction of the subject evidence would deprive the very defendants before the court of their constitutional rights. As is discussed infra note 116, however, the Supreme Court has adopted the view that the fourth amendment exclusionary rule and the fourth amendment are not coextensive.

118 The Supreme Court has held that the fourth amendment requires exclusion from criminal trials of evidence obtained in violation of that amendment’s prohibition on unreasonable searches and seizures. See Mapp v. Ohio, 367 U.S. 643, 655-57 (1961); cf. Weeks v. United States, 232 U.S. 383, 393-94, 398 (1914). More recently, however, the Court has stated that the fourth amendment exclusionary rule is not compelled by the fourth amendment. Rather, it constitutes a judicially developed, functional doctrine, designed to effectuate fourth amendment concerns by deterring police misconduct. See United States v. Calandra, 414 U.S. 338, 347-48 (1974); cf. Stone v. Powell, 428 U.S. 465, 482-89 (1976). If the exclusionary rule is merely a deterrent which implements but is not compelled by the fourth amendment, it is difficult to identify the source of the Supreme Court’s power to impose the rule on the states as it did in Mapp. Cf. Wolf v. Colorado, 338 U.S. 25, 28-33 (1949). For a particularly sophisticated discussion of the constitutional status of the fourth amendment exclusionary rule in light of its deterrence function, see Selzman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 449-59 (1980); see also Rose v. Lundy, 455 U.S. 509, 543 n.8 (1982) (Stevens, J., dissenting).

Moreover, if the rule is merely a deterrent, designed to have prospective impact, such a rule cannot be squared with the dispute-resolution model. When the rule is applied, the defendant’s conviction is reversed not because of any right that the defendant possesses, but solely as an incident to the court’s desire to affect future police conduct. Although such motivation properly can be attributed to an expository judiciary, it turns the dispute-resolution model on its head. See generally supra notes 57 & 115.
pute-resolution model because it regulates future conduct instead of narrowly disposing of the case before the court.

Although the legitimacy of these decisions may be questioned on other grounds, they are not objectionable simply because the Court was concerned primarily with the prospective impact that the decisions would have. Nevertheless, those decisions are inconsistent with the traditional model. Because the only limitation that the traditional model imposes upon judicial conduct is that of avoiding actions unnecessary to resolution of the dispute before the court, that limitation cannot be ignored without leaving the judiciary completely unconstrained. The traditional model is unable to tolerate even a small amount of prospective exposition because it offers no basis for determining when such exposition would be proper. Some exposition is manifestly desirable, however, and a viable model of adjudication is needed to place proper limits upon the expository function of courts.

It is descriptively artificial, as well as demeaning to the judiciary, to suggest—as does the traditional model—that exposition is only a by-product of dispute resolution. Courts do not incidentally expound principles of law solely to aid resolution of particular disputes. Rather, courts resolve particular disputes as part of the process of properly performing their governmental function of expounding principles. If anything is incidental, it is resolution of the particular dispute that is used as a vehicle for exposition. The exposition itself is central. Brown v. Board of Education did not effect a profound social change because Linda Carol Brown wished to attend a desegregated school. Other students had possessed the same desire before her but were told that separate could be equal. Rather, Linda Brown was permitted to attend a desegregated school because the judiciary foresaw shifting social attitudes that would support profound social change. The value of

---

117 For example, it is possible to object to Miranda on separation-of-powers grounds because the Supreme Court was engaged in legislative policymaking. See infra text accompanying notes 205-57.

118 The justiciability doctrines traditionally relied upon to constrain the judiciary are rooted in the concept of an "injury" emanating from a dispute. See infra notes 131-38 and accompanying text. When resolution of the dispute ceases to be the court's objective, the traditional justiciability limitations cease to function in a coherent manner. Professor Sager has recognized the all-or-nothing quality of justiciability doctrines under the traditional model, characterizing the issue posed by recent liberal justiciability decisions as a choice between the Marbury model and "the Abyss." See Sager, supra note 10, at 1377-81.

119 See, e.g., Gong Lum v. Rice, 275 U.S. 78, 86-87 (1927) (Chinese high school student denied right to attend whites-only high school); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 543 (1899) (black parents unable to send children to whites-only high school); Lehew v. Brumell, 103 Mo. 546, 551-52, 15 S.W. 765, 766 (1891) (injunction forbidding black children from attending whites-only school upheld); cf. Plessy v. Ferguson, 163 U.S. 537 (1896).

120 Cf. Fiss, supra note 1, at 5-17 (suggesting that the important purpose of adjudication is to give concrete meaning to our public values).
equality embodied in the equal protection clause could no longer be reconciled with segregated public schools. This view of the judiciary gives it an affirmative, coequal function to serve in the operation of government, but it also poses certain dangers—dangers to which the law of justiciability properly should be directed.

III. THE SAFEGUARDS OF JUSTICIABILITY

The law of justiciability is designed to confine the judiciary to proper judicial activity, as contemplated by article III of the Constitution. The text of article III extends the federal judicial power to "cases" and "controversies."\(^{121}\) Although those terms appear in a portion of the Constitution that grants power to the judiciary, the Supreme Court has construed them to limit the jurisdiction of federal courts, generally prohibiting the issuance of advisory opinions.\(^{122}\) The criteria used to determine whether a "case" or "controversy" exists collectively comprise the concept of justiciability, or suitability for judicial resolution.\(^{123}\) The components of justiciability are standing, ripeness, and mootness, as well as the collusive-suit, finality, and political-question doctrines.\(^{124}\) Because of their jurisdictional underpinning, justiciability doctrines have acquired a heightened aura of constitutional gravity, although it seems that the aura exaggerates the constitutional stature to which the doctrines realistically are entitled.\(^{125}\)

Justiciability rules, predictably, tend to reflect prevailing views of the proper judicial function.\(^{126}\) Accordingly, the present law of jus-
ticiability is designed to implement the traditional, dispute-resolution model of adjudication. Yet, the present law of justiciability is notoriously incoherent, and serious scrutiny suggests that the incoherency is due to adherence to the wrong model of adjudication. Because the dispute-resolution model does not conform to society's expectations concerning the process of adjudication, the doctrines evolved from that model often produce unacceptable results. The expository model of adjudication, which more accurately reflects our expectations concerning the judicial process, provides the basis for the development of a coherent law of justiciability—a law that, in turn, guards against potential abuse of the judiciary's expository function.

A. Justiciability and the Traditional Model

The touchstone of the Supreme Court's approach to justiciability the Court's approach to ripeness in the two cases strongly suggests that prevailing views of justiciability had changed in the 26 years that had elapsed between the decisions in the two cases. In Flast v. Cohen, 392 U.S. 83, 101 (1968), the Court, discussing standing, stated:

Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," Baker v. Carr, [369 U.S.] at 204, and whether the dispute touches upon "the legal relations of parties having adverse legal interests." Aetna Life Insurance Co. v. Haworth, [300 U.S.] at 240-241.

This language appears to track the Marbury-based dispute-resolution model of adjudication. See supra text accompanying notes 6-12. In Flast, however, the Court went on to hold that federal taxpayers could, by virtue of their taxpayer status alone, satisfy article III limitations for the purpose of challenging the constitutionality of a government program authorizing aid to parochial schools. See 392 U.S. at 101.

Such a holding certainly is at odds with the traditional model's dispute-resolution function. If one concedes that the merits properly were reached in Flast, it is difficult to avoid the conclusion that the dispute-resolution model cannot account for the full scope of desirable judicial activities.


Professor Tushnet has cogently and systematically destroyed any vestiges of coherence that might survive superficial scrutiny of standing, terming the doctrine "little more than a set of disjointed rules dealing with a common subject," and emphasizing that "the law of standing lacks a rational conceptual framework." Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L. Rev. 663 (1977).

Doctrinal incoherence makes justiciability rules particularly susceptible to manipulation by the courts—a fact that has been noted by jurists and commentators alike, see Tushnet, supra note 110, at 1705-06 nn.31-33, and such manipulation, of course, serves only to increase dissatisfaction with the law of justiciability.

See supra text accompanying notes 24-120.
EXPOSITORY JUSTICE

has been "injury." The Court has frequently asserted that the article III case-or-controversy limitation precludes judicial initiatives directed at "generalized grievances," and permits judicial redress of only actual or threatened "injury in fact." Standing rules assure that the plaintiff actually suffers the asserted injury; ripeness and mootness rules assure that the injury is ongoing at the time of adjudication; and resolution of collusive suits is prohibited because friendly disputes reflect no real injury. Although finality requirements fit less comfortably into an injury framework, they arguably can be understood to assure the plaintiff that judicial redress of an injury will not subsequently be undermined by another branch of government. Only the prohibition against judicial resolution of political questions relates more to the nature of the legal issue raised than to the harm suffered by the plaintiff. The injury-orientation of Supreme Court justiciability decisions logically follows from the dispute-resolution model of adjudication: the presence of an injury reflects the presence of a dispute sufficiently concrete for judicial resolution.

A functional approach to justiciability under the traditional model would focus on the likelihood of social disruption absent a receptive judicial tribunal: suits posing a serious threat of disruption would be justiciable, but those posing only a small threat of disruption would

See infra text accompanying notes 143-73.

See infra note 188.

See infra note 190.

See infra note 192.

See supra text accompanying notes 94-96.

See infra notes 249-57 and accompanying text.

not. Of course, the Supreme Court has never asserted such a theory of justiciability. Instead, it has chosen to rely on a commonly understood, intuitive concept of injury as the basis for its justiciability determinations. Although a commonly shared concept of injury once may have existed, that no longer appears to be the case. One reason, then, that Supreme Court justiciability decisions are unsatisfying is that the concept of injury is too elusive and malleable to be of any use.

Supreme Court allegiance to the traditional model of adjudication appears most strongly in the Court's standing decisions. The Supreme Court has held that, as a matter of constitutional jurisdiction, federal courts are empowered to entertain only suits filed by a plaintiff with standing; in the absence of standing no article III case or controversy exists. In Duke Power Co. v. Carolina Environmental Study Group, Inc., the Court stated that article III standing doctrine required the plaintiffs to possess a "personal stake in the outcome of [a] controversy," measured by the presence of a "distinct and palpable injury" with a "fairly traceable" causal connection between the claimed injury and the challenged conduct. Demonstration of a "distinct and palpable injury" can be viewed as effecting adherence to the dispute-resolution model, and the causation requirement can be understood as ensuring that judicial redress will actually remedy the injury. Judicial action is thus limited to that which is necessary for dispute resolution.

Early standing decisions equated "injury" with the concept of "legal injury"—a violation of a legal right protected by common law or

---

140 It is tantalizing to flirt with such a construction. Arguably certain jurisdictional requirements, such as the $10,000 amount-in-controversy requirement for federal court diversity jurisdiction, see 28 U.S.C. § 1332 (1976), distinguish between disputes that are likely to result in social disruption if not resolved by a sophisticated, formalized process and those that are not. It is unlikely, however, that the potential for social disruption would ultimately correlate very highly with the amount of money involved in any particular lawsuit. People tend to have strong feelings about their fundamental, nonmonetary rights, nonformal abrogation of which might well pose the danger of social disruption.

141 The concept of injury has been expanded over the years to include legal and nonlegal, economic and non-economic, and direct and attenuated injury without ever defining injury. See infra text accompanying notes 149-55.


145 Id. at 72 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

146 438 U.S. at 72 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).


148 See supra note 130. "Distinct" appears to mean particularized, thereby depriving plaintiffs of standing if they assert mere "generalized grievances." See supra note 131 and accompanying text.
Gradually, however, the concept of judicially cognizable injury expanded to include interests other than those that were directly protected by a common law or statutory provision. In *Association of Data Processing Service Organizations v. Camp,* invasion of an economic interest in freedom from competition was recognized as an "injury in fact" even though it did not constitute a "legal injury." Three years later in *United States v. SCRAP,* the Court held that the undifferentiated, abstract interest of an ordinary citizen in environmental protection constituted a cognizable injury. Because the plaintiffs in *SCRAP* were in no pertinent respects different from any other citizens, the *SCRAP* decision dispensed with any meaningful notion of palpability or redressability as a requirement for finding "injury in fact."  

---

149 See Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939). This conception of injury is based on a circular definition: an injury is something that the law protects against, but, in determining whether the law protects against something, one must ascertain whether it is an injury. Cf. Barlow v. Collins, 397 U.S. 159, 168 (1970) (Brennan, J., concurring); infra note 174. Even Chief Justice Marshall seems to have internalized the equation between injury and invasion of a legally protected right, as evidenced by his reference in *Marbury to damnum absque injuria,* or loss without injury, as a loss upon which the judiciary will not act. 3 U.S. (1 Cranch) 137, 163-64 (1803).


151 In *Data Processing,* companies that sold data processing services to businesses challenged the statutory validity of a ruling issued by the Comptroller of the Currency which permitted national banks to sell similar services to their customers as an incident to their banking activities. The challenged ruling allegedly subjected the plaintiffs to competition by national banks that the plaintiffs would not have had to face in the absence of the challenged ruling. Although the plaintiffs suffered no "legal injury," because they were viewed as having no legally protected rights under the subject statute, the Supreme Court found that the economic injury with which the plaintiffs were threatened was a sufficient basis for standing. Id. at 152. In the process, the Court abandoned the legal-right test for standing, finding that it related more to the merits that it did to standing inquiries. Id. at 153.


153 In *SCRAP,* an ad hoc organization of five law students, formed apparently for the purpose of instituting the subject litigation, challenged the statutory validity of the Interstate Commerce Commission's failure to suspend a scheduled railroad freight surcharge, arguing that the agency's action was invalid because the agency had not prepared an environmental impact statement prior to deciding not to suspend the proposed rate increase. The plaintiff organization based its claim to standing on the alleged economic, recreational, and aesthetic harm that its members would suffer if the increase were permitted to go into effect. The plaintiffs reasoned that the resultant rate structure would discourage the use of recyclable materials, thereby promoting additional exploitation of raw materials, which, in turn, would not only increase the prices that *SCRAP* members would have to pay for finished products, but also would affect adversely the forests, rivers, mountains, and other natural resources in the Washington, D.C. area, in a way that would interfere with the members' enjoyment of those resources. Id. at 672-83. The Supreme Court found these claims to allege "injury in fact," thereby serving as an adequate basis for standing. See id. at 686-90.

154 The Court, however, specifically rejected both the argument that the alleged chain of causation was too attenuated ever to be proved, 412 U.S. at 688-90, and the suggestion that standing should be limited to those who are "significantly" affected by an agency's action, id. at 689 n.14. It is unlikely that *SCRAP* and its members made allegations that could not, in good faith, have been made by any member of the public. See Eckhardt, *Citizens' Groups and Standing,* 51 N.D.L. REV. 359, 365 (1974); Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard,* 20 ST. LOUIS U.L.J. 663, 667-72 (1976). Cf. *Flast v. Cohen,* 392 U.S. 83 (1968) (individual taxpayer may have standing to challenge federal spending program). But see *Valley Forge*
Nevertheless, rather than dispense with the injury requirement altogether, the Court went to great pains to stretch the concept so that it could be satisfied by the plaintiffs in that case, yet still be retained for future use.\(^{165}\)

For a time it appeared that *SCRAP* was merely the most recent in a line of cases signifying a general liberalization in the Supreme Court law of standing,\(^{166}\) with a concomitant increase in judicial activism. Two years after *SCRAP* was decided, however, the Supreme Court, in *Warth v. Seldin*,\(^{167}\) denied standing to an array of plaintiffs challenging the constitutionality of a restrictive municipal zoning ordinance. The Court held that the alleged injury might not be eliminated by a favorable decision on the merits and denied the plaintiffs' standing.\(^{168}\) The decision was surprising because victims of alleged economic harm and racial discrimination typically had been thought to suffer an injury that was cognizable for standing purposes.\(^{169}\)

The Supreme Court's increasingly blurred vision of injury was clouded further in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*\(^{160}\) There, the plaintiffs' injury seemed identical in all pertinent respects to the injury suffered in *Warth*; yet standing was granted.\(^{161}\) The following year, in *Simon v. Eastern Kentucky Welfare Rights Organization*,\(^{162}\) the Supreme Court

---

\(^{159}\) *Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)* (standing denied where taxpayer challenged HEW actions; limited *Flast* to challenges directed at congressional action).

\(^{160}\) *See Scott, Standing in the Supreme Court—A Functional Analysis, 86 HARV. L. REV. 645, 646 (1973)* (discussing the line of cases that preceded *SCRAP*).

\(^{161}\) *Warth, 422 U.S. 490 (1975).*

\(^{162}\) *Id. at 502-08.* In his opinion for the five-member majority of the Court, Justice Powell recited each plaintiff's asserted injury in excruciating detail, demonstrating in every instance that some contingency could be imagined that would render a favorable decision less than completely satisfactory. See *id.* at 502-17.

The opinion exudes artificiality. Few could read it without seriously questioning why the factors discussed by the Court should have had any bearing on the plaintiffs' standing. Moreover, the Court imposed stringent factual pleading requirements which appear to be wholly inconsistent with the notice-pleading objective of the Federal Rules of Civil Procedure. See *Conley v. Gibson, 355 U.S. 41, 47-48 (1957).* It is not surprising that the Court has been accused of manipulating the doctrine of standing to suit its own purposes. See *Tushnet, supra* note 110, at 1705-06 nn.31-33.

\(^{163}\) *See Warth, 422 U.S. at 507 & n.17; cf. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)* (standing granted under civil rights act where plaintiff alleged injury as a result of discriminatory housing practices).

\(^{164}\) *429 U.S. 252 (1977).*

\(^{165}\) Although the facts of *Warth* and *Arlington Heights* were extremely similar, the court distinguished the two by holding that *Arlington Heights* involved a particular housing project, but *Warth* did not. *429 U.S. at 264.* This distinction is less than satisfactory, because at least one contemplated project was involved in *Warth.* See *422 U.S.* at 516-17. More fundamentally, it is difficult to determine why such a factor should be dispositive of the standing issue, and the Court has offered no explanation.

\(^{166}\) *426 U.S. 26 (1976).*
EXPOSITORY JUSTICE

denied standing to an organization representing indigents who also possessed what, until that time, had appeared to be the type of injury sufficient to confer standing:163 deprivation of free medical care as a result of an Internal Revenue Service ruling that permitted hospitals to retain their preferential tax status even if they ceased providing free care to indigents.164 As in Warth, the Court held the alleged injury insufficient because it was not certain to be redressed by a favorable decision on the merits.165 The striking feature of the Welfare Rights decision, however, was its apparent holding that the alleged injury was inadequate in a constitutional sense, thereby depriving the Court of article III jurisdiction to hear the case.166 Such a holding appears to contradict directly the result in SCRAP—a case which presented even weaker evidence of injury and redressability than did the Welfare Rights case but that was, nevertheless, adjudicated on the merits.167

The Warth and Welfare Rights decisions might have been viewed simply as evidence of a resurrection of restrictive Supreme Court notions of injury, rather than an exercise in arbitrariness. Two years after Welfare Rights, however, the court granted standing in Duke Power Co. v. Carolina Environmental Study Group, Inc.168 on the basis of a very attenuated claim of injury.169 There, the plaintiffs challenged the constitutionality of the Price-Anderson Act,170 which limits the liability of private companies for damages resulting from nuclear power plant accidents,171 alleging that particular environmental and aesthetic injuries would be redressed if the Act were invalidated, because construction of the subject plant would not be completed.172 Rec-

---

163 See infra note 165.
164 426 U.S. at 28-36.
165 Id. at 40-46. The Welfare Rights case is difficult to distinguish from earlier cases such as Barlow v. Collins, 397 U.S. 159 (1970), and Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1968), in which rather general expressions of congressional intent to benefit a particular group were held to be a sufficient basis for standing. The charitable-organization provision of the Internal Revenue Code, I.R.C. § 501(c)(3) (1976), involved in Welfare Rights seems to evidence a genuine congressional desire to induce private parties to aid indigents. If the incentive scheme proves to be of limited effectiveness, that may provide a policy argument for new legislation. It does not, however, provide a basis for denying beneficiaries of the scheme standing to claim whatever benefits might exist. In this regard, the Welfare Rights decision poses serious separation-of-powers problems. The separation-of-powers component of justiciability is discussed infra notes 205-57 and accompanying text.
166 See 426 U.S. at 45-46; see also id. at 64 (Brennan, J., concurring).
167 The Court attempted, with very little success, to distinguish SCRAP. See 426 U.S. at 45 n.25.
169 See id. at 102-03 (Stevens, J., concurring).
171 See 438 U.S. at 63-67.
172 See id. at 72-78. It may be that the Court in Duke Power strained to find standing in order to reverse the decision of the lower court invalidating the Act, because the Supreme Court believed that unless reversed on the merits, the lower-court decision would undesirably impede the
ognition of the alleged injury as sufficient to confer standing would have followed quite naturally from SCRAP, but because of the Court’s intervening standing decisions, the Duke Power decision simply rendered unintelligible any description of the Supreme Court’s concept of injury.

In light of the mystifying contours of “injury” that emerge from Supreme Court standing decisions, one doubts whether a viable concept of injury any longer exists. When “injury” meant invasion of a legally protected interest, the concept was intelligible; it simply resembled the question of whether the plaintiff had a claim on the merits. Although the Supreme Court has now expanded the concept of “injury” beyond “legal injury,” it has stopped short of literal “injury in fact,” without explaining where the stopping point is. For example, a plaintiff claiming to be so upset by an allegedly unconstitutional government program that it caused the plaintiff’s blood pressure to rise development of nuclear power. Cf. id. at 103 (Stevens, J., concurring).

Commentators have frequently noted the confusion that has plagued the Court’s definitions of sufficient injury to convey standing. See, e.g., Chayes, supra note 1, at 1291 (“the Supreme Court is struggling manfully, but with questionable success, to establish a formula for delimiting who may sue that stops short of ‘anybody who might be significantly affected by the situation he seeks to litigate.’ ”); Tushnet, supra note 110, at 1705 (“[t]he ease of manipulation [of standing criteria] is especially enhanced because the doctrine is so amorphous and confused”); Wolff, supra note 154, at 678 (“[t]he confusing and inconsistent nature of these decisions has been the subject of judicial and scholarly comment [citations omitted]”). The Court itself has recently recognized the confusing trail it has left and admitted “[w]e need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it . . . .” Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982).

Analytically, the two concepts are identical. A “legal injury” exists when the legal provision that the plaintiff claims the defendant violated is intended to protect the interests of some identifiable class, of which the plaintiff is a member, from some identifiable category of harms, which includes the harm suffered by the plaintiff. See supra note 149. As noted infra text accompanying notes 228-35, this formulation also describes the nonconstitutional “nexus” and “zone of interest” components of current standing doctrine. The formulation is problematic, because it has, of course, been possible to establish standing under the “legal injury” standard and yet lose on the merits. See, e.g., Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936). A plausible explanation for this possibility is simply that courts made less-searching inquiries when addressing the issue of standing than when addressing the merits. A favorable decision on the issue of standing meant that the plaintiff might win, and a favorable decision on the merits meant that the plaintiff would win. This distinction seems to be retained in the present formulation of the zone-of-interest test that a plaintiff can satisfy merely by demonstrating that his or her interest is “arguably” within the zone of interests protected by the provision of law sought to be enforced. See infra note 230; cf. Investment Co. Inst. v. Camp, 401 U.S. 617, 620 (1971) (because economic injury suffered by plaintiffs was arguably within the zone of interests Congress intended to protect, plaintiffs had standing to sue).

would, in all likelihood, be held not to suffer a qualifying injury, even though a plaintiff alleging economic, competitive harm would suffer such an injury. The Supreme Court, however, has offered no explanation for why the two harms should be treated differently. Both seem to be injuries "in fact." Moreover, the tangible or intangible nature of the harm at issue seems to be irrelevant, as does its objective or subjective nature. The Court's criterion for identifying "injury" appears at best to be intuitive, but even the Court's intuitions are difficult to understand.

Any action—especially government action—affects a variety of people with varying degrees of certainty and immediacy. For example, if the government authorizes operation of a nuclear power plant but the authorization is arguably unlawful because mandatory safety requirements were not adequately complied with, the resulting array of threatened injuries is vast. Should there be a meltdown, the employ-

---

276 Subjective injuries are typically viewed as an insufficient basis for standing. See, e.g., Laird v. Tatum, 408 U.S. 1, 12-14 (1972) (subjective "chill" of first amendment rights resulting from allegedly unconstitutional Army surveillance program not adequate to make case justiciable).


278 Compare the intangible injuries that conveyed standing in United States v. SCRAP, 412 U.S. 669 (1973) (injury to environmental quality sufficient to convey standing), and Flast v. Cohen, 392 U.S. 83 (1968) (injury to plaintiff caused by application of federal funds to purchase parochial school textbooks sufficient to confer standing), with the tangible injuries that did not, in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (favorable tax treatment of hospitals refusing to serve indigents did not sufficiently injure plaintiffs to confer standing), and Warth v. Seldin, 422 U.S. 490 (1975) (zoning ordinance that effectively excludes low income residents does not sufficiently injure plaintiffs to confer standing).

279 Despite contrary language in cases such as Laird v. Tatum, 408 U.S. 1, 12-14 (1972) (subjective "chill" of first amendment rights resulting from allegedly unconstitutional Army surveillance program not adequate to make case justiciable), the subjective or objective nature of an injury does not adequately distinguish between those cases in which standing has been upheld and those in which it has been denied. The injuries to indigents in Welfare Rights and to racial minorities in Warth were objective. Yet, the plaintiffs in those cases were denied standing, while the generalized subjective apprehension of future environmental harm was a sufficient basis for standing in SCRAP. Indeed, the very distinction between subjective and objective injuries is too elusive to be viable. The only sensible basis for distinguishing between subjective and objective injuries is to focus on the number of people involved, but the Supreme Court has not viewed this factor as dispositive. Rather, to the extent that large numbers of people are involved, it makes standing harder, rather than easier, to establish. See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-17 (1974); United States v. Richardson, 418 U.S. 166, 176-80 (1974).

280 Curiously, it was possible to conclude that high blood pressure resulting from intense opposition to a government program would not fall within the ill-defined concept of injury-in-fact. This suggests that some visceral distinction may exist between qualifying and nonqualifying injuries, even though such a distinction cannot be articulated satisfactorily. Alternatively, the conclusion may simply be an artifact of the well-established principle that mere concern about a problem is not a sufficient basis for standing. See Sierra Club v. Morton, 405 U.S. 727, 738-40 (1972).

281 A "meltdown" is the term commonly applied to a loss-of-coolant accident in a nuclear reactor. Because the process of nuclear fission, which is central to the operation of a reactor, produces a great deal of heat, large amounts of water must constantly be supplied to the core of an operating reactor in order to dissipate this heat. Failure to supply water as a coolant for even a few minutes would result in rapid temperature increases approaching 2,700 degrees Fahrenheit in the reactor core. Such temperatures would melt the nuclear fuel, thereby initiating an "irreversible
ees on duty would suffer immediate physical injuries. Other employees would suffer loss of their jobs because the plant could no longer operate. Neighboring residents would suffer physical injuries from escaping radiation and economic injury in the form of property loss from the meltdown itself. Customers of the utility company operating the plant would suffer increased rates so that the utility could purchase substitute power from other sources and begin to pay for the economic consequences of the meltdown. Residents of communities hundreds of miles away would be threatened with physical injuries as radiation was carried by the winds to their communities, and all taxpayers would suffer increased taxes to pay for the remedial actions that Congress would have to take. Even unborn generations might be harmed by long-term effects of radiation exposure that have yet to be discovered.183

Who should have standing to seek an injunction prohibiting operation of such a plant? It is no answer to say that "injured" parties are authorized to sue. Virtually everyone in the United States is "injured," but it is unclear how far along the continuum of affected parties the right to sue should extend.184

The Court's recent precedents offer no guidance, and no commonly shared concept of injury exists to facilitate line-drawing.184 Moreover, confusion is heightened because the SCRAP decision indicates that the case-or-controversy limitation of article III will tolerate virtually any extension of standing.185 Further, as the nuclear-meltdown scenario indicates, the changing character of society may be making injury an inherently undefinable concept on which to base just-

---

188 'Fear of such consequences prompted environmentalists and residents of an area in which a nuclear plant was being constructed to file suit in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978), apparently hoping either to halt construction of the plant or to increase their chances of being compensated for any injuries they might suffer as a result of the plant's operation. See id. at 73.

189 Note that the attenuated injuries that threaten those at the far end of the continuum of affected parties in the meltdown scenario are neither more remote nor less palpable than injuries that the Supreme Court has already recognized as adequate to confer standing. See, e.g., United States v. SCRAP, 412 U.S. 669 (1973) (environmental aesthetic injury); Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer injury); cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (environmental and aesthetic injury caused by thermal pollution of neighboring lakes).

184 It is probable that no analytically sound concept of injury ever existed—not even under the now-abandoned "legal injury" standard. It may be that some consensus concerning cognizable injury did exist under the "legal injury" standard, and consensus is an adequate foundation for a viable rule of law. Now, however, it appears that even consensus is absent.

184 This view is further enhanced by Supreme Court recognition of justiciability in the so-called "headless class action" cases which have no plaintiff at all. See infra note 191.
Without a viable concept of injury, there can be no meaningful concept of "dispute." In addition, continued reliance on a concept of injury that has no intuitive appeal as a justification for standing decisions will eventually undermine the perceived legitimacy of judicial dispositions that is essential to effective adjudication.\(^{187}\)

Adherence to the traditional model of adjudication has infected the other justiciability doctrines as well. Like standing, the doctrine of ripeness is rooted in the article III case-or-controversy provision, and requires that the plaintiff's injury be suffered with a sufficient degree of

---

186 Cf. Fiss, supra note 1 (increase in large, bureaucratic governmental structure requires a new form of adjudication focusing on giving meaning to constitutional values).

187 See, e.g., Tushnet, supra note 110, at 1705-06 nn.31-32.

The absence of consensus concerning the types of injuries that should be judicially cognizable demonstrates the difficulty of determining where along the continuum of effects created by a challenged action the line should be drawn between effects that do and those that do not warrant standing. One approach to resolving this problem is to conclude that no line should be drawn at all, and that the entire range of effects produced by a challenged action should be judicially recognized. Such an approach, which would constitute abolition of the injury-based standing requirement, has been adopted in certain circumstances. For example, Congress has enacted a number of statutes containing "any person" provisions that permit enforcement by plaintiffs who would not satisfy traditional standing requirements. See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2619 (1976); Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1365 (1976); Marine Protection, Research and Sanctuaries (Ocean Dumping) Act, 33 U.S.C. § 1415(g) (1976); Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2 (1976); Noise Control Act, 42 U.S.C. § 4911 (1976); cf. Consumer Product Safety Act, 15 U.S.C. § 2073 (1976) ("any interested person"); id. § 2060(a) ("any consumer or consumer organization"); Federal Informers Act, 31 U.S.C. § 232 (1976) (any person may file suit on behalf of the United States and share in up to ten percent of the recovery). As a practical matter, however, it is unlikely that injury-based standing will be abolished across-the-board.

An alternative to injury-based standing determinations would be for courts to base their decisions on legislative intent. Standing would be granted to the intended beneficiaries of the provision of law sought to be enforced, and would be denied to plaintiffs who were not within the contemplation of the drafters or whom the drafters wished to preclude from maintaining suit. Where such a provision was a statutory one, intended beneficiaries could be identified through the normal process of statutory construction. Moreover, a customary degree of inference concerning the drafters' intent would be appropriate. Accordingly, even claims that might not have been directly addressed by the drafters of a provision could be inferred to fall within their contemplation. Where the provision sought to be enforced was a constitutional one, the task of identifying beneficiaries would be more difficult, but not substantively different. The court would have to ascertain the intent of the framers—modified by the effects of social developments—just as it does in all cases of constitutional interpretation.

This approach has, in fact, been used by the Court. It has ruled that standing will not be granted unless the plaintiff can satisfy nexus requirements, which involve nothing more than establishing that the plaintiff's claimed interest is among the interests intended to be protected by the drafters of the provision in question. See infra text accompanying notes 227-35. Such an approach would not produce bright-line tests, because drafters do not always make clear who their intended beneficiaries are. Indeed, the drafters in most cases may well have had no intent as to who should be able to sue, because they may well have assumed that determination of who should have enforcement rights was a judicial function. Although this approach leaves the door open for result-oriented manipulation of the drafters' intent by courts disposed to engage in such manipulation, it would have the advantage of giving courts a familiar, principled ground for decision—the drafters' intent—rather than leaving them to wrestle with the vacant concept of injury in fact.
immediacy to warrant judicial intervention. In the meltdown scenario, the ripeness issue would be whether the probability that the plaintiff would be injured by a nuclear accident was great enough to make the controversy a "live" one fit for judicial review. As with standing, however, injuries that are quite remote and speculative have been held sufficiently ripe to satisfy article III, and the real question upon which ripeness turns is where along the continuum of immediacy the line authorizing maintenance of a suit should be drawn.

The doctrine of mootness, too, is rooted in article III. It requires that a controversy be live, rather than resolved, in order to be justiciable. Once the safety requirements are complied with in the meltdown

---

168 Ripeness stems from the Marbury-authorized protection of legal rights. In a case lacking ripeness, premature intervention involves the court in the issuance of an advisory opinion, which would exceed the article III case-or-controversy limitation on proper judicial activity. As a constitutional matter, ripeness is rooted in the doctrine of separation of powers. See United Pub. Workers v. Mitchell, 330 U.S. 75, 89-91 (1947); see also Duke Power Co. v. Carolina Envl. Study Group, Inc., 438 U.S. 59, 81 (1978) (threat of environmental damage from operation of nuclear power plants satisfies ripeness requirements); Regional Rail Reorg. Act Cases, 419 U.S. 102, 138 (1974) (suit ripe because Rail Act would operate inexorably to harm plaintiffs). Ripeness also contains a nonconstitutional, prudential component authorizing dismissal of a case where delay that would cause undue hardship to the parties might improve the context in which the court adjudicates the case. See Abbot Laboratories v. Gardner, 387 U.S. 136, 148-56 (1967); see also Duke Power, 438 U.S. at 82 (delayed adjudication would frustrate policy objectives therefore prudence requires immediate adjudication); Regional Rail Reorg. Act Cases, 419 U.S. at 138 (delay would permit the court to avoid unnecessary adjudication of a constitutional issue). See generally L. TRIBE, supra note 6, § 3-13, at 60-62.

169 In Duke Power the Supreme Court adjudicated the constitutional validity of an elaborate statutory scheme for dealing with claims that might be asserted after a nuclear power plant accident, and did so before any such accident had occurred, even though the validity of the scheme could depend upon the amounts and types of losses that resulted from the particular accident at issue as well as upon whatever additional remedial actions Congress chose to take. See 438 U.S. at 81-82; cf. id. at 103 (Stevens, J., concurring).

In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court disregarded a District of Columbia Circuit Court finding of lack of ripeness, and adjudicated the constitutionality of the process for appointment of Federal Election Commission members before the Commission had exercised powers pertinent to the merits of the constitutional issue. See id. at 113-18.

In the Regional Rail Reorg. Act Cases, the Supreme Court adjudicated the merits of a claim asserted by eight major railroads that a statutory reorganization scheme constituted an unconstitutional taking of their property without just compensation prior to determination of the amount of compensation that would be provided to the railroads. See 419 U.S. at 136-48.

In those cases, the Court apparently viewed the hardship of withholding immediate review as outweighing the benefits that might result from waiting for an improved context for adjudication.

169 A case is "moot" when the plaintiff no longer suffers the injury complained of. Judicial intervention under such circumstances would constitute the issuance of a prohibited advisory opinion because the assistance of the court would no longer be needed to protect the plaintiff's legal rights. As a result, adjudication of a moot case would exceed the article III case-or-controversy limitation on federal jurisdiction much as resolution of a case that was not yet ripe would. See North Carolina v. Rice, 404 U.S. 244, 246 (1971); Powell v. McCormack, 395, U.S. 486, 496 n.7 (1969); Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964). The mootness doctrine is also grounded in separation-of-powers concerns in that it seeks to confine courts to proper judicial activity. Exceptions to the mootness doctrine have been formulated to permit adjudication where collateral consequences of the offensive conduct continue to exist despite termination of the primary injury, see Sibron v. New York, 392 U.S. 40, 53-58 (1968); where the defendant voluntarily ceases the offensive conduct, but the voluntary cessation may not be permanent, see United States v. W.T.
scenario, the preexisting controversy arguably would no longer exist and, therefore, would be moot. As with standing and ripeness, however, article III has been held to tolerate virtually any degree of mootness, similarly rendering mootness determinations matters of drawing a line along a continuum.

The justiciability doctrines aimed at avoidance of collusive suits and finality also stem from the injury orientation of the dispute-resolution model, but as with standing, ripeness, and mootness, that model does little to account for the doctrines' existence or to justify their operation. In addition, those doctrines are invoked too infrequently to have

---

Grant Co., 345 U.S. 629, 632-33 (1953); and where, although terminated, the injury is "capable of repetition yet evading review" because the normal duration of the injury is too short to permit adjudication before it terminates, see Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-15 (1911). See generally L. Tribe, supra note 6, at 62-68.

101 Article III is strained to the limit by federal court adjudication of "headless class actions." In such actions, there is no plaintiff at all presenting a live, ongoing controversy, because the case has become moot with respect to the named plaintiff in a suit pleaded as a class action. In some headless class actions the court's decision to adjudicate the merits stems from the fiction that the certified class constitutes the plaintiff suffering the injury. See Sosna v. Iowa, 419 U.S. 393, 397-403 (1975). Others, involving classes that have not been certified, can be explained through application of one of the traditional exceptions to the doctrine of mootness, see Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (named plaintiff continued to suffer collateral consequences, including inability to share in recovery of classwide litigation costs); Gerstein v. Pugh, 420 U.S. 103 (1975) (injury to named plaintiff capable of repetition yet evading review). In United States v. Parot Comm'n v. Geraghty, 445 U.S. 388 (1980), the Supreme Court permitted an appeal of the lower court's denial of a class certification motion made by a named plaintiff with respect to whom the case had become moot and for whom none of the traditional exceptions applied. The Court viewed the doctrine of mootness to be flexible with respect to "nontraditional" forms of litigation such as the class action and viewed the plaintiff as analogous to a private attorney general. See id. at 402-04. In headless class actions it may well be that some party suffers an injury sufficient to warrant judicial intervention under the traditional, dispute-resolution model, but that party is not before the court.

102 A suit is "collusive" when one of the parties, although nominally asserting a legal right, has no genuine interest in the protection of that right, but merely participates in the suit for the purpose of litigating the issues presented. For example, in United States v. Johnson, 319 U.S. 302 (1943), the Supreme Court refused to adjudicate the merits of a tenant's treble-damage action against his landlord for violation of the maximum rent level prescribed under the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, when it appeared that the landlord had instigated the suit and hired the plaintiff's lawyer for the purpose of testing the constitutionality of the Act. See id. at 303-05. Because a collusive suit is motivated by a desire to obtain a declaration of law rather than to resolve a genuine dispute, it is traditionally viewed as a request for an advisory opinion, which exceeds the article III case-or-controversy jurisdiction of the federal courts. See Muskrat v. United States, 219 U.S. 346, 356-62 (1911). See generally L. Tribe, supra note 6, § 3-15, at 69-71. Because the collusive-suit restriction is rooted in article III, the Court has held that not even Congress can provide for judicial declarations of law in a "collusive" manner. See Muskrat, 219 U.S. at 349-51. But cf. Buckley v. Valeo, 424 U.S. 1, 9-12 (1976) (per curiam) (Supreme Court decided constitutionality of Federal Election Campaign Act under expedited test-case procedures prescribed in the Act; finding case or controversy to have been presented).

It can be difficult to distinguish between a nonjusticiable "collusive" test case and a permissible action for a declaratory judgment. Compare Muskrat, 219 U.S. at 360-62, with Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-44 (1937) (Aetna's plea to have insured's nonpayment of premiums disqualify him from future benefits sufficiently live case or controversy). The distinction is likely to turn on how ripe the putative controversy is at the time that the suit is filed.

103 See supra text accompanying notes 94-105.
much practical significance. Only the political question doctrine, which is discussed below, has developed free from the constraints of the injury requirement.

The inability of the dispute-resolution model to generate satisfactory justiciability rules is particularly apparent in "public actions." A public action is one filed primarily to vindicate an interest possessed by the public in general, or a large segment thereof, rather than to redress an "injury" suffered by the particular plaintiff who files suit.

A suit filed to enjoin operation of a nuclear plant because of a failure to satisfy mandatory safety requirements can be characterized as a public action. Although one or more named plaintiffs technically

194 For example, the Supreme Court in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), refused to invoke the finality rule despite its seemingly obvious application to the case. See supra notes 97-105 and accompanying text. Nor has the Supreme Court been willing to dismiss lawsuits as collusive, despite allegations of collusion, in such cases as Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277 n.8, 280 n.14 (1978).

195 See infra notes 249-57 and accompanying text.

196 The concept of public actions was described in relation to its historical antecedents by Professor Jaffe. See Jaffe, Standing to Secure Judicial Review: Public Actions, 74 HARV. L. REV. 1265 (1961). It has been characterized more recently by Professor Chayes, see Chayes, supra note 1, at 1302-03:

The public law litigation model portrayed in this paper reverses many of the crucial characteristics and assumptions of the traditional concept of adjudication:

(1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
(2) The party structure is not rigidly bilateral but sprawling and amorphous.
(3) The fact inquiry is not historical and adjudicative but predictive and legislative.
(4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
(5) The remedy is not imposed but negotiated.
(6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
(7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.
(8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

In fact, one might say that, from the perspective of the traditional model, the proceeding is recognizable as a lawsuit only because it takes place in a courtroom before an official called a judge. But that is surely too sensational in tone. All of the procedural mechanisms outlined above were historically familiar in equity practice. It is not surprising that they should be adopted and strengthened as the importance of equity has grown in modern times.

See also supra note 53. The Supreme Court has generally been hostile toward adjudication of public actions. See, e.g., cases cited supra note 131; see also HART & WECHSLER Supp., supra note 10, at 15; Stein & Vining, Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context, 70 AM. J. INT'L L. 219, 238-39 (1976).
would have to maintain the suit in order to satisfy traditional standing requirements, the suit would engage the active participation of the government and a variety of special interest groups including the utility operating the plant, labor unions, utility consumer groups, local civic associations, and national environmental groups. In addition, the public action would have a substantial impact on absentees, such as residents of communities hundreds of miles downwind of the plant, whose interests might well be given consideration by the court. Moreover, the remedy sought in the public action would probably be injunctive in nature and could involve active supervision by the court for extended periods of time.

Realistically, the judiciary does not become involved in public actions because such involvement is necessary to resolve a dispute between the immediate parties. Contemporary judicial involvement in public actions constitutes active participation in the process of governance, and appears to be here to stay. Because public actions are not private disputes, they highlight the inadequacies of the justiciability rules developed to implement the dispute-resolution model. It is also in public actions that unprincipled use of justiciability rules is most likely to occur, thereby posing the greatest threat to perceived judicial legitimacy. In the absence of a viable concept of injury, which is necessary

---

197 Although the Supreme Court has declined to adjudicate pure public actions, see supra note 131, it has—consistent with the Marbury-based dispute-resolution model—adjudicated cases dominated by public-action features. See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). As long as the plaintiff alleges a right to redress of some cognizable injury, judicial resolution of the broader issues involved theoretically can be viewed as a mere incident to the court's ruling on the plaintiff's claim for relief.

198 See generally Chayes, supra note 1, at 1310-13 (discussing the representation of differing interests in public litigation).

Other examples of public actions are school desegregation suits, employment discrimination suits, electoral reapportionment actions, and large antitrust or securities fraud cases. Id. at 1284.

199 Id. As has been noted, Professor Brilmayer would view the adequacy of absentee representation as a factor of sufficient importance to be of article III, constitutional dimensions. See supra note 110. Professor Jaffe shares Brilmayer's concern with the interests of absentees, but he would not give those interests constitutional stature. See Jaffe, Standing Again, 84 HARV. L. REV. 633, 634-35 (1971); cf. Fiss, supra note 1, at 18-24 (the interests of affected groups, as opposed to injured victims, should be the focus of a court's attention).

200 See generally Chayes, supra note 1, at 1298-1301. Professor Fiss argues that management of public actions and issuance of relief necessary to achieve desired structural reform of our social institutions is a centerpiece of the judicial function. See Fiss, supra note 1, at 24-28, 44-58.

Although this Article recognizes the desirability of judicial involvement in public actions, it views declaration—rather than implementation—as the essence of the judicial function. See supra text accompanying notes 24-120.

201 Professor Fiss has argued that, far from serving as the objects of judicial power, disputes provide “occasions” for judicial construction of our social norms, and dispute-resolution is simply a “mode of judicial operation” whereby the judiciary undertakes to give meaning to our public values. Resolution of the dispute at issue is merely a “consequence” of this more important judicial function. Fiss, supra note 1, at 29-30 (emphasis omitted).

202 See Chayes, supra note 1.

203 See Tushnet, supra note 110, at 1705-06 nn.31-33.
to make the dispute-resolution model work, some other basis must be found for making justiciability determinations.

B. Justiciability and the Expository Model

This Article suggests that exposition, rather than dispute resolution, is the truly important function served by courts. Accordingly, justiciability rules should be fashioned to facilitate proper exposition—or, more accurately, to impede improper exposition. To facilitate exposition, justiciability doctrines must serve two objectives. First, they should incorporate separation-of-powers concerns by minimizing the danger of judicial usurpation of legislative functions—the one danger posed by judicial action with which the framers seemed directly concerned. Second, justiciability rules should be formulated to optimize the likelihood that exposition will be well-informed and that the power to expound will be exercised prudently. Adherence to these objectives can help assure that the judiciary is confined to proper judicial conduct.

1. Separation of Powers

The expository model of adjudication gives the judiciary an affirming, coequal function to serve in the operation of government, but it does not authorize the judiciary to perform more than a coequal function. Because the value of exposition is prospective and somewhat prescriptive in nature, there is a danger that the judiciary, under the guise of expounding, can drift into the process of legislating. The gravity of this danger is illustrated by the fact that such judicial impropriety may well exceed the only meaningful limitation imposed upon the judiciary by the framers—that of honoring the principle of separation of powers.

a. The Constitutional Concept of Justiciability

The Supreme Court has repeatedly held that justiciability doctrines reflect concerns that are constitutional in stature. Consequently, these concerns should find expression in the article III case-or-controversy provision. Analysis of that provision indicates that if the

---

204 See infra notes 219-22 and accompanying text.
205 See infra notes 219-22.
207 See, e.g., cases cited supra note 206.
framers intended it to have any particular meaning, they intended it to preclude the judiciary from performing legislative functions.

Proper examination of the case-or-controversy provision necessarily begins with the intent of the framers in including it in the Constitution. It is unlikely that the framers relied on any shared perception of the structure or function of a federal judiciary. At the Constitutional Convention, the proper function of the courts was hotly debated, demonstrating significantly divergent desires and expectations among the framers. At one point, during the debate on whether the judicial power should extend to cases arising under the Constitution and laws of the United States, the convention appears to have assumed that the jurisdiction of the federal courts would be constructively limited to cases of a "Judiciary Nature." The context of the debate, however, suggests that the phrase "Judiciary Nature" was useful in resolving the controversial dispute precisely because it was imprecise and permitted each delegate to believe that it captured the thrust of his own position on the issue. Moreover, the fact that proposals assigning what we now consider to be nonjudicial functions to the courts were even considered by the Convention further suggests that the framers conceived of courts as flexible entities whose roles were not precisely defined by tradition.

This flexible view of American courts comports with the role historically played by the English courts—the courts with which the framers were most familiar. Since medieval times, English courts had engaged in a variety of activities that were administrative rather than judicial in nature. English courts not only resolved disputes, but they

---

208 See generally 1 & 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911); 2 & 3 J. MADISON, THE PAPERS OF JAMES MADISON (H. Gilpin ed. 1841). The delegates to the convention debated many aspects of the role of the federal judiciary. They debated whether judges should be selected by Congress or by the President. See, e.g., 1 M. FARRAND, supra, at 119-21. They also debated the desirability of creating inferior courts, as opposed to relying on the Supreme Court to hear appeals from state courts, in order to facilitate the avoidance of local prejudice and promote uniformity in the development of the law. See, e.g., id. at 124-25, 232. In addition, they debated the proper scope of federal jurisdiction and the desired degree of judicial independence. See, e.g., id. at 232, 244; see also HART & WECHSLER, supra note 10, at 7-8.

209 See M. FARRAND, supra note 208, at 430.

210 See infra notes 219-20 and accompanying text.

211 Justice Frankfurter has suggested that the historical role played by the English courts must weigh heavily in determining what meaning should be ascribed to the "cases" and "controversies" language of article III. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring); Coleman v. Miller, 307 U.S. 443, 460 (1939) (Frankfurter, J., concurring). Although historical precedent is an illuminating starting point for constitutional analysis, it should not be viewed as dispositive where organic growth of the Constitution is desired. Justice Frankfurter seems to have assumed that English practice coincided with what has been advanced as the dispute-resolution model of adjudication. See McGrath, 341 U.S. at 150; Coleman, 307 U.S. at 460. As is discussed in the accompanying text, this appears not to have been the case.

212 See 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 35, 128-29 (1938).
also oversaw the operation of programs to assist the poor, issued and revoked licenses, regulated wages and prices, and raised revenues to support those administrative activities.\textsuperscript{213} Significantly, English courts also issued advisory opinions at the request of Parliament.\textsuperscript{214} The judiciary was viewed as an arm of the sovereign and its functions were limited by little more than the sovereign's preferences.\textsuperscript{215}

It is likely that the framers never reached any agreement about the precise role that the new judiciary would play. The celebrated, ongoing debate concerning the framers' intent with respect to judicial review of the constitutionality of actions taken by other branches of government\textsuperscript{216} indicates that the framers were capable of preserving a high degree of ambiguity with respect to major issues. There is no reason to suppose that the framers' intent concerning the proper role of the judiciary was any more precise. The framers probably chose to leave unanswered questions about the courts' functions to the first Congress. Because Congress was to determine the size, structure and jurisdiction of the federal judiciary\textsuperscript{217} it could also resolve competing policy considera-

\textsuperscript{213} See id. at 128-29; Berger, supra note 12, at 821; Jaffe, supra note 196, at 1269-70; Jaffe, \textit{The Right to Judicial Review I}, 71 HARV. L. REV. 401, 403-04 (1958).

\textsuperscript{214} See Veeder, \textit{Advisory Opinions of the Judges of England}, 13 HARV. L. REV. 358, 359 (1900). Professor Berger has argued that the framers' apparent aversion to advisory opinions resulted from the fear that issuance of such opinions concerning proposed legislation would bias judges in a way that might render them less-effective guardians against an overreaching Congress. This concern is quite different than the prevailing contemporary view that advisory opinions are undesirable because their issuance poses the risk of judicial encroachment upon legislative powers. See Berger, supra note 12, at 830-32; see also Flast v. Cohen, 392 U.S. 83, 96 (1968); 2 M. FARRAND, supra note 208, at 75-76.

\textsuperscript{215} As was stated by Blackstone:

\begin{quote}
\textit{[A]ll} courts of justice, which are the medium by which [the king] administers the laws, are derived from the power of the crown. . . . [T]he king is supposed in contemplation of law to be always present [in court]; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.
\end{quote}

\textit{3 W. BLACKSTONE, COMMENTARIES} *23-24 (footnotes omitted).

\textsuperscript{216} The endurance of Chief Justice Marshall's opinion in \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803), has rendered the question of whether the framers intended to incorporate judicial review into their constitutional scheme largely academic. Nevertheless, Marshall's opinion remains controversial because the framers arguably never made any specific reference to judicial review and because such a power never existed in England. There is evidence, however, that at least some of the framers assumed that judicial review was a necessary constitutional protection. See, e.g., \textit{THE FEDERALIST NO. 78} (A. Hamilton). See generally G. GUNTHER, supra note 6, at 15-25; HART & WECHSLER, supra note 10, at 9-11; Note, supra note 12, at 807-08. There is surprisingly little to be found on the subject in the records of the convention. See generally M. FARRAND, \textit{THE FRAMING OF THE CONSTITUTION} 154 (1913); HART & WECHSLER, supra note 10, at 3. Many commentators support the power of judicial review. E.g., R. BERGER, CONGRESS V. THE SUPREME COURT (1969); HART & WECHSLER, supra note 10, at 14-16; Wechsler, \textit{Toward Neutral Principles}, supra note 74, at 2-10. Others are more skeptical. E.g., L. HAND, \textit{THE BILL OF RIGHTS 1-30} (1958). For an excellent short account of the constitutional debates over the nature and functions of the judiciary, and the attendant ambiguities, see HART & WECHSLER, supra note 10, at 1-23.

\textsuperscript{217} The appellate jurisdiction of the Supreme Court, as well as the entire jurisdiction of
tions relating to how active a role the new judiciary should play.218

The framers did, however, take a series of actions that proved significant because they suggest that the Convention did have a well-developed preference for what is now commonly referred to as the separation of powers—particularly with respect to Congress and the Courts. A proposal to create a Council of Revision, which would have permitted federal judges to rule on the constitutionality of contemplated legislation before it took effect, was rejected by the Convention.219 In addition, the Convention rejected a proposal to make the Chief Justice one of the members of a contemplated Privy Council to advise the President on legislative matters.220 Moreover, the Convention declined to authorize the executive and legislative branches of government to require the Supreme Court to issue legal opinions.221 Frequently cited reasons for rejection of these proposals relate to the desire to keep the judiciary out of the legislative process.222

b. Legislation v. Exposition

Proper regard for the separation of judicial and legislative functions requires an appreciation of the distinction between exposition and legislation. In one respect, the two appear to be quite similar. Both have prospective and prescriptive impact. Legislation regulates future conduct to make it conform to the legislature's view of public policy, and exposition regulates future conduct to make it conform to the judiciary's view of the dictates of statutory and constitutional provisions. Despite the fact that both regulate future conduct, there is an important difference between legislation and exposition—one that relates to the

inferior courts is, nominally at least, subject to the control of Congress. U.S. CONST. art. III, §§ 1 & 2; see also Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). But see Hart, supra note 77. See generally HART & WECHSLER, supra note 10, at 18-27.

218 To date, Congress has taken no comprehensive action to regulate the context in which judicial review properly should occur or the concomitant degree of activity that the federal judiciary should play in the governing process. Rather, Congress intervenes sporadically to regulate judicial activity in particular substantive areas, to implement particular policy preferences. For example, Congress has precluded judicial review of certain decisions of the Administrator of the Veterans' Administration. 38 U.S.C. § 211(a) (Supp. III 1979). In addition, Congress has greatly liberalized standing requirements under a variety of environmental statutes, presumably to further congressional efforts to protect the environment. See supra note 213. Moreover, when Congress desired rapid resolution of the constitutional problems raised by its campaign reform efforts, it provided for expedited judicial review under a diluted, any-voter standing provision. See Federal Election Campaign Act Amendments of 1974, § 315(a) (current version at 2 U.S.C. § 437h(a) (Supp. IV 1980)).

219 2 M. FARRAND, supra note 208, at 73-83, 298-302; 1 id. at 97-105, 138-40.

220 2 id. at 328-29, 340-44, 367.

221 Id.

222 See HART & WECHSLER, supra note 10, at 7-8.
institutional constraints surrounding each activity.

Legislation consists of making policy—an activity that is virtually unbounded. The only limitations on legislative power, aside from specific constitutional restrictions, are the legislators' views of expediency and political realities. The reason such legislative freedom is palatable, and even desirable, is that legislators are subject to relatively immediate political accountability. If their policy determinations are unpopular, they can be voted out of office, and new legislators can make new policies.

Proper exposition does not involve policymaking. Because it has been insulated purposely from immediate political accountability, the judiciary does not possess the institutional competence to make policy; it is not empowered to do what it believes to be expedient simply because such an action appears to be a good idea. Rather the judiciary must engage in textual analysis, honor the doctrine of stare decisis, and, where constitutional exposition is involved, give proper regard to facilitation of orderly social evolution. By creating separate legislative and judicial branches, the framers intended to prevent the judiciary from engaging in policymaking.

c. Reducing the Risk of Judicial Policymaking

Separation-of-powers concerns suggest that justiciability rules should be aimed at reducing the likelihood that courts will engage in legislative, policymaking activities. Current justiciability rules, however, actually encourage judicial policymaking in two ways. First, the concept of injury, the bulwark against judicial legislation under the traditional model, does not adequately serve its purpose, thereby compelling courts to make policy in order to determine whether an injury exists. Second, raising the bulwark of injury to a constitutional status while relegating the current nexus requirement to a mere "prudential" status encourages the judiciary to intrude on policy choices that properly belong to the legislature. If any aspect of a justiciability inquiry is to be given constitutional status, it should be the nexus requirement because of its close relation to separation-of-powers concerns. The determination of when a statutory provision should be enforced—the nexus deter-

---

233 Indeed, the United States Constitution was developed from a theoretical and historical context that specifically contemplated representative participation in policymaking. See THE FEDERALIST 51 (A. Hamilton or J. Madison) ("[i]n republican government, the legislative authority necessarily predominates"); B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 161-75 (1967) (prior to the American Revolution the right to actual representation in policymaking came to be seen as natural right). See generally C. DE MONTESEQUIEU, THE SPIRIT OF LAWS (outlining theory of separation of powers and legislative supremacy).
mination—is legislative in nature and should not be left to the discretion of the judiciary. Rather, justiciability rules based upon the expository model should simply focus on the nature of the issues before the court and the court's institutional competence to resolve them.

The traditional belief has been that courts will not trespass upon the legislative function as long as they confine themselves to redressing particularized injuries. If the injury presented to the court for redress is no different from the kind of injury suffered by the public at large, then the plaintiff would be asserting a mere "generalized grievance" about the conduct of government, which properly should be resolved by one of the political branches rather than by the judiciary. Injury-

---

224 See supra note 10 and accompanying text.
226 In a series of cases, the Supreme Court has found that lack of particularized injury rendered nonjusticiable the dispute at issue, even though it has made very little sense to speak in terms of injury. In each of those cases, the plaintiff sought to enjoin alleged governmental violation of a constitutional provision that was intended to benefit the public at large and was not, therefore, likely to be violated in a way that would produce particularized injury. Accordingly, the Court's refusal to reach the merits in those cases effectively precluded judicial review of the government's actions without any convincing explanation of why such preclusion of review was warranted. For example, in Ex parte Levitt, 302 U.S. 633 (1937), the Supreme Court refused to reach the merits of a challenge to the appointment of Justice Black as a justice of the Supreme Court. It was argued that, because Justice Black had voted to increase the retirement benefits of Supreme Court justices while serving as a member of the United States Senate, he could not sit on the Court without violating the ineligibility clause of the Constitution, art. I, § 6, cl. 2, which prohibits members of either House of Congress from holding any civil office that was created, or the emoluments of which were increased, while that member served in the legislature. The apparent intent of the provision was to prevent potential conflicts of interest. The Supreme Court refused to reach the merits because the challenge, filed by someone claiming only to be a citizen and member of the Bar of the Supreme Court, did not allege any particularized injury resulting from Justice Black's appointment. Levitt, 302 U.S. at 634.

In United States v. Richardson, 418 U.S. 166 (1974), the Supreme Court refused to reach the merits of a challenge to the manner in which the Central Intelligence Agency was funded. The plaintiff argued that, by refusing to disclose the amount of the Agency's annual budget, Congress violated article I, § 9, cl. 7 of the Constitution, which requires "a regular Statement and Account of the Receipts and Expenditures of all public Money." Presumably, that provision was intended to promote public accountability for the expenditure of public funds. The Supreme Court found that the taxpayer plaintiff suffered no particularized injury sufficient to establish standing.

In Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), decided the same day as Richardson, the Supreme Court refused to reach the merits of a challenge to the simultaneous membership of some legislators in both Congress and the armed forces reserves. The plaintiffs argued that such dual membership violated the incompatibility clause of the Constitution, art. I, § 6, cl. 2, which prohibits persons holding "any Office under the United States" from serving in Congress while holding that office. As in Ex parte Levitt, the apparent intent of the provision was to prevent potential conflicts of interest. The Supreme Court denied standing to the citizen and taxpayer plaintiffs, again because they failed to establish a cognizable, particularized injury.

Most recently, in Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), the Supreme Court refused to reach the merits of a challenge to a government "gift" of a 77-acre tract of land to a religious school. The plaintiff challenged the "gift" as a violation of the establishment clause of the first amendment, which states that "Congress shall make no law respecting an establishment of religion." The establishment clause presumably was intended to prevent the problems that can result from failure to honor the separation of church and state. As in the other cases, the Supreme Court denied standing to the citizen and taxpayer plaintiffs because they failed to establish the requisite degree of particularized
based limitations, however, are no longer viable constraints on judicial action because no consensus exists as to the definition of a cognizable injury.

In some respects, the Supreme Court's injury-oriented approach to justiciability has been not only unsatisfying but counterproductive. In addition to an article III "injury" requirement, standing doctrine also encompasses nonconstitutional, "prudential" limitations. The most well-known of the prudential limitations requires that a "nexus" be established between the plaintiff's injury and the provision of law that the plaintiff seeks to enforce. The nexus concept can best be understood as a requirement that courts respect the intent of the drafters of the provision claimed to have been violated. If the drafters intended that provision to protect or benefit the interest asserted by the plaintiff in connection with the alleged harm, the requisite nexus exists. For example, in suits filed under the federal Administrative Procedure Act—the context out of which many standing decisions

---


227 See United States v. Richardson, 418 U.S. 166, 196 n.18 (1974) (Powell, J., concurring). "Prudential" requirements are not compelled by article III, but rather have been evolved by the judiciary as complementary rules of self-restraint. See Barrows v. Jackson, 346 U.S. 249, 255 (1953). Because of the lack of article III compulsion, Congress can override "prudential" rules. See Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972). Common "prudential" requirements include the "nexus" requirement, discussed infra text accompanying notes 228-35, and the restriction on a plaintiff's ability to raise the rights of parties not before the court. See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 78-81 (1978). Curiously, the prohibition on judicial redress of generalized grievances, see supra note 131 and accompanying text, is also viewed as a "prudential" limitation, see Duke Power, 438 U.S. at 80, despite its arguably intimate connection to the separation-of-powers function of justiciability doctrines. See supra note 10; notes 130-31 and accompanying text.


229 See Jaffe, supra note 199, at 634-35. In Flast, the Supreme Court held that for a federal taxpayer to have standing to challenge the constitutionality of a federal spending program he or she must challenge an exercise of congressional power under the article I, § 8 taxing and spending power, as opposed to challenging an expenditure that is merely incidental to an essentially regulatory scheme, and must allege that the challenged action violates a specific constitutional limitation imposed on congressional taxing and spending, as opposed to merely alleging that the challenged action generally exceeded Congress's legislative powers. 392 U.S. at 102-03. The test was instantly challenged as having no bearing on the justiciability concerns that underlie the doctrine of standing. See id. at 121-30 (Harlan, J., dissenting); id. at 107 (Douglas, J., concurring).

If the test has any vestige of rationality it is as a flawed attempt to prohibit a danger about which the framers felt very strongly. If the framers are viewed as having had a special desire to protect taxpayers from government diversion of their taxes for religious purposes, it is not unreasonable to "deem" taxpayers to have a sufficient nexus to the first amendment's establishment clause to be granted standing. See id. at 114 (Stewart, J., concurring); see also Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 504-05 (1982) (Brennan, J., dissenting).

s 5 U.S.C. §§ 551-559; 701-706 (1976). Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1976), grants standing to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." That provision has been construed to impose two requirements on a plaintiff seeking to
arise—the nexus requirement demands that the plaintiff's interest be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. A plaintiff asserting environmental interests will satisfy the nexus, or zone-of-interests, requirement in a suit to compel preparation of an environmental impact statement, but a plaintiff seeking to avoid an FTC divestiture order will not, because avoidance of divestiture is not one of the interests that the drafters of legislation requiring the preparation of environmental impact statements intended to protect.

Early Supreme Court nexus decisions appear to have treated the requirement as part of the article III case-or-controversy limitation on federal jurisdiction. Curiously, however, the Supreme Court has sub-

establish standing under the Act. First the plaintiff must allege some "injury in fact" caused or threatened by the challenged conduct—an article III requirement. Second, the plaintiff must establish that the interest sought to be protected is arguably within the zone of interests protected by the provision of law sought to be enforced—a nonconstitutional "nexus" requirement. See Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152-56 (1970); see also Barlow v. Collins, 397 U.S. 159, 164 (1970).

The injury-in-fact requirement has traditionally been treated more seriously than the zone-of-interests test. In Investment Co. Inst. v. Camp, 401 U.S. 617 (1971), the Supreme Court, relying on Data Processing, did little more than assume that the plaintiff's interest in freedom from competition was arguably within the zone of interests of the pertinent statute, stating that the question of whether it was actually within the zone of interests was to be resolved on the merits. Id. at 620-21. Cursory treatment of the zone-of-interests test in Data Processing itself and in its progeny prompted some commentators to view the test as inconsequential. See, e.g., Albert, supra note 226, at 496; Seder, Standing, Justiciability, and All That: A Behavioral Analysis, 25 VAND. L. REV. 479, 487 (1972); Comment, Standing to Sue in Federal Courts: The Elimination of Preliminary Threshold Standing Inquiries, 51 TUL. L. REV. 119, 122-23 (1976). The requirement has not disappeared, however. See, e.g., Gifford-Hill & Co. v. FTC, 523 F.2d 730 (D.C. Cir. 1975).

A LEXIS search of recent court of appeals cases revealed that over 250 decisions involving standing and the Administrative Procedure Act were handed down between January 1977 and January 1983. 231 Although lack of redressibility is precisely the problem of whether the plaintiff's interest in freedom from competition was arguably within the zone of interests of the pertinent statute, stating that the question of whether it was actually within the zone of interests was to be resolved on the merits. 232 Cursory treatment of the zone-of-interests test in Data Processing itself and in its progeny prompted some commentators to view the test as inconsequential. See, e.g., Albert, supra note 226, at 496; Seder, Standing, Justiciability, and All That: A Behavioral Analysis, 25 VAND. L. REV. 479, 487 (1972); Comment, Standing to Sue in Federal Courts: The Elimination of Preliminary Threshold Standing Inquiries, 51 TUL. L. REV. 119, 122-23 (1976). The requirement has not disappeared, however. See, e.g., Gifford-Hill & Co. v. FTC, 523 F.2d 730 (D.C. Cir. 1975).

231 A LEXIS search of recent court of appeals cases revealed that over 250 decisions involving standing and the Administrative Procedure Act were handed down between January 1977 and January 1983.


234 See, e.g., Linda R. S. v. Richard D., 410 U.S. 614 (1973). In that case, the mother of an illegitimate child filed a class action to enjoin discriminatory application of a Texas parental-support statute. The plaintiff alleged that the statute, which made it a misdemeanor for a parent wilfully to refuse to provide for the support of his or her child, was being applied to prosecute only the parents of legitimate children, thereby violating the equal protection clause of the Constitution. Presumably, the plaintiff's goal was to create an incentive for the father of her child to provide support payments. The court held that she lacked standing because enforcement of the statute would result in the incarceration of the father of her child, and not in receipt of support payments. Id. at 618-19. Such a holding today would be based upon the lack of an injury likely to be redressed by a favorable decision on the merits—a defect that goes to the nominal article III component of standing. See supra note 130. Although lack of redressibility is precisely the problem that troubled the court in Linda R. S., it termed the problem a "nexus" defect, reasoning that where the requisite nexus had not been established, the injury was not caused by the asserted violation of law. See 410 U.S. at 617-18. In addition, Flast v. Cohen, 392 U.S. 83 (1968), can be read as having treated "nexus" as an article III requirement, id. at 97-102. Although the Flast Court recognized that there was some confusion concerning whether restrictions on taxpayer standing were constitutionally grounded, id. at 97, it failed to clarify matters with respect to the
sequently held that nexus requirements are nonconstitutional—even though nexus requirements appear to be more closely related to the framers' separation-of-powers concerns than does the concept of injury, which presently is treated as constitutional. The Court appears to have drawn its distinctions between constitutional and nonconstitutional standing requirements in a way that is precisely backwards, because it actually encourages judicial usurpation of legislative policymaking functions.

Nexus inquiries promote separation of powers by preventing the judiciary from overriding legislative policy choices. As a practical matter, most justiciability determinations turn on policy issues relating to the desirability of entertaining particular suits at particular points in time. These are policy issues that properly should be resolved by the legislature rather than the courts, and the judiciary should defer to those legislative resolutions. Legislative policy determinations of this type are embodied, at least tacitly, in the intent of the drafters in enacting the provision of law sought to be enforced—the subject of the nexus inquiry.

The policymaking nature of justiciability decisions is manifest in the broad societal interests that bear on such determinations. Judicial protection of an interest entails social costs, not only through expenditures of public funds, but also through inconvenience and cost to the defendant. Justiciability rules can serve the function of distinguishing between suits in which the inconvenience and expense of litigation warrant expenditure of societal resources to protect the plaintiff's interest, and suits in which the inconvenience and expense do not. Arguably, maintenance of a suit is less likely to be desirable as the effect on the plaintiff's interest becomes less direct, but a court must draw the line between justifiable and unjustifiable expenditure of resources where the legislature tells it to. The separation of powers prohibits judicial policymaking in court rulings on justiciability.

Further, the point along the continuum of affected interests at which justiciability lines are drawn has an immediate impact on the degree to which privately induced enforcement of laws is encouraged. To the extent that justiciability lines are drawn with the conscious intent of regulating the degree of ensuing law enforcement, the line draw-

---

"nexus" test that it announced. *Id.* at 102. The language suggests that an article III jurisdictional standard was established, but such a reading of the case is unsatisfying, precisely because the test has so little to do with justiciability concerns. See supra note 229.


237 *Cf.* Scott, supra note 156, at 675-83.
ing again serves a specific policy function. For example, Congress has enacted a variety of laws containing provisions that authorize the maintenance of suits to enforce particular statutory provisions by private parties who appear not to suffer any injury in the traditional sense. These "citizen-suit" provisions seem to have been motivated by a desire to increase law enforcement through private litigation—a policy determination that should not be judicially supplanted.

The timing of judicial exposition, which is directly governed by justiciability rules, can also raise policy considerations. For example, judicial review of the adequacy of a utility's compliance with safety requirements for a nuclear power plant can have different consequences depending upon its timing. If early review is permitted, at the proposal or blueprint stage, authorization for construction can be seriously delayed, thereby increasing construction costs in an inflationary economy and precluding prompt availability of needed energy sources. If review is delayed until an operating license is sought, however, safety defects serious enough to prohibit operation of the plant or to require major remedial measures could produce staggering financial losses to the utility and its ratepayers which might have been avoided by earlier judicial intervention. Realistically, the timing of review is also likely to affect the degree of vigor with which courts will require adherence to safety standards. Balancing such competing considerations requires policymaking expertise, not judicial skills.

When a court makes a nexus determination, that determination embodies legislative resolution of the policy issues inherent in a legislative decision to authorize or preclude litigation. Because proper respect for separation of powers requires courts to defer to such legislative decisions, courts cannot properly ignore the results of their nexus inquiries. Nevertheless, under current standing law, the judiciary has given itself the option of ignoring at least tacit, and possibly even explicit, expressions of legislative intent concerning the desirability of judicial intervention. The nexus requirement has been denominated a "prudential"

---

288 See, e.g., statutes cited supra note 187.
289 The Supreme Court has, on occasion, found that Congress desired to grant standing to the extent permissible under article III in order to maximize private enforcement actions. For example, in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) and Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979), the Court interpreted various provisions of the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1976), as evidencing congressional intent to grant such standing in order to help implement the congressional policy of reducing racial discrimination in housing. See 409 U.S. at 208-12; 441 U.S. at 100-09.
240 See supra text accompanying notes 27-60.
241 Presumably, courts would defer to a congressional grant of standing as long as Congress did not seek to push the courts beyond the limits of article III. See Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) ("where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' [citation omitted] is one
rule of "judicial self-restraint," and only "injury in fact" is deemed to be constitutionally required.243

There is a striking paradox in this formulation of the law. It is possible for Congress to grant standing to plaintiffs who suffer no traditional injury in order to maximize enforcement, but for a court then to invalidate the statutory grant of standing on jurisdictional grounds, due to lack of an article III injury.244 If a court should issue such a decision, however, it would improperly be exercising legislative, policymaking power; it would, paradoxically, be usurping power for the purpose of denying itself power. In sum, the traditional model's reliance on "injury in fact" as a constitutional minimum and nexus determinations as a prudential restraint is seriously defective because it does not advance separation-of-powers objectives.

Adoption of the expository model suggests two significant departures from the traditional model that would better implement separation-of-powers concerns. First, courts should focus on the nature of the issue presented to the court rather than on whether the plaintiff asserts a cognizable injury. If the issue is one that is legislative in nature, where the will of the majority should control, proper regard for separation of powers requires the court to be parsimonious in its exercise of judicial review, deferring to whatever expressions of congressional intent are available. Where, however, the nature of the issue presented to the court is such that its resolution calls for a degree of insulation from

within the power of Congress to determine."); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970) ("Congress can, of course, resolve the question [of standing] one way or another, save as the requirements of Article III dictate otherwise [citation omitted]."). It is possible, however, to view the important issues raised by justiciability doctrines as so inherently judicial that Congress could not compel the courts to adjudicate even an article III case or controversy if the courts deemed adjudication under the circumstances to be sufficiently ill-advised.

In Natural Resources Defense Council v. EPA, 481 F.2d 116 (10th Cir. 1973), the Tenth Circuit Court of Appeals was asked to resolve certain environmental issues arising under a provision of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857c-5 (1970). The statute contained a "citizen-suit" provision authorizing maintenance of actions to enforce the provisions of the statute by "any person." 42 U.S.C. § 1857h-2 (1970). Without referring to that provision, the court dismissed the action for lack of standing, stating its belief that the plaintiffs had failed to allege any article III injury and had alleged nothing that brought them within the zone of interests protected by the Act. 481 F.2d at 121. The court went on to hold that even if its injury analysis was wrong a dismissal for lack of standing was still warranted, because the statute "is ineffective to deny the exercise of judicial restraint in determination of standing in cases like these, and we choose to exercise that restraint." Id.

The decision was almost certainly wrong. It ignored an unambiguous policy determination made by Congress without invalidating the pertinent congressional enactment. It does not follow, however, that, within the sphere of article III cases and controversies, Congress necessarily has the last word on justiciability. If the reason for declining to exercise congressionally compelled jurisdiction was adequate, the doctrine of separation of powers itself would authorize the court to dismiss the action. See infra text accompanying notes 258-310.

243 See supra note 227.

244 This is arguably what the court did in Natural Resources Defense Council v. EPA, 481 F.2d 116 (10th Cir. 1973). See supra note 241.
majority desires, the court should exercise the full extent of its judicial power as the guardian of our fundamental values. It is true, of course, that classification of the issue before the court will often be difficult, but focusing on the nature of an issue will at least make the court address the proper question rather than addressing an extraneous one about injury. Second, to the extent that it is proper to view justiciability requirements as constitutional in nature, the nexus determination should be raised to the constitutional stature separation-of-powers principles demand.

There is another respect in which the Supreme Court’s injury orientation has frustrated separation-of-powers concerns. As noted above, the framers appear to have invited Congress to play a more active role than it has played in shaping the nature of the judicial function. Whatever the reason for the reluctance of early Congresses to accept this invitation, in recent times the Supreme Court itself may have contributed to congressional timidity through its frequent insistence that not even Congress can authorize federal courts to entertain suits in the absence of an article III “injury in fact.” Besides being almost certainly wrong, the Court’s frequent pronouncements of the need for an article III injury may well have had an in terrorem effect on Congress, chilling it from taking actions in the area of justiciability that it otherwise would have taken as a policy matter. If that is the case, the

244 See supra note 217.

246 As has been discussed supra, text accompanying notes 130-203, the Supreme Court has found many cases to have been justiciable where no traditional injury existed. Other commentators have made similar observations. See, e.g., Berger, supra note 12, at 817-18 (neither English practice nor the policies embedded in article III require injury for the establishment of justiciability); Jaffe, supra note 199, at 633, 634-35; Jaffe, Standing to Secure Judicial Review: Private Actions, 75 HARV. L. REV. 255, 302-03 (1961) (the case-or-controversy provision of the Constitution does not preclude adjudication of public actions); Tushnet, supra note 128, at 665 (Supreme Court has transformed the law of standing from a constitutional to a statutory requirement).

248 See, e.g., cases cited supra note 130.

247 For example, in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 64 (1976), Justice Brennan, concurring in the judgment, stated:

Of course, the most disturbing aspect of today’s opinion is the Court’s insistence on resting its decision regarding standing squarely on the irreducible Art. III minimum of injury in fact, thereby effectively placing its holding beyond congressional power to rectify. Thus, any time Congress chooses to legislate in favor of certain interests by setting up a scheme of incentives for third parties, judicial review of administrative action that allegedly frustrates the congressionally intended objective will be denied, because any complainant will be required to make an almost impossible showing. Clearly the Legislative Branch of the Government cannot supply injured individuals with the means to make the factual showing in a specific context that the Court today requires. More specific indications of a congressional desire to confer standing upon such individuals would be germane, not to the Art. III injury-in-fact requirement, but only the Court’s “zone of interests” test for standing, that branch of standing lore which the Court assiduously avoids reaching.

The level of discontent with many Supreme Court justiciability decisions has been sufficiently high that, in recent years, Congress has frequently held hearings on various proposals to modify
court has done a disservice to the law of justiciability by suppressing congressional involvement in its development, thereby offending the principle of separation of powers.\textsuperscript{248}

\textsuperscript{248} If Congress chooses not to exercise its policymaking function with respect to justiciability doctrines, the Court will, of necessity, have to continue to make justiciability policy. Arguably, congressional failure to enact justiciability legislation has ratified the Supreme Court's policy preferences and, therefore, effectively discharged its legislative obligations. Assuming that tacit ratification properly can be inferred from congressional inaction, two problems still remain. First, no such inference would be warranted unless it were established that Congress had an accurate appreciation properly can be inferred from congressional inaction, two problems still remain. First, no such inference would be warranted unless it were established that Congress had an accurate appreciation.
d. The Political Question Doctrine

Of the available justiciability doctrines the political question doctrine seems best suited to protect the virtue of separation of powers. In fact, ensuring the proper separation of powers has been specifically cited as the doctrine's purpose. The political question doctrine has developed with less attachment to the concept of injury than have the other justiciability doctrines. Moreover, that doctrine focuses directly on the nature of the question presented to the court, rather than on the manner of its presentation. Accordingly, the political question doctrine is an appropriate vehicle for separation-of-powers analysis precisely because the issue of whether a question constitutes a political question mirrors the issue of whether the judiciary is institutionally competent to resolve it.

A political question is one that the text of the Constitution commits to another branch of government or for which no judicially manageable standards governing proper resolution exist. As formulated, the political question doctrine appears ideal for preserving the separation of powers; as applied, however, the doctrine is rarely invoked to

---

249 In the seminal political question case, Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court stated:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

Justice Powell reformulated the doctrine in a less awkward fashion in his concurring opinion in Goldwater v. Carter, 444 U.S. 996 (1979) (mem.):

> As set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962), the doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?

*Id.* at 998.

249 *But see* United States v. Richardson, 418 U.S. 166, 179 (1974) (in rejecting a taxpayer standing claim, the Court asserted that because of the potential absence of any plaintiff able to assert a traditional injury arising from the alleged violation of a constitutional provision, enforcement of such a provision was better left to the political branches of government).

251 See supra note 249.

252 See supra note 249.
There is some evidence that the doctrine is on the verge of a revival, but it is unclear whether the courts will apply the revived doctrine meaningfully. In Goldwater v. Carter, a four-justice plurality of the Supreme Court wished to rely on the political question doctrine to avoid ruling on the validity of President Carter's unilateral termination of a mutual defense treaty between the United States and Taiwan—a necessary condition to diplomatic recognition of the People's Republic of China. Justice Powell, however, convincingly demonstrated that use of the political question doctrine would be inconsistent with precedent, and voted to dismiss the case on ripeness grounds. The position of the plurality in Goldwater v. Carter illustrates the possibility that the political question doctrine may be used to preclude adjudication of cases that are politically charged rather than cases threatening to abrogate separation of powers. Nevertheless, of the present array of justiciability doctrines, the political question doctrine still seems best-suited to implement separation-of-powers objec-

---

253 See generally L. Tribe, supra note 6, § 3-16, at 71-79. The cases described by Professor Tribe contain varying formulations of the political question doctrine, but no particular formulation seems satisfactory. Professor Henkin has argued that, in fact, no political question doctrine is necessary, because other principles of law adequately advance the legitimate objectives of the political question doctrine:

The "political question" doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts. Its authentic contents have general jurisprudential validity, and nothing but confusion is gained by giving them special handling in selected cases. I see its proper content as consisting of the following propositions:

1. The courts are bound to accept decisions by the political branches within their constitutional authority.
2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
4. The courts may refuse some (or all) remedies for want of equity.
5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review. (But the only one the courts have found is the "guarantee clause" as applied to challenges to state action, and even that interpretation was not inevitable.)


Properly understood, the political question doctrine is superfluous. It merely reflects separation-of-powers concerns that are best pursued through an understanding of the relative institutional competence of each branch of government. To the extent that the formulations and tests surrounding the political question doctrine impede such understanding—or provide an excuse for dispensing with efforts to understand separation-of-powers principles—they are counterproductive. See infra Conclusion.

254 444 U.S. 996 (1979) (mem.).
255 Id. at 1002-06.
256 Id. at 997-1002.
tives. Its very existence serves as a reminder that conscious efforts should be made to prevent judicial usurpation of legislative power, and a judiciary sensitive to the distinction between exposition and legislation will be able to apply justiciability rules in a way that will advance this objective.

2. Quality Control

In addition to facilitating maintenance of the separation between legislative and judicial power, justiciability rules can enhance the quality of judicial exposition. The constitutional scheme can be viewed as granting to each branch of government the power to do what is necessary to perform its function properly. Congress is explicitly granted such power by the "necessary and proper" clause of article I,258 and the President is arguably granted such power implicitly in the article II admonition that the President "shall take Care that the Laws be faithfully executed."259 Although article III contains no language granting an analogous power to the judiciary, it is reasonable to suppose that the judiciary, too, possesses the inherent power to avoid improper exercises of its jurisdiction.260 In fact, it has been asserted that Marbury v. Madison261 itself might have been better decided if it had limited its holding to recognition of an inherent judicial power to avoid improper exercise of its jurisdiction, rather than finding the more expansive power of judicial review.262

An inherent judicial power to decline improper exercises of jurisdiction has certain implications for the law of justiciability. Courts need help to adjudicate properly. They need a proper context in which to consider the principles they are called upon to expound, and they

258 U.S. CONST. art. I, § 8, cl. 18 provides:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.

See also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it . . . .")

259 U.S. CONST. art. II, § 3. Presumably, there is inherent in this obligation some degree of authority to comply with it.


261 5 U.S. (1 Cranch) 137 (1803).

262 See, e.g., Van Alstyne, supra note 6, at 34-38; see also G. GUNThER, supra note 6, at 26-27; J. NOWAK, supra note 6, at 9.
need assistance in assessing the strengths and weaknesses of pertinent arguments. Satisfaction of these needs reduces the likelihood of erroneous adjudication—adjudication in which the court would not have expounded on a principle of law as it did if the court had been apprised of additional facts or arguments. Courts also need a mechanism for avoiding imprudent exposition—exposition that miscalculates the advisability of giving a principle a particular meaning at a particular point in time. The justiciability rules that have emerged from the traditional model recognize these needs to some extent but only satisfy them tangentially. Similar rules, however, applied under the expository model could respond directly to context, adversariness, and necessity concerns to assure that the judiciary only exercises its power when it is appropriate to do so.

a. Context Restrictions

Context considerations facilitate adjudication because it is easier, and safer, to expound a principle in a particular factual context than in the abstract. For example, it is a manageable task to determine whether the equal protection guarantee of the Constitution requires school desegregation in the context of a particular school system when a court can determine the degree of segregation, ascertain the causes, and assess the effectiveness of available remedies. It is not a manageable task to determine in the abstract whether equal protection requires desegregation without knowing those facts.

At any given time, prior judicial exposition of a principle will have made some facts clearly relevant to current exposition; proper adjudication would therefore be impossible in the absence of those facts. In a school desegregation suit, under present law, the de jure or de facto nature of the existing segregation is such a fact. Other facts may be

---

263 As noted supra, text accompanying notes 130-203, the traditional model of adjudication assumes that ensuring the presence of an injury will advance satisfaction of these needs.

264 In Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973), the Supreme Court was presented with the question of whether a finding of de jure segregation, or legally sanctioned racial discrimination, which was common in southern states prior to issuance of the decision in Brown v. Board of Educ., 347 U.S. 483 (1954), would also be required in northern cities, where school segregation tended to result more from de facto causes, such as segregated residential patterns, than from official legal policies. Prior to Keyes, civil rights lawyers had consistently argued that de facto segregation was sufficient to trigger the remedial measures authorized in Brown. See D. BELL, supra note 58, at 393 n.20. In Keyes, however, the Court held that the requirement to desegregate schools extended only to those portions of a school system in which existing segregation was the product of intentional state action. See 413 U.S. at 198-213. This holding was reaffirmed in Milliken v. Bradley, 418 U.S. 717 (1974) where the Court refused to include suburban school districts in a desegregation order because no intentional policy of racial segregation had been proved with respect to those schools. Id. at 744-47.

For an illuminating discussion of the development of law relating to school desegregation, see D. BELL, supra note 58, at 364-473.
relevant, with their ultimate significance dependent upon the way the
court subsequently refines the principle. For a time, the *de jure* or *de
facto* nature of segregation was only an arguably relevant fact; it might
or might not have had some effect on proper application of the equal
protection principle.\(^{265}\) In its successive adjudications, knowledge of argu-
ably relevant facts would aid a court in determining whether those
facts should be made relevant. In addition, facts that are legally irrele-
vant under the traditional model of adjudication, such as the desires of
nonlitigant members of the community concerning desegregation, would
be useful in providing the court with information about the degree of
popular resistance likely to accompany various dispositions.\(^{266}\) A well-
developed context makes the court’s job easier, permits narrow exposi-
tion to occur, and reduces the likelihood that judicial determinations
subsequently will be abandoned because of unanticipated difficulties.

The standing and ripeness concepts, albeit somewhat modified, are
well-suited to ensure an acceptable context for adjudication. Standing
can be viewed as requiring the presence of a plaintiff who brings before
the court a factual situation which establishes the context necessary for
exposition and for fashioning the appropriate scope of relief.\(^{267}\) Al-
though considerations relating to relief are more pertinent to jus-
ticiability under the dispute-resolution model, they do serve a useful
function under the expository model by ensuring that principles are
expounded in a way that permits them to be incorporated into societal
conduct. Ripeness requirements can improve context by assuring that
the positions of the parties have become sufficiently crystallized to sup-
ply the court with useful facts.\(^{268}\) For example, if the constitutionality
of a municipality’s busing plan is challenged, the court may encounter
difficulty in ruling on the plan until the municipality has made certain
important decisions about how the plan will operate, such as whether
busing will be voluntary or mandatory. In the absence of such deci-
sions, it may make sense to conclude that a suit is not sufficiently ripe
to serve as a basis for exposition. The context aspect of justiciability is
likely to be better understood and better served if it is addressed di-
rectly—as is natural under the expository model—rather than through
the intermediary of injury—as is required under the traditional

\(^{265}\) See D. BELL, *supra* note 58, at 389-97.

\(^{266}\) Arguably, such factors should play no role in adjudication under the traditional model.
Realistically, however, they must play a role in order to ensure continued popular acceptance of

\(^{267}\) See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-23 (1974);
see also A. BICKEL, *supra* note 74, at 115-16.

b. Adversary Presentation

The quality of judicial exposition is also aided by the adversarial participation of the parties. Through vigorous advocacy each party helps the court to perceive and to respond properly to weaknesses in the presentations made by the other parties. In addition, vigorous advocacy can illuminate facets of a case that are not immediately apparent and might not otherwise be considered by the court. These benefits of vigorous advocacy serve as the foundation of the adversarial system, and appear to be deeply and permanently rooted in our legal system. The likelihood that a party’s advocacy will be sufficiently vigorous has traditionally been thought to vary with the party’s stake in the outcome. Accordingly, traditional rules of standing, ripeness and mootness require plaintiffs to suffer ongoing injuries in the belief that only injury will adequately assure the personal stake necessary for vigorous advocacy.

This assumption is of doubtful validity for a variety of reasons. Because lawyers do the advocating, the status of the plaintiff is only remotely relevant to the vigor of the advocacy that will be displayed to the court. Moreover, it would appear that the willingness of a plaintiff voluntarily to undergo the expense and inconvenience of litigation should itself provide adequate assurance of vigorous advocacy. Further, because most significant constitutional litigation entails many features of public actions, the requirement of an injured plaintiff is proba-

---

269 The injury requirement reflects the importance of a well-developed context more by coincidence than by design. See supra text accompanying notes 130-203.


271 See cases cited supra note 270.

272 The decision of the Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972), seems to belie any controlling concern with the quality of a litigant's presentation to the court. There, in an environmental case, the Court denied standing to a nationally recognized organization with legal expertise in environmental matters, but articulated a standing test that would have permitted a backwoods hermit, who had never seen the inside of a courthouse, to maintain the action, and presumably to do so pro se. Id. at 734-41.

It is true that the client does hire the lawyer, and the client decides how much money will be devoted to the case. The pertinent justiciability rules, however, do not disqualify indigent plaintiffs or parties represented by only marginally competent attorneys. In fact, all parties have the constitutional right to represent themselves—at least in criminal cases, see Faretta v. California, 422 U.S. 806 (1975)—and this right could seriously defeat the objective of ensuring competent advocacy.

bly counter-productive. It is very likely that the quality of advocacy in public actions, where interest groups competently assert their own special interests, is higher than the quality of advocacy in the average private suit where the plaintiff satisfies traditional requirements of particularized injury.274

The traditional prohibition on the adjudication of collusive suits is also rooted in the desire to secure vigorous advocacy.275 Collusive suits are objectionable because they are conceived of as not presenting the desired adversary clash.276 This conception may be accurate when opposing parties actually desire the same result,277 but is less likely to be the case when the parties genuinely desire some, but not the same, resolution of the issue, even though they agree to abide by the results of a test case.278

Although emphasis on injury or collusion in order to implement adversarial presentation may be somewhat artificial, the objective of assuring vigorous advocacy is legitimate as long as the judiciary continues to operate within the confines of the adversarial system. Again, the traditional model requires this objective to be pursued through the intermediary of injury, but it can be better pursued directly, within the context of the expository model. If, for whatever reason, it appears that

274 See supra note 272; see also Albert, supra note 226, at 487.
276 Id.
277 Theoretically, justiciability problems are posed when a party such as a government agency desires to comply with the demands of its opponent in litigation, but suits arising out of such circumstances are not typically deemed collusive. For example, in GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980), the Consumer Product Safety Commission desired to release to the plaintiff consumer organizations documents that the plaintiffs had requested under the Freedom of Information Act, 5 U.S.C. § 552 (1976). The documents pertained to television-related accidents. The Commission could not legally release the documents because the television manufacturers who had submitted them to the agency had obtained an injunction prohibiting their release. See 445 U.S. at 376-82. In a suit filed by the consumer groups against the Commission to compel disclosure, the Supreme Court held that the action was not rendered nonjusticiable by the fact that both parties desired the same result. Id. at 382-83.

Likewise, the Supreme Court has not treated cases as nonjusticiable simply because a governmental party to the suit confesses error on appeal. See Sibron v. New York, 392 U.S. 40, 58-59 (1968). Similar problems were posed in Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), aff'd, 103 S. Ct. 2017 (1983), when the Reagan Administration changed its position during litigation involving the constitutionality of Internal Revenue Service regulations denying tax exemptions to private schools that engaged in racially discriminatory activities. After the Administration declined to support the validity of the regulations, the Supreme Court appointed private counsel to argue in favor of the validity of the regulations. See 102 S. Ct. 1965 (1982).

278 In Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982), a damage action filed against former President Nixon alleging that Nixon was responsible for the unconstitutional discharge of the plaintiff after the plaintiff had publicized cost overruns in connection with a series of Air Force contracts, it was revealed that the plaintiff and Nixon had settled the case, with the terms of the settlement contingent upon the ruling of the Supreme Court in connection with one of the issues in the case. The Court held that the settlement did not render the case moot, and therefore nonjusticiable, because the agreement between the parties left Nixon and Fitzgerald "with a considerable financial stake in the resolution of the question presented in this Court." Id. at 2699.
a party or a party’s attorney is an inadequate representative of the interest asserted in a suit, the justiciability rules should permit the court to take appropriate remedial steps, including dismissal of the action, in order to avoid the consequences of poorly considered exposition. Whether such remedial action is taken in the name of standing, ripeness, mootness, collusive suit or some other doctrine, it is important that adversariness be divorced from the concept of injury. The injury requirement under the traditional model only indirectly addresses the need for adversarial advocacy in a system of judicial exposition. Under the expository model, adversariness and vigorous advocacy can be placed directly at issue in making justiciability determinations.

c. Necessity

Even when context and adversary-presentation safeguards are implemented through properly applied justiciability rules, erroneous adjudication is still a possibility. There is always some danger that a court will expound a principle in a way that later is abandoned due to inadequate initial consideration or to the occurrence of an unanticipated change in circumstances. On a more subtle level, there is also a danger of imprudent exposition; in important cases the court runs the risk of issuing a particular exposition of a principle before its time or of being seduced into “legitimating” conduct that is not genuinely warranted by the principle at issue. Erroneous or imprudent adjudication may well produce unfortunate consequences and threaten institutional legitimacy when the improper adjudication is ultimately rectified. Accordingly, there is much to be said for exercising the power of adjudication with restraint; a case should be adjudicated only when “necessary.”

“Necessary” means simply that the benefits of exposition outweigh

---

379 Federal courts are required to make similar determinations in ruling upon whether an action properly may proceed as a class action. See FED. R. CIV. P. 23(a)(4).
380 For example, in Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court held that separate-but-equal treatment of races did not offend the Constitution. This exposition of the pertinent constitutional provisions was later abandoned in Brown v. Board of Educ., 347 U.S. 483 (1954), and Loving v. Virginia, 388 U.S. 1 (1967), which generally prohibited legislative classifications based on race.
381 Arguably, Brown v. Board of Educ., 347 U.S. 483 (1954) was decided prematurely. If this were the case, it would help to explain the Court’s questionable actions in Naim v. Naim, 350 U.S. 891 (1955), and 350 U.S. 985 (1956), see supra note 74. It might also explain the degree of persistence that has accompanied opposition to busing as a means of implementing Brown. See supra note 58.
382 Perhaps Plessy v. Ferguson, 163 U.S. 537 (1896) “legitimated” separate-but-equal treatment of the races because of practical, social exigencies, even though the Constitution did not “truly” tolerate such treatment. Cf. A. BICKEL, supra note 64, at 29, 70-71, 129, 197.
the dangers, in whatever manner the benefits and dangers are measured by the court. The concept of necessity as a component of justiciability finds some recognition in traditional standing, ripeness and mootness decisions.\textsuperscript{284} Again, however, necessity has been measured in terms of injury. Those decisions assert the general proposition that judicial intervention is unnecessary if some eventuality may eliminate the plaintiff's injury in the absence of a remedial judgment.\textsuperscript{288} Thus, if the defendant has already provided what the plaintiff seeks, the action is moot;\textsuperscript{286} if the defendant may yet meet the plaintiff's demands the action is not yet ripe;\textsuperscript{287} and if the defendant may lawfully avoid the plaintiff's desires even in the face of a judgment rendered in favor of the plaintiff, the plaintiff lacks standing due to a failure of redressability.\textsuperscript{288}

The dangers of erroneous or imprudent adjudication warrant a necessity component of justiciability. Necessity determinations, however, should be made in a more sophisticated manner than they have been under present doctrines.\textsuperscript{289} Calculation of whether judicial intervention is warranted will frequently be quite difficult, especially in public actions where both the benefits and dangers of exposition are very high. In \textit{Brown v. Board of Education},\textsuperscript{290} the Supreme Court determined that the benefits of judicial intervention outweighed the attendant problems. A year later in \textit{Naim v. Naim},\textsuperscript{291} however, the same Court


\textsuperscript{288} See cases cited \textit{supra} note 284.


\textsuperscript{290} On occasion, the Supreme Court's "necessity" determinations appear to be somewhat sophomoric. For example, in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978), Justice Stevens accused the majority of sidestepping a host of jurisdictional and justiciability problems in order to resolve definitively legal questions that, if left in their then-present state of resolution, might have had the arguably undesirable effect of impeding the development of nuclear power. See \textit{id}. at 102-03 (Stevens, J., concurring in the judgment). After reading the majority opinion, one is left with the impression that the Court would not have reached the merits of the case if the lower court had not done so, or if the lower court had issued a pronuclear decision. Many of the Supreme Court's "necessity" determinations seem to have been little more than result oriented manipulation of the applicable justiciability doctrines. See \textit{supra} note 128. On other occasions, the Supreme Court's necessity determinations appear to have been more delicate and well-considered. See, e.g., cases discussed \textit{supra} note 74.

\textsuperscript{291} 347 U.S. 483 (1954). See \textit{supra} note 74.

\textsuperscript{291} 350 U.S. 891 (1955) (per curiam); 350 U.S. 985 (1956) (per curiam).
determined that the problems likely to be precipitated by judicial intervention outweighed the benefits, even though the same legal principle was at issue.\textsuperscript{292} When such delicate balancing is involved, adherence to artificial visions of injury, which can obscure rather than illuminate the truly pivotal factors, adversely affects the court's determination.

Some of the presently used component doctrines of standing can be viewed as responses to necessity concerns,\textsuperscript{293} although they rarely are presented in such terms. For example, the general prohibition on third-party standing to assert the rights of others\textsuperscript{294} may simply reflect a suspicion that if the injured parties do not care enough to file suit themselves, then the need for judicial relief is not acute enough to warrant risking the dangers of exposition. The exceptions to the third-party standing prohibition, which generally apply when the injured parties face some legal or practical impediments to filing suit,\textsuperscript{295} are consistent with this view. When such impediments exist, failure of the injured parties to file suit is no longer an accurate barometer of the need for judicial intervention and is not, therefore, properly treated as one.

The rules governing representational or associational standing can be understood as being directed at a special case of third-party standing. Where many individuals suffer the same small injury, their collective desire for judicial intervention, evidenced by their authorization of a representational suit filed on their behalf, may provide a more meaningful measure of necessity than that provided by the failure of any individual to file suit. Accordingly, rules for representational and associational standing tend to focus on whether an associational plaintiff genuinely represents the views of its constituents.\textsuperscript{296}

\textsuperscript{292} See supra note 74.


\textsuperscript{295} A student commentator has identified three considerations—in addition to a more general exception for overbreadth claims—that may prompt a court to dispense with the customary prohibition on third-party standing. See Note, supra note 294, at 423-28. Those considerations are: (1) the presence of a substantial relationship between the plaintiff and the third party whose rights are being asserted; (2) the impossibility of the third party's assertion of his or her own rights; and (3) the need to avoid dilution of the third party's rights that would result from adherence to the customary prohibition. See id. at 425. The presence of any or all of those considerations suggests that basing necessity determinations solely on the actions or inactions of a third party would be imprudent.

\textsuperscript{296} The Supreme Court has consistently recognized the standing of voluntary membership organizations to assert the rights of their members, even when the organizations themselves suffered no injury. See Warth v. Seldin, 422 U.S. 490, 511 (1975); see also Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1977). In Hunt, the Court recognized three "prerequisites" to establishing an organization's standing to maintain suit on behalf of its members:
Congressional standing poses a related but more complicated problem. Frequently, the interest asserted by a congressional plaintiff will not only fail to serve as an accurate barometer of the need for judicial intervention, but the congressional plaintiff will arguably be urging the court to engage in nonjudicial behavior that is inconsistent with separation-of-powers concerns. 297

(a) its members would otherwise have standing to sue in their own right;
(b) the interests it seeks to protect are germane to the organization’s purpose; and
(c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343. Hunt also extended standing to sue in a representative capacity to nonmembership organizations as long as those organizations, nevertheless, possessed the “indicia of membership.” See id. at 344-45. Presumably, when the “indicia of membership” are present, the “members” have sufficient control over the operation of the representational plaintiff to warrant the inference that judicial intervention is “necessary.” Cf. Health Research Group v. Kennedy, 82 F.R.D. 21, 23-28 (D.D.C. 1979).

The Supreme Court has been conspicuously absent in the development of congressional-standing law, but the District of Columbia Circuit has been quite active. In most respects, congressional plaintiffs are treated as if they were private plaintiffs for standing purposes. In Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977), the court stated:

When analyzing the standing claims of a Congressman it is important to keep in mind the nature and source of the analytical standards to be employed. The most basic point to consider is that there are no special standards for determining congressional standing questions. Although the interests and injuries which legislators assert are surely different from those put forth by other litigants, the technique for analyzing the interests is the same. Id. at 204 (emphasis in original). Presumably, application of more lenient standing rules to congressional plaintiffs would provide inaccurate necessity information to a dispute-resolution oriented judiciary. Accordingly, congressional plaintiffs can secure standing by establishing injury in fact—with the requisite likelihood of redressibility—to an interest that is arguably within the zone of interests protected by the relevant law. See Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 878 (D.C. Cir. 1981). For example, when President Ford improperly attempted to exercise his pocket-veto power over legislation for which Senator Kennedy had voted, the consequent nullification of the Senator’s vote was viewed as constituting an injury sufficient for standing to challenge the validity of the pocket veto. See Kennedy v. Sampson, 511 F.2d 430, 433-36 (D.C. Cir. 1974); cf. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (en banc) (per curiam), vacated mem., 444 U.S. 996 (1979).

Because congressional plaintiffs tend to file suit in situations suggesting that they were unable to convince their colleagues in Congress to follow a particular course of action, see Riegle, 656 F.2d at 877, it is not clear whether judicial intervention would be appropriate. The language quoted, supra, from Harrington suggests that the political context out of which a case arises should have no bearing on the standing issue. Nevertheless, judicial intervention could interfere with the legislative process, thereby posing separation-of-powers problems. See Riegle, 656 F.2d at 879. The District of Columbia Circuit appears to have approached the problem by treating the standing and separation-of-powers issues as analytically distinct.

In Riegle, the plaintiff, a senator, challenged the composition of the Federal Open Market Committee because some of its members, by statute, had been exempted from the process of Senate confirmation, in alleged violation of the appointments clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2. The court held that Senator Riegle had suffered an injury sufficient to establish standing, due to the deprivation of his opportunity to cast a confirmation vote. See 656 F.2d at 877-79. The court, however, went on to dismiss the action in its “equitable discretion,” in order to avoid interference with the legislative process. See 656 F.2d at 879-82. The court noted that affected private plaintiffs would, in all likelihood be able to establish standing. See id. at 881. But see Reuss v. Balles, 584 F.2d 461, 468-70 (D.C. Cir.), cert. denied, 439 U.S. 997 (1978) (bondholder who was also member of House of Representatives denied standing to make same chal-
The propriety of a federal court's declining to exercise jurisdiction over a dispute that is sufficiently acute to be cognizable under the traditional model has sparked spirited debate. Professor Bickel has argued that when judicial intervention would be imprudent, the court—at least the Supreme Court—should rely on justiciability devices such as standing, ripeness and the political question doctrine to avoid adjudication on the merits. He has termed those devices "passive virtues." Professor Bickel appears to have condoned manipulation of those doctrines to the extent necessary to preserve the institutional respect, and corresponding effectiveness, of the judiciary, even if a degree of public deception were to ensue. Such deception would be tolerable because of the importance of enabling the judiciary to extricate itself from troublesome

The court's opinion in Riegle may well reflect its view of the necessity of judicial intervention in light of the competing considerations. Presumably, the court did not view separation-of-powers concerns as a constitutional barrier to adjudicating the case; it did express a willingness to reach the merits if a noncongressional plaintiff were to file suit. See id. at 881-82. Apparently, the court viewed judicial intervention as unnecessary—not sufficiently weighty to overcome the separation-of-powers concerns at issue—when the only ensuing benefit would be to permit a senator to win in court a political battle that she or he had lost in Congress. If someone were to present the court with a more traditionally cognizable injury, in a context that raised fewer separation-of-powers concerns, the court's necessity calculation might have come out differently.

In McClure v. Carter, 513 F. Supp. 265 (D. Idaho), aff'd mem., 102 S. Ct. 559 (1981), a three-judge district court dismissed, for lack of standing, a suit filed by Senator McClure of Idaho challenging the appointment by President Carter of Abner J. Mikva as a judge of the United States Court of Appeals for the District of Columbia Circuit. Prior to his appointment, Judge Mikva was a Member of the House of Representatives when the salaries of federal judges were increased. Accordingly, in a suit reminiscent of Ex parte Levitt, 302 U.S. 633 (1937), see supra note 260, Senator McClure—who had voted against Senate confirmation of Judge Mikva—sued for a declaration that Judge Mikva's appointment was constitutionally invalid as a violation of the ineligibility clause, U.S. CONST. art. I, § 6, cl. 2.

The court held that Senator McClure suffered no injury that would be sufficient for standing as either a private citizen or as a senator. See 513 F. Supp. at 269-70. The court also rejected Senator McClure's claim to standing based upon a special statute which Congress had enacted specifically to permit congressional-plaintiff challenges to Judge Mikva's appointment. See id. at 266, 271.

The case poses separation-of-powers problems with an ironic twist. Although the court expressed reluctance to become involved in the legislative process, see id. at 271, in McClure, Congress had expressly invited the court to rule on the constitutional issue. Arguably, the court violated separation-of-powers principles by supplanting its own views of expediency for a congressionally enacted policy determination. See supra text accompanying note 243. The court viewed it as "unnecessary" to reach the merits of the constitutional issue involved, purposefully leaving the alleged constitutional violation unreviewable. It is difficult to find any merit in the court's holding. See supra note 226. McClure—like Ex parte Levitt—appears to be simply a case in which the courts have chosen not to enforce a provision of the Constitution but have avoided explaining why. If there is some reason that—contrary to the views of the framers—the ineligibility clause is in reality undesirable, principled decisionmaking requires the courts to disclose that reason, rather than hide behind justiciability doctrines.

See A. BICKEL, supra note 64, at 111-98.

Id.

See, e.g., id. at 169-97 (suggesting how a variety of cases properly could be disposed of). But see id. at 132-33.
cases without undermining the common perception that it remains available to resolve disputes. Arguably, an array of justiciability devices is required precisely because it makes deception easier than it would be if only a single, transparent device were available.

Professor Wechsler disagrees, arguing that the Marbury model of judicial review obligates courts to resolve disputes that fall within their jurisdiction, and that justiciability doctrines do not countenance discretionary abstention. Professor Wechsler would, however, permit courts to decline to reach the merits where genuine jurisdictional defects exist. Professor Gunther shares the Wechsler view that justiciability is not synonymous with discretion, and criticizes the Bickel position as being fundamentally unprincipled. Professor Gunther, however, also appears to recognize that in some circumstances courts will, nevertheless, simply refuse to exercise jurisdiction that they are, under his view, required to exercise. His argument appears to be that if courts perceive exigencies that will, in extraordinary circumstances, cause them to ignore their obligation to adjudicate particular cases, then so be it. But such judicial "misconduct" should not be elevated to the level of a recognized, validating doctrine.

All three commentators would probably concede that in some cases the mischief produced by a decision on the merits would outweigh the need to protect the "rights" of the parties. Naim v. Naim may have been such a case; if not, others could be imagined. It is likely that none of the three would demand an adjudication of the merits in such cases. They differ only in their stated response to the Court's manipulation of a justiciability device in order to avoid a decision on the merits. Bickel presumably would argue that such manipulation was the intended use of technical justiciability doctrines, doctrines that the parties could not be expected to understand. Wechsler and Gunther presumably would rebuke the Court for misuse of the doctrine being manipulated in order to reduce the frequency with which such judicial tactics would recur. All three, however, would be secure in the knowledge that the system had worked properly. Potentially disasterous adjudication of the merits would have been avoided, while the general perception that the judiciary safeguards the rights of litigants would have been preserved. Only

---

301 See id. at 117-27.
302 See Wechsler, Toward Neutral Principles, supra note 74, at 1-10, 34.
303 See id. at 6.
304 See Gunther, supra note 74.
305 See id. at 12.
306 See id. at 12-13.
307 See id.
the rights of the parties immediately before the court would have been sacrificed in order to save the system.

Judicial abstention is the inevitable end result of a confrontation between the needs of the parties and weightier needs of society as a whole, and such abstention is not necessarily improper. It is not clear, however, that so much deception is necessary. Bickel's "passive virtues" are useful primarily because few people will understand them, thereby permitting the court to feign fidelity to a principle other than the principle actually being applied—the principle that sometimes the need to enforce the rights of the parties can be outweighed by societal needs. The Wechsler and Gunther position seems even more deceptive; it asserts that a particular type of judicial disposition is improper, while recognizing that it is necessary; it argues that such a disposition should not be repeated in the future, while knowing that occasions will arise in which it must. All of this deception is a necessary outgrowth of the dispute-resolution model, which dictates that protection of rights is the only legitimate function of adjudication.

The expository model recognizes that dispute resolution, and its ensuing protection of rights, is not the primary function of article III adjudication. Rather resolving disputes is incidental to the function of ensuring that society's principles develop properly. Therefore, the expository model permits courts to decline to adjudicate the merits—to decline to expound principles—if the circumstances would render the risks of erroneous or imprudent exposition unacceptably high. If reaching the merits in Naim v. Naim is likely to frustrate rather than facilitate proper development of the equal-protection principle with respect to race relations, the court has not only the authority but the duty to avoid adjudication of that principle. Honest exposition of the principle could cause loss of the popular support necessary for the court to perform its long term expository function. Dishonest exposition would confuse the meaning of the principle, and, if detected, would result in the loss of perceived legitimacy. Thus, the expository model does not change the present judicial practice of sidestepping the merits of troublesome constitutional questions; it merely recognizes that practice as a legitimate one.

---

209 Although Professor Bickel has offered intelligible explanations for why the use of one particular "passive virtue" is more appropriate in particular circumstances than the use of another, see A. BICKEL, supra note 64, at 133-97, it is unlikely that his subtle distinctions could be generally understood by the populace. This is probably true of most uses of most justiciability doctrines, and perhaps of most other legal doctrines as well. The population comes to understand a court's application of a principle as news reporters and legal commentators translate judicial concepts and language into more commonly understood terms. Judicial opinions, of course, lose something in the translation, and extremely subtle ideas are likely to be completely lost.
The expository model also has implications for what the parties and interested observers should be told when a court declines to reach the merits. They should be told the truth. The expository model is premised upon the belief that the judiciary propels society forward by making complex, aspirational principles understandable and concrete. It follows, therefore, that the principle that all rights cannot be safeguarded in all cases should come to be societally recognized. The judiciary is the institution that can best explain the principle, and exposition in the context of particular cases is the process by which it should be explained. Accordingly, if *Naim v. Naim* were determined to be a case in which the court could justifiably abandon the rights of the parties for the greater social good, the court’s opinion should state:

The court declines to consider what meaning the principle of equal protection has in the present context. In light of the extraordinary sensitivity of the constitutional issue presented, and the likely inability of the court to issue an opinion that would be properly understood and implemented into conduct at the present time, the court declines to reach the merits. The needs of the parties for judicial resolution of their dispute do not offset the dangers to proper performance of the court’s expository function that could result from an adjudication on the merits. The opinion should then go on to discuss the respective needs and dangers with a degree of specificity sufficient to make the opinion convincing.

Although a necessity doctrine would permit a court to decline to exercise jurisdiction in certain cases even though no traditional justiciability defects were present, such a doctrine should not be viewed as embodying the general discretion to flee from difficult cases. On the contrary, it is likely that such a doctrine would rarely be invoked, because the expository function itself would temper judicial use of the necessity doctrine. As noted above, in order to reduce principles to a comprehensible, operational level in an effective manner, the judiciary requires a great deal of esteem.\(^\text{31o}\) That esteem would be undermined if the judiciary were perceived to be “ducking” difficult or controversial issues without sufficient reason. Accordingly, the necessity doctrine could be invoked effectively only where its invocation could be acceptably explained. As a practical matter, that would rarely be the case, and recognition of a necessity doctrine would not increase the incidence of

\(^{310}\) See supra text accompanying notes 75-78.
judicial abstention. A necessity doctrine would not be easy to apply, but it would have the advantage of permitting direct and explicit balancing of competing considerations in a way that would promote public scrutiny rather than public deception. More important, it would serve an expository function by increasing society's understanding of one of its important principles—the principle that the judiciary exists to oversee the development of our fundamental values.

IV. Conclusion

This Article has discussed the ways in which justiciability doctrines should be applied, emphasizing the desirability of focusing on the functions that those doctrines properly should serve. Some of the suggested applications correspond to present applications of justiciability doctrines, while others are directly at odds with current practices. It is possible that the law of justiciability is in such disarray that it cannot be salvaged without abandoning the present doctrinal terminology and its accompanying confusion. Perhaps it would be best for courts to stop speaking in terms of standing or ripeness, and to begin speaking in terms of context or separation of powers. However, questions of doctrinal nomenclature are relatively unimportant; they neither create nor defeat coherence. What is important is that courts genuinely pursue sensible objectives. But those objectives must be understood before they can be pursued.

It is no longer plausible to maintain that the objective of article III adjudication is to resolve disputes or to redress injuries. Bare dispute-resolution does not accurately describe what courts do or what society desires them to do. Moreover, the chimerical quality of injury renders its redress too elusive to serve as a meaningful objective. The injury-orientation that characterizes present justiciability rules is at best an anachronism. Although it may have originally been formulated to facilitate proper understanding of the judicial function, it is now relied upon in lieu of understanding. The most important function of the judiciary is to give meaning to the law. When legislative policies are at issue, such exposition facilitates proper operation of the legislative process in a manner consistent with separation of powers. When fundamental principles are involved, exposition affects society's understanding and implementation of those principles in a way that facilitates social progress.

The concept of justiciability and its various component doctrines can usefully be understood as reflecting a concern with confining the judiciary to proper judicial activity. The injury-orientation of present justiciability rules, however, has caused those rules to perform this
function poorly, because the presence or absence of a traditional injury has little bearing on the limitations that properly should govern the process of exposition. As expository institutions, federal courts should primarily be concerned with avoiding the exercise of legislative policymaking functions and with avoiding adjudication under circumstances in which the dangers of exposition are likely to outweigh the benefits. Justiciability determinations should, therefore, focus upon ensuring the proper separation of powers, and upon ensuring adjudication in a well-developed context, with adversarial presentation of the issues, where the need to adjudicate those issues is not outweighed by the overall needs of the expository justice system. These objectives are more likely to be realized if pursued directly, with an appreciation for the expository function of adjudication, than through reliance on a nonviable concept of injury. Realistically, the federal courts cannot be expected to perform their social function better until they better understand it.