and the Country as a permanent and indispensable feature of our constitutional system. . . . Every state legislator and executive and judicial officer is solemnly committed by oath . . . 'to support this Constitution.'"[48]

## §2.3 INTRODUCTION TO THE JUSTICIABILITY DOCTRINES

Perhaps the most important limit on the federal judicial power is imposed by a series of principles termed "justiciability" doctrines. The justiciability doctrines determine which matters federal courts can hear and decide and which must be dismissed. Specifically, justiciability includes the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine. Each of these justiciability doctrines was created and articulated by the United States Supreme Court. Neither the text of the Constitution, nor the framers in drafting the document, expressly mentioned any of these limitations on the judicial power.

### Constitutional Versus Prudential Requirements

Although all of these requirements for federal court adjudication were judicially created, the Supreme Court has distinguished two different sources for these rules. First, the Court has declared that some of the justiciability doctrines are a result of its interpretation of Article III of the United States Constitution. Article III, §2, defines the federal judicial power in terms of nine categories of "cases" and "controversies." The Supreme Court repeatedly has said that the requirement for "cases" and "controversies" imposes substantial constitutional limits on federal judicial power.

Second, the Court has said that other justiciability doctrines are derived not from the Constitution but from prudent judicial administration. In other words, although the Constitution permits federal court adjudication, the Court has decided that in certain instances wise policy militates against judicial review. These justiciability doctrines are termed "prudential."

The distinction between constitutional and prudential limits on federal judicial power is important because Congress, by statute, may override prudential, but not constitutional, restrictions. Because Congress may not expand federal judicial power beyond what is authorized in Article III of the Constitution, a constitutional limit on federal judicial review may not be changed by federal law. But since prudential constraints are not derived from the Constitution, Congress may instruct the federal courts to disregard such a restriction.[1]

[48] *Id.* at 18 (citations omitted).

§2.3 [1] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."). *Id.* at 500-501 (the requirements for injury and causation are constitutionally required; the ban on third-party standing and the prohibition against federal courts deciding generalized grievances are prudential); *but see* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (declaring that the ban on generalized grievances is constitutional, not prudential).





It must be emphasized that both constitutional and prudential limits on justiciability are the product of Supreme Court decisions. The Court determines whether a particular restriction is constitutional or prudential in its explanation of whether the rule derives from Article III or from its views of prudent judicial administration. Some justiciability doctrines, such as standing, have both constitutional and prudential components. In other instances — for example, the political question doctrine — the Court has not announced whether it views the limitation as constitutional or prudential.

### Policies Underlying Justiciability Requirements

A clear separation of the constitutional and prudential aspects of the justiciability doctrines is often difficult because both reflect the same basic policy considerations. In fact, all of the justiciability doctrines are premised on several important concerns. First, the justiciability doctrines are closely tied to separation of powers. Chief Justice Warren explained that the "words [cases and controversies] define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[2] The justiciability doctrines define the judicial role; they determine when it is appropriate for the federal courts to review a matter and when it is necessary to defer to the other branches of government.

Second, the justiciability doctrines conserve judicial resources, allowing the federal courts to focus their attention on the matters most deserving of review. For example, the justiciability doctrine termed "mootness" conserves judicial resources by allowing the federal courts to dismiss cases where there no longer is a live controversy. Many influential commentators have argued not only that the federal courts have finite resources in terms of time and money, but also that the federal judiciary has limited political capital.[3] That is, these commentators contend that federal courts generally depend on the other branches to voluntarily comply with judicial orders and that such acquiescence depends on the judiciary's credibility. Justiciability doctrines permit the judiciary to expend its political capital only when necessary and not to squander it on matters inappropriate for judicial review.[4]

[2] Flast v. Cohen, 392 U.S. 83, 95 (1968).

[3] Jesse Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 55-59 (1980); Alexander Bickel, The Least Dangerous Branch 201-268 (1962); *but see* Erwin Chemerinsky, Interpreting the Constitution 134-138 (1987) (arguing that the Court's legitimacy is not fragile and conserving judicial credibility should not be a primary objective in constitutional interpretation).

[4] Bickel, *id.* at 116 (arguing that justiciability requirements create "a time lag between legislation and adjudication [and] strengthens the Court's hand in gaining acceptance for its principles").

Third, the justiciability doctrines are intended to improve judicial decision making by providing the federal courts with concrete controversies best suited for judicial resolution. The Supreme Court explained that the requirement for cases and controversies "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[5] Because federal courts have limited ability to conduct independent investigations, they must depend on the parties to fully present all relevant information to them. It is thought that adverse parties, with a stake in the outcome of the litigation, will perform this task best. Many of the justiciability doctrines exist to ensure concrete controversies and adverse litigants.[6]

Finally, the justiciability doctrines also promote fairness, especially to individuals who are not litigants before the court. The justiciability doctrines generally prevent the federal courts from adjudicating the rights of those who are not parties to a lawsuit. It would be unfair to allow someone to raise a complaint on behalf of a person who is satisfied with a situation. Also, because judicial decisions almost inevitably affect many people other than the parties to the suit, it is thought fairest to reserve court review for situations where it is truly necessary.[7]

These policy considerations repeatedly recur in Supreme Court opinions concerning particular justiciability doctrines. Yet these justifications for limits on the judicial role must be balanced against the need for judicial review. Federal courts exist, in large part, to prevent and remedy violations of federal laws. Federal judicial review is particularly important in enjoining and redressing constitutional violations inflicted by all levels of government and government officers.[8] Thus, while justiciability doctrines serve the important goals described above, it is at least equally important that the doctrines not prevent the federal courts from performing their essential function in upholding the Constitution of the United States and preventing and redressing violations of federal laws.

The recurring issue is what should be the content of the justiciability doctrines to achieve this balance between restraint and review. Inevitably, the debate turns on a normative question concerning the proper role of the federal courts. Critics argue that the Court has gone too far in limiting justiciability and preventing federal courts from protecting and vindicating important constitutional rights. But the Court's defenders contend that the decisions have defined the properly limited role of the federal judiciary in a democratic society. This normative question about the appropriate role of the federal judiciary thus is common to discussions of each of the justiciability doctrines.

The debate over justiciability also centers on an issue of methodology: Should the rules of justiciability be as clear and predictable as possible, or should the

[5] Hast v. Cohen, 392 U.S. at 95.

[6] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) (standing ensures "concrete adverseness").

[7] Lea Brilmeyer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 306-310 (1979) (describing fairness as a basis for justiciability doctrines).

[8] For an excellent discussion of the importance of shaping justiciability doctrines to achieve this goal, *see* Susan Bandes, The Idea of a Case, 42 Stan. L. Rev. 227 (1990).





doctrines be very flexible, permitting the federal courts discretion in choosing which cases to hear and which to decline? Some argue that the justiciability doctrines should be malleable, according judges great discretion in deciding which cases warrant federal judicial review. For example, the late Professor Alexander Bickel spoke of the "passive virtues" — the desirability of the Supreme Court using discretionary doctrines such as justiciability to decline review where prudence counsels judicial avoidance.[9]

But others contend that the rules defining jurisdiction should be as firm and predictable as is possible.[10] They argue that it is undesirable for federal courts to be able to manipulate justiciability doctrines to avoid cases or to make decisions about the merits of disputes under the guise of rulings about justiciability. Thus, another recurring theme is whether the Supreme Court has been sufficiently specific and consistent in defining justiciability requirements — a question that, of course, depends on the normative question about the proper approach to justiciability.

## Other Limits on the Judicial Power

Additionally, there are other constitutional limits on federal judicial power, such as the Eleventh Amendment, which prevents federal court relief against state governments.[11] The Supreme Court also has identified a number of circumstances in which federal courts should abstain and refrain from deciding a matter even though it is justiciable and all jurisdictional requirements are met.[12]

Moreover, the Court has formulated other rules to guide its exercise of discretion. For example, the Court has stated that it will avoid deciding constitutional issues where there are nonconstitutional grounds for a decision, where the record is inadequate to permit effective judicial review, or where the federal issue is not properly presented.[13]

But the justiciability doctrines are, without a doubt, among the most significant principles defining access to the federal courts. The doctrines are enormously important, especially in constitutional litigation, in determining whether a case can be heard and decided by a federal judge. As such, the doctrines are crucial in defining the role of the federal courts in American society.

[9] Alexander Bickel, The Supreme Court 1960 Term: Foreword: The Passive Virtues, 75 Harv. L. Rev. 40 (1961).

[10] Gene Nichol, Rethinking Standing, 72 Cal. L. Rev. 68 (1984); Gerald Gunther, The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964).

[11] The Eleventh Amendment is discussed below in §2.10.

[12] For a discussion of the abstention doctrines, *see* Erwin Chemerinsky, Federal Jurisdiction ch. 12-14 (5th ed. 2007).

[13] *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (articulating principles governing Supreme Court review, including avoiding constitutional decisions where possible). For an excellent criticism of the use of these avoidance doctrines, *see* Lisa Kloppenberg, Playing It Safe: How the Supreme Court Sidesteps Hard Cases and Stunts the Development of Law (2001).

## §2.4 THE PROHIBITION AGAINST ADVISORY OPINIONS

The core of Article III's limitation on federal judicial power is that federal courts cannot issue advisory opinions. In many states, state courts are authorized to provide opinions about the constitutionality of pending legislation or on constitutional questions referred to them by other branches of government.[1] Such advisory opinions are in many ways beneficial. By providing guidance to the legislature, these rulings can prevent the enactment of unconstitutional laws. Also, an advisory opinion can spare a legislature the effort of adopting statutes soon to be invalidated by the courts and can save time by allowing the legislature to correct constitutional infirmities at the earliest possible time.

### Justifications for Prohibiting Advisory Opinions

Despite these benefits, it is firmly established that federal courts cannot issue advisory opinions. Many of the policies described in §2.3 are served by the prohibition of advisory opinions. First, separation of powers is maintained by keeping the courts out of the legislative process. The judicial role is limited to deciding actual disputes; it does not include giving advice to Congress or the president.

Second, judicial resources are conserved because advisory opinions might be requested in many instances in which the law ultimately would not pass the legislature. The federal courts can decide the matter if it turns into an actual dispute; otherwise, judicial review is unnecessary, a waste of political and financial capital.

Third, the prohibition against advisory opinions helps ensure that cases will be presented to the Court in terms of specific disputes, not as hypothetical legal questions. As the Court explained in *Flast v. Cohen:* "[T]he implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions. [The rule] implements the separation of powers [and] also recognizes that such suits often are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests."[2]

### Criteria to Avoid Being an Advisory Opinion

For a case to be justiciable and not an advisory opinion, two criteria must be met. First, there must be an actual dispute between adverse litigants. This

**§2.4** [1] States permitting advisory opinions include Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota. Laurence Tribe, American Constitutional Law 73 n.4 (3d ed. 1999); *see also* Henry Melvin Hart, David L. Shapiro & Daniel J. Meltzer, Hart & Wechsler's The Federal Courts and the Federal System 70 (5th ed. 2003).

[2] Flast v. Cohen, 392 U.S. 83, 96-97 (1968) (citations omitted).





requirement dates back to the earliest days of the nation. During the administration of President George Washington, Secretary of State Thomas Jefferson asked the Supreme Court for its answers to a long list of questions concerning American neutrality in the war between France and England.[3] In his letter to the Justices, Jefferson explained that the war between these countries had raised a number of important legal questions concerning the meaning of United States' treaties and laws. Jefferson's letter said that "[t]he President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the [Court], whose knowledge of the subject would secure us against errors dangerous to the peace of the United States."[4] For example, Jefferson asked the Justices, "May we, within our own ports, sell ships to both parties, prepared merely for merchandise? May they be pierced for guns?"[5]

The Justices wrote back to President Washington and declined to answer the questions asked. They explained that separation of powers would be violated if they were to give such advice to another branch of government. The Justices, in their letter, stated: "[The] three departments of the government . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to."[6] The Justices concluded their letter in a gracious tone: "We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States."[7]

For almost 200 years, then, it has been established that federal courts may not decide a case unless there is an actual dispute between adverse litigants. For example, federal courts must dismiss suits where the parties collude to bring the matter to federal court in the absence of a real controversy between them. In *United States v. Johnson,* the Supreme Court held that a suit brought by the plaintiff at the request of the defendant, who also financed and directed the litigation, had to be dismissed.[8] The Court explained that "the absence of a genuine adversary issue between the parties" meant that the case was not justiciable.[9]

Another example of the Court's insistence on an actual dispute between adverse litigants is *Muskrat v. United States*.[10] Congress adopted a statute expanding the participants in an allotment of land that was made to certain Native American tribes. In order to facilitate resolution of constitutional questions about the law, Congress subsequently adopted a statute permitting the filing of two

[3] *See* Hart et al., *supra* note 1, at 65-67 (reprinting the correspondence between Jefferson and the Supreme Court).

[4] *Id.* at 65.

[5] *Id.* at 66.

[6] *Id.*

[7] *Id.* at 67.

[8] 319 U.S. 302 (1943).

[9] *Id.* at 304.

[10] 219 U.S. 346 (1911).

lawsuits in the Court of Claims to determine the validity of the earlier law. Pursuant to this statutory authorization, a suit was initiated, but the Supreme Court ruled that it was not justiciable. The interests of the Native Americans and the government were not at all adverse. In the Court's view, Congress simply had adopted a statute authorizing the federal courts to issue an advisory opinion on the constitutionality of a statute.

Many of the other justiciability doctrines seek to ensure the existence of an actual dispute between adverse litigants. For instance, the standing requirement that a plaintiff demonstrate that he or she has suffered or imminently will suffer an injury is crucial in determining whether there is an actual dispute that the federal courts can adjudicate. Likewise, the ripeness doctrine determines whether a dispute has occurred yet or whether the case is still premature for review. Also, the mootness requirement states that federal courts should dismiss cases in which there no longer is an actual dispute between the parties, even though such a controversy might have existed at one time.

Second, in order for a case to be justiciable and not an advisory opinion, there must be a substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect. This requirement also dates back to the Supreme Court's earliest days. In *Hayburn's Case*, in 1792, the Court considered whether federal courts could express nonbinding opinions on the amount of benefits owed to Revolutionary War veterans.[11] Congress adopted a law permitting these veterans to file pension claims in the United States Circuit Courts. The judges of these courts were to inform the secretary of war of the nature of the claimant's disability and the amount of benefits to be paid. The secretary could refuse to follow the court's recommendation.

Although the Supreme Court never explicitly ruled the statute unconstitutional, five of the six Supreme Court Justices, while serving as Circuit Court judges, found the assignment of these tasks to be unconstitutional. The Justices explained that the duty of making recommendations regarding pensions was "not of a judicial nature."[12] They said that it would violate separation of powers because the judicial actions might be "revised and controuled [sic] by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts."[13]

In other cases as well, the Supreme Court has said that a case is a nonjusticiable request for an advisory opinion if there is not a substantial likelihood that the federal court decision will have some effect. For example, in *C. & S. Air Lines v. Waterman Corp.*, the Supreme Court said federal courts could not review Civil Aeronautics Board decisions awarding international air routes because the president could disregard or modify judicial ruling.[14] The Court declared: "Judgments

[11] 2 U.S. (2 Call.) 409 (1792).
[12] *Id.* at 411.
[13] *Id.*
[14] 333 U.S. 103 (1948); *see also* United States v. Ferreira, 54 U.S. (13 How.) 40 (1852) (denying jurisdiction because the secretary of treasury could refuse to pay claims under a treaty if they were deemed to not be just and equitable).





within the powers vested in courts by [Article III] may not lawfully be revised, overturned or refused faith and credit by another Department of Government. To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form."[15]

More recently, in *Plaut v. Spendthrift Farm, Inc.*, the Court applied the principle of *Hayburn's Case* to find unconstitutional a federal statute that overturned a Supreme Court decision dismissing certain cases.[16] In 1991, the Court ruled that actions brought under the securities laws, specifically §10(b) and Rule 10(b)(5), had to be brought within one year of discovering the facts giving rise to the violation and three years of the violation.[17] Congress then amended the law to allow cases to go forward that were filed before this decision if they could have been brought under the prior law.

In *Plaut*, the Supreme Court declared the new statute unconstitutional as violating separation of powers. Although the Court acknowledged that *Hayburn's Case* was distinguishable, the Court found *Hayburn's* underlying principle of finality applicable. Justice Scalia, writing for the Court, said that the Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them."[18] He said that because the "judicial power is one to render dispositive judgments," the federal law "effects a clear violation of separation-of-powers."[19] The statute was unconstitutional because it overturned a Supreme Court decision and gave relief to a party that the Court had said was entitled to none.

The difficulty with Justice Scalia's analysis is that Congress always has the ability to overturn Supreme Court statutory interpretation by amending the law. The Court's concern was that Congress was reinstating cases that had been dismissed by the judiciary. But it is not clear why Congress cannot give individuals a cause of action, even if the courts previously ruled that none existed. For example, if the Court ruled that a group of plaintiffs could not obtain relief under a particular civil rights law, Congress surely could amend the law to overturn the decision and also could provide retroactive effect for the new statute. Critics of *Plaut* argue that it is exactly what Congress did with regard to the securities law after the Supreme Court's earlier ruling.

The Court refused to apply *Plaut* in a subsequent case concerning the Prison Litigation Reform Act (PLRA).[20] A provision of the PLRA provides that an injunction concerning prison conditions must be lifted by a federal court on a motion by the government after it has been in place for two years, unless the court finds that continuation of the order is needed to remedy ongoing constitutional violations.[21] The section of the Act also says that if the government moves to end

[15] 333 U.S. at 113.
[16] 514 U.S. 211 (1995).
[17] *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).
[18] 514 U.S. at 218.
[19] *Id.* at 211, 224.
[20] 18 U.S.C. §3626.
[21] 18 U.S.C. §3626(b).

the injunction, the federal court must act within 30 days; if it does not do so, then it must stay the injunction during the pendency of the proceedings.

The effect is that Congress, by statute, is ordering the suspension of a court injunction, essentially overturning a final judgment. But in *Miller v. French*,[22] the Court, in a 5-to-4 decision, distinguished *Plaut* and upheld this provision of the Act. Justice O'Connor, writing for the majority, stressed that "[p]rospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law."[23] Thus, unlike *Plaut*, it is not the "last word of the judicial department."[24] Therefore, even though the PLRA provision had the effect of retroactively overturning a court's order, it was permissible because Congress can require federal courts to revise their injunctions to be in compliance with changes in the law.

An interesting and unusual issue based on *Plaut* arose after the Florida courts ordered the removal of the feeding tube from Theresa Marie Schiavo. She had been in a persistent vegetative state for more than ten years when the court held that she would have wanted food and water withdrawn under these circumstances. Congress adopted a statute, Act for Relief of the Parents of Theresa Marie Schiavo, vesting the federal courts with jurisdiction to adjudicate any claim on behalf of Ms. Schiavo under the Constitution or laws of the United States "relating to the withdrawal of foods, fluids, or medical treatment necessary to sustain her life." The statute provided that the district court should determine all claims de novo "notwithstanding any prior state court determination."

The Act raised issues under *Plaut* because it was Congress, by statute, attempting to overrule the prior judgment of the courts, albeit the Florida state courts. The Act was unambiguous that this was its goal and was explicit that it did not apply to anyone else in similar circumstances. The federal district court twice denied relief to Schiavo's parents, the Eleventh Circuit affirmed, and the Supreme Court denied review. Eleventh Circuit Judge Stanley Birch wrote a concurring opinion in which he cited *Klein* and argued that the federal law was unconstitutional because it "constitute[s] legislative dictation of how a federal court should exercise its judicial functions. . . . It invades the province of the judiciary and violates the separation of powers principle."[25]

More generally, a federal court decision is purely advisory if it has no effect. In fact, several of the other justiciability doctrines prevent review where there is not a sufficient likelihood that the federal court decision will make some difference. One of the requirements for standing is termed redressability: There must be a substantial likelihood that a favorable federal court decision will remedy the claimed injury. Also, if a case is moot, then the federal court decision will not have any effect because the controversy already has been resolved.

The difficulty, however, is predicting in advance whether there is a substantial enough chance that a federal court decision will have an effect so as to avoid being

[22] 530 U.S. 327 (2000).

[23] *Id.*

[24] *Id.* at 347.

[25] Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1273-1274 (11th Cir. 2005) (Birch, J., concurring); *see also* Evan Caminker, *Schiavo* and *Klein*, 22 Constit. Comm. 553 (2005).





an advisory opinion. As Professor Bickel expressed, "the finality or lack of it in judicial judgments is rather a matter of degree."[26]

Therefore, for a case to be justiciable, and for it not to be a request for an advisory opinion, there must be an actual dispute between adverse litigants, and there must be a substantial likelihood that a favorable federal court decision will have some effect. These requirements must be met regardless of whether the plaintiff seeks monetary, injunctive, or declaratory relief.

## Are Declaratory Judgments Impermissible Advisory Opinions?

For a time early in this century, the Supreme Court expressed doubts about whether suits for declaratory judgments could be justiciable.[27] In fact, at one point, Justice Brandeis said "[w]hat the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary."[28]

But soon after this statement was uttered, the Supreme Court said that suits for declaratory judgments are justiciable so long as they meet the requirements for judicial review. In *Nashville, Chattanooga & St. Louis Railway v. Wallace*, the Court upheld the power of federal courts to issue declaratory judgments. A company sought a declaratory judgment that a tax was an unconstitutional burden on interstate commerce.[29] The Supreme Court explained that because the matter would have been justiciable as a request for an injunction, so was the suit for a declaratory judgment capable of federal court adjudication. Justice Stone, writing for the majority, explained, "The Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. [Article III] did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy."[30] The Court emphasized that the focus was on "substance" and "not with form" and that the case was justiciable "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy."[31]

*Wallace* involved a request for relief pursuant to a state declaratory judgment statute. However, soon after *Wallace*, Congress adopted the Declaratory Judgment Act of 1934, authorizing a federal court to issue a declaratory judgment in a "case or actual controversy within its jurisdiction."[32] In *Aetna Life Insurance Co. v.*

[26] Alexander Bickel, The Least Dangerous Branch 117 (1962). Professor Currie points out that the federal government can always refuse to pay money judgments against it, yet this does not make such awards advisory opinions. *See* David Currie, Federal Courts 9 n.l (4th ed. 1990).

[27] See Piedmont & Northern Ry. v. United States, 280 U.S. 469 (1930); Willing v. Chicago Auditorium Assn., 277 U.S. 274 (1928).

[28] *Id.* at 289.

[29] 288 U.S. 249 (1933).

[30] *Id.* at 264.

[31] *Id.*

[32] 28 U.S.C. §2201. *See also* 28 U.S.C. §2202 (authorizing federal courts to enforce declaratory judgments by appropriate further relief).

*Haworth,* the Supreme Court upheld the constitutionality of the Act.[33] The Court concluded that "[w]here there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."[34] In other words, federal courts can issue declaratory judgments if there is an actual dispute between adverse litigants and if there is a substantial likelihood that the favorable federal court decision will bring about some change.

An interesting fairly recent case that found a request for a declaratory judgment to be nonjusticiable was *Calderon v. Ashmus*.[35] The Antiterrorism and Effective Death Penalty Act of 1996 provides that there is a one-year statute of limitation for habeas corpus petitions, except in capital cases where the limitations period is reduced to six months if a state provides adequate counsel for collateral proceedings.[36] Death row inmates in California sought a declaratory judgment that California had not complied with the requirements for providing counsel and thus the six-month statute of limitations for habeas corpus petitions did not apply.

The United States Supreme Court unanimously held that the request for a declaratory judgment was not justiciable. The Court explained that the determination of whether the statute of limitations was six months or a year would not resolve the key controversy between the inmate and the prison: whether the prisoner was entitled to collateral relief. The Court stated that the "disruptive effects of an action such as this are particularly great when the underlying claim must be addressed in a federal habeas proceeding."[37] The effect of *Calderon* is that prisoners may individually receive a determination of the statute of limitations in their case in the context of a ruling on their habeas corpus petition, but no declaratory relief would be available.

Although the Supreme Court was unanimous, this is a puzzling ruling. As explained above, declaratory judgments exist so that people can know their rights in advance. Prisoners obviously have a need to know whether they have six months or a year to file their habeas petitions. *Calderon* means that prisoners will need to guess, and if a prisoner guesses wrong, assuming a year, when it is really six months, the court will deny the petition as time barred. In capital cases, that mistake can literally mean the difference between life and death. Although the determination of the statute of limitations would not resolve whether any particular prisoner was entitled to habeas corpus, it would have settled an important issue between the litigants and thus not have been an advisory opinion.

[33] 300 U.S. 227 (1937).
[34] *Id.* at 221.
[35] 523 U.S. 740 (1998).
[36] 110 Stat. 1214, Pub. L. No. 104-132, April 24, 1996.
[37] *Id.* at 1699.





### Importance of Prohibition of Advisory Opinions

Although the Supreme Court expressly refers to the ban on advisory opinions less frequently than the other justiciability doctrines, this should not be taken as an indication that it is less important. Quite the contrary, the other justiciability doctrines exist largely to ensure that federal courts will not issue advisory opinions, because the prohibition of advisory opinions is at the core of Article III. That is, it is because standing, ripeness, and mootness implement the policies and requirements contained in the advisory opinion doctrine that it is usually unnecessary for the Court to separately address the ban on advisory opinions.

## §2.5 STANDING

### *§2.5.1 Introduction*

Standing is the determination of whether a specific person is the proper party to bring a matter to the court for adjudication. The Supreme Court has declared that "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[1]

Standing frequently has been identified by both Justices and commentators as one of the most confused areas of the law. Professor Vining wrote that it is impossible to read the standing decisions "without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate."[2] Thus, it is hardly surprising that standing has been the topic of extensive academic scholarship and that the doctrines are frequently attacked. Many factors account for the seeming incoherence of the law of standing. The requirements for standing have changed greatly in the past 40 years as the Court has formulated new standing requirements and reformulated old ones. The Court has not consistently articulated a test for standing; different opinions have announced varying formulations for the requirements for standing in federal court.[3] Moreover, many commentators believe that the Court has manipulated standing rules based on its views of the merits of particular cases.[4]

Most of all, though, the extensive attention to the standing doctrine reflects its importance in defining the role of the federal courts in American society. Basic

**§2.5** [1] Warth v. Seldin, 422 U.S. 490, 498 (1975).
[2] Joseph Vining, Legal Identity 1 (1978).
[3] The Court itself observed: "We 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." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982).
[4] *See, e.g.,* Gene Nichol, Jr., Abusing Standing: A Comment on *Allen v. Wright*, 133 U. Pa. L. Rev. 635, 650 (1985); Mark Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L. Rev. 663 (1977).

policy considerations, about which there are strong arguments on both sides, are at the core of the law of standing. The Court has identified several values which are served by limiting who can sue in federal court.

## Values Served by Limiting Standing

First, the standing doctrine promotes separation of powers by restricting the availability of judicial review.[5] The Supreme Court explained that standing "is founded in concern about the proper — and properly limited role — of the courts in a democratic society."[6] In *Allen v. Wright,* the Supreme Court declared that standing is "built on a single basic idea — the idea of separation of powers."[7] The notion is that by restricting who may sue in federal court, standing limits what matters the judiciary will address and minimizes judicial review of the actions of the other branches of government. Indeed, the Court had said that the "standing inquiry is especially rigorous [because of separation of powers concerns] when reaching the merits of a dispute would force [it] to decide whether an action taken by one of the other two branches of the federal government was unconstitutional."[8]

However, concern for separation of powers also must include preserving the federal judiciary's role in the system of government.[9] Separation of powers can be undermined either by overexpansion of the role of the federal courts or by undue restriction. Standing thus focuses attention directly on the question of what is the proper place of the judiciary in the American system of government.

Second, standing is said to serve judicial efficiency by preventing a flood of lawsuits by those who have only an ideological stake in the outcome.[10] But in light of the high costs of litigation, one must wonder how large the burden really would be without the current standing restrictions. Standing also is justified in terms of conserving the Court's political capital. The Court once stated: "Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organs of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches."[11] But the question, of course, is what constitutes judicial abuse and what is appropriate court behavior.

Third, standing is said to improve judicial decision making by ensuring that there is a specific controversy before the court and that there is an advocate with a

[5] *See* Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk L. Rev. 881 (1983) (describing standing as a function of separation of powers). For a criticism of this view, *see* Nichol, Abusing Standing, *supra* note 4.

[6] Warth v. Seldin, 422 U.S. at 498.

[7] 468 U.S. 737, 752 (1984); *see also* Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996) (standing "has a separation of powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not. That is where the 'actual injury' requirement comes from.")

[8] Raines v. Byrd, 521 U.S. 811, 819 (1997).

[9] *See* Susan Bandes, The Idea of a Case, 42 Stan. L. Rev. 227 (1990).

[10] *See, e.g.*, United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

[11] United Pub. Workers v. Mitchell, 330 U.S. 75, 90-91 (1947).





sufficient personal concern to effectively litigate the matter. The Supreme Court has frequently quoted its words from *Baker v. Carr,* that standing requires that a plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[12]

Yet the need for specificity is likely to vary; some cases present pure questions of law in which the factual context is largely irrelevant. For example, if a city government tomorrow banned all abortions within its borders, the surrounding facts in the legal challenge almost surely would be immaterial. Also, the insistence on a personal stake in the outcome of the litigation is a very uncertain guarantee of high quality advocacy. The best litigator in the country who cared deeply about an issue could not raise it without a plaintiff with standing; but a pro se litigant, with no legal training, could pursue the matter on his or her own behalf.

Fourth, standing requirements are said to serve the value of fairness by ensuring that people will raise only their own rights and concerns and that people cannot be intermeddlers trying to protect others who do not want the protection offered. The Court explained, "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not."[13] But standing requirements might be quite unfair if they prevent people with serious injuries from securing judicial redress.[14]

Thus, although important values are served by the doctrine of standing, these same values also can often be furthered by expanding who has standing. Ultimately, the law of standing turns on basic normative questions about which there is no consensus.[15]

## Requirements for Standing

The Supreme Court has announced several requirements for standing, all of which must be met in order for a federal court to adjudicate a case. The Court has said that some of these requirements are constitutional; that is, they are derived from the Court's interpretation of Article III and as constitutional restrictions they cannot be overridden by statute. Specifically the Supreme Court has identified

[12] 369 U.S. 186, 204 (1962).

[13] Singleton v. Wulff, 428 U.S. 106, 113-114 (1976). For an excellent explanation of this fairness argument, *see* Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 306-310 (1979).

[14] *See* Richard Fallon, Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. Rev. 1 (1984).

[15] Indeed, some prominent commentators argue that the standing doctrine is unnecessary and that standing should simply be a question on the merits of the plaintiff's claim. *See* William Fletcher, The Structure of Standing, 98 Yale L.J. 221, 223 (1988) ("The essence of a true standing question is . . . [does] the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked." *Id.* at 229).

three constitutional standing requirements.[16] First, the plaintiff must allege that he or she has suffered or imminently will suffer an injury. Second, the plaintiff must allege that the injury is fairly traceable to the defendant's conduct. Third, the plaintiff must allege that a favorable federal court decision is likely to redress the injury. The requirement for injury is discussed in §2.5.2. The latter two requirements — termed causation and redressability — often have been treated by the Court as if they were a single test: Did the defendant cause the harm such that it can be concluded that limiting the defendant will remedy the injury?[17] Accordingly, these two requirements are considered together in §2.5.3.

In addition to these constitutional requirements, the Court also has identified three prudential standing principles. The Court has said that these are based not on the Constitution, but instead on prudent judicial administration. Unlike constitutional barriers, Congress may override prudential limits by statute. First, a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court. Second, a plaintiff may not sue as a taxpayer who shares a grievance in common with all other taxpayers. However, in its most recent decision, the Supreme Court indicated that the bar on citizen suits, obviously quite similar to the limit on taxpayer suits, is constitutional and not prudential.[18] Third, a party must raise a claim within the zone of interests protected by the statute in question. These three standing requirements are discussed in §§2.5.4, 2.5.5, and 2.5.6, respectively.[19]

Although the requirements for standing must be met in every lawsuit filed in federal court, the issue frequently arises in cases presenting important constitutional and public law statutory questions. As such, standing is crucial in defining the scope of judicial protection of constitutional rights. Because standing is jurisdictional, federal courts can raise it on their own and it may be challenged at any point in the federal court proceedings.

### §2.5.2 *Injury*

The Supreme Court has said that the core of Article III's requirement for cases and controversies is found in the rule that standing is limited to those who allege that they personally have suffered or imminently will suffer an injury. The Court explained, "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official

[16] For the Court's articulation of these three constitutional standing requirements, *see, e.g.*, Northeastern Florida Contractors v. Jacksonville, 508 U.S. 656, 663-664 (1993).

[17] It should be noted that the Supreme Court indicated that causation and redressability are separate and independent standing barriers. Allen v. Wright, 468 U.S. at 758-759.

[18] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), discussed below.

[19] Specialized standing problems, such as standing for legislators and standing for government entities, are not covered. For a discussion of these topics, *see* Erwin Chemerinsky, Federal Jurisdiction (5th ed. 2007).





conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical."[20]

The injury requirement is viewed as advancing the values underlying the standing and justiciability doctrines. Requiring an injury is a key to ensuring that there is an actual dispute between adverse litigants and that the court is not being asked for an advisory opinion. The judicial role in the system of separation of powers is to prevent or redress particular injuries. Judicial resources are thought to be best saved for halting or remedying concrete injuries. An injury is said to give the plaintiff an incentive to vigorously litigate and present the matter to the court in the manner best suited for judicial resolution. An injury ensures that the plaintiff is not an intermeddler, but rather someone who truly has a personal stake in the outcome of the controversy.

#### Requirement for a Personally Suffered Injury

Two questions arise in implementing the injury requirement: What does it mean to say that a plaintiff must personally suffer an injury; and what types of injuries are sufficient for standing? Each issue warrants separate consideration.

The Supreme Court has declared that the "irreducible minimum" of Article III's limit on judicial power is a requirement that a party "show he personally has suffered some actual or threatened injury."[21] Two environmental cases from the early 1970s illustrate this requirement. In *Sierra Club v. Morton*, the Sierra Club sought to prevent the construction of a ski resort in Mineral King Valley in California.[22] The issue was whether the plaintiff was "adversely affected or aggrieved" so as to be entitled to seek judicial review under the Administrative Procedures Act of the Interior Department's decision. The Sierra Club, a national membership organization dedicated to protecting the environment, asserted "a special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country."

The Supreme Court found this insufficient for standing purposes because there was no allegation that any of the Sierra Club's members ever had used Mineral King Valley. The Court stated: "The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of respondents."[23] The Court concluded that "a mere interest in a problem, no matter how long standing the interest and no matter how qualified the organization is in evaluating

[20] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983) (citations omitted); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[By injury in fact we mean] an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'").

[21] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

[22] 405 U.S. 727 (1972).

[23] *Id.* at 735.

the problem, is not sufficient."[24] Justice White is quoted in *The Brethren* as saying, "Why didn't the Sierra Club have one goddamn member walk through the park and then there would have been standing to sue?"[25] In fact, on remand, the Sierra Club amended its complaint to allege that its members had used the park for activities that would be disrupted by the ski resort, and it was then accorded standing.

*Sierra Club* can be contrasted with another decision handed down a year later involving a group seeking to protect the environment. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Supreme Court upheld the standing of a group of students to seek review under the Administrative Procedures Act of an Interstate Commerce Commission decision to increase freight rates.[26] A group of law students at George Washington University Law Center contended that the hike in railroad freight rates would discourage the use of recycled goods because of the extra cost of shipping them. The lawsuit claimed that a decrease in recycling would lead to more use of natural resources and thus more mining and pollution. The students maintained that their enjoyment of the forests, streams, and mountains in the Washington, D.C., area would be lessened as a result. The Supreme Court upheld the group's standing, concluding that aesthetic and environmental injuries are sufficient for standing so long as the plaintiff claims to suffer the harm personally.

A comparison of *Sierra Club* and *SCRAP* is revealing. The plaintiffs complaint must specifically allege that he or she has personally suffered an injury. Although what constitutes a sufficient injury is discussed in detail below, it is worth noting that these cases establish that an ideological interest in a matter is not enough for standing. Yet these cases also raise important policy questions. Why assume in *Sierra Club* that the only ones injured by the destruction of the park are those who already have used it? As Professor David Currie explained, why cannot a person upset by the destruction of the last grizzly bear be allowed to sue, even if he or she never has seen a grizzly?[27]

The Supreme Court has continued to apply *Sierra Club*.[28] In *Lujan v. National Wildlife Federation*, the plaintiffs challenged the federal government policy lessening the environmental protection of certain federal lands.[29] Two members of the National Wildlife Federation submitted affidavits that they used land "in the vicinity" of that which was reclassified and that the increased mining activity would destroy the area's natural beauty. The Supreme Court, however, said that this allegation was too general to establish a particular injury, and thus the defendant

[24] *Id.* at 739.

[25] Bob Woodward & Scott Armstrong, The Brethren 164 n.* (1979).

[26] 412 U.S. 669 (1973).

[27] David Currie, Federal Courts: Cases and Materials 42 (4th ed. 1990).

[28] *See also* Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122 (1995) (holding that the Director of the Office of Workers' Compensation Programs is not an aggrieved person under the Longshore and Harbor Workers' Compensation Act and thus did not have standing to seek review of decisions by the Benefits Review Board that deny individuals benefits).

[29] 497 U.S. 871, 883 (1990).





was entitled to prevail on summary judgment because of the plaintiffs' lack of standing. The Court quoted the district court's finding that thousands of acres were opened to development and "[a]t a minimum, [the] . . . affidavit is ambiguous regarding whether the adversely affected lands are the ones she uses."[30] In other words, the plaintiffs were not entitled to standing unless they could demonstrate that they used specific federal land that was being mined under the new federal regulations.

The Supreme Court subsequently applied this principle in *United States v. Hays* to hold that only a person residing within an election district may argue that the lines for the district were unconstitutionally drawn in violation of equal protection.[31] The Supreme Court has held that the government may use race in drawing election district lines only if it meets strict scrutiny, even if the purpose is to increase the likelihood of electing minority-race representatives.[32] In *Hays*, the Court held that only individuals residing within a district suffer an injury from how the lines for that district are drawn. The Court said that a "plaintiff [who] resides in a racially gerrymandered district . . . has standing to challenge the legislature's action," but a plaintiff who resides outside the district fails to suffer "the injury our standing doctrine requires."[33]

It is understandable that the Court would want to limit who has standing to challenge election district lines, but it seems hard to justify restricting standing to those who actually reside within the districts. Why shouldn't a voter residing in a contiguous district, who claims to have been excluded because of the race-based districting, also have standing?[34] Drawing lines for one election district inevitably affects the lines for neighboring districts. It therefore seems arbitrary to say that those within the district suffer an injury under the equal protection clause and all others do not.

### Application of Requirement for Personally Suffered Injury: *City of Los Angeles v. Lyons*

Perhaps the most important application of the requirement for a personally suffered injury is the requirement that a plaintiff seeking injunctive or declaratory relief must show a likelihood of future harm. This was the holding in *City of Los*

[30] *Id.* at 888 (citation omitted).

[31] 515 U.S. 737 (1995). The Court reaffirmed and applied this limitation on standing to challenge election districts in Shaw v. Hunt, 517 U.S. 899, 904-905 (1996), and Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion).

[32] *See e.g.*, Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993), discussed in §9.3.5.3 and §10.8.5.

[33] 515 U.S at 745. Although the Court expressly said that the injury requirement was not met, the Court also said that the case presented a "generalized grievance." *Id.* at 745. This raises the question of whether the Court continues to believe that the generalized grievance requirement is a separate standing rule or simply another way of saying that there is not an injury sufficient for standing purposes.

[34] *But see* Pamela S. Karlan, All Over the Map: The Supreme Court's Voting Rights Trilogy, 1993 Sup. Ct. Rev. 245 (arguing that even voters who live in majority-minority districts should not have standing).

brokerage services at locations around the country. The association claimed that this violated a federal law preventing banks from creating branch banks in other states.

The Supreme Court said that the plaintiff had standing because it was injured and because it was within the zone of interests intended to be protected by the statute. The Court explained: "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[233] The Court explained that the zone of interests test was "not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."[234] On the merits, the Court ruled in favor of the plaintiffs that the regulation was inconsistent with federal law.

The Court's most recent applications of the zone of interests test, like *Clarke,* involved situations in which the Court found that its requirements were met. In *Bennett v. Spear,* the Court found that the authorization for citizen suits within the Endangered Species Act eliminated the requirement that the plaintiffs be within the zone of interests created by the statute.[235] In *Bennett,* ranch operators and irrigation districts sued under the citizen suit provision of the Endangered Species Act to challenge the restriction of the use of reservoir water to protect two species of fish. Specifically, the Bureau of Reclamation determined that the operation of the Klamath Irrigation Project might affect two endangered species of fish and required the maintenance of water levels in the reservoir.

The ranch operators and irrigation districts sued and alleged an economic injury from the proposed federal action. The district court and court of appeals found that this was not within the zone of interests of the Endangered Species Act, which was intended to protect environmental interests. The United States Supreme Court reversed. Justice Scalia, writing for the Court, concluded that the authorization for citizen suits within the Act was meant to expand federal court standing to the maximum permitted under Article III. Therefore, the statute overrides prudential standing requirements, such as the zone of interests test. The Court concluded: "It is true that the plaintiffs here are seeking to prevent application of environmental restrictions rather than to implement them. But the 'any person' formulation applies to all of the causes of action authorized by [the law] — not only to private violators of environmental restrictions, and not only to actions against the secretary asserting underenforcement . . . , but also to actions against the secretary asserting overenforcement."[236]

More recently, in *National Credit Union Administration v. First National Bank & Trust Co.,* the Court found that banks had standing to challenge a change in federal regulations that would allow credit unions to compete more directly with the

[233] *Id.* at 399.
[234] *Id.* at 399-400.
[235] 520 U.S. 154 (1997).
[236] 520 U.S. at 166.





banks.[237] Although there was no indication that the federal law restricting credit union membership was intended to protect the economic interests of banks, the Court concluded that plaintiffs are not required to show that Congress intended to benefit them. Rather, plaintiffs need only demonstrate that the statute "arguably" protects their interests. Based on this relaxed standard, the Court concluded that the federal law restricting the operation of credit unions arguably protects the interests of their competitors.

In contrast, in *Air Courier Conference v. American Postal Workers Union,* the postal workers' union challenged the United States Postal Service's suspension of its monopoly over "extremely urgent" letters under the Postal Express Statutes.[238] After the Postal Service suspended the application of its monopoly over certain routes, postal unions challenged the decision. The Supreme Court ruled that the unions lacked standing because they were not within the zone of interests protected by the Postal Express statutes. In an opinion by Chief Justice Rehnquist, the Court began by noting that "[t]he particular language of the statutes provides no support for respondents' assertion that Congress intended to protect jobs with the Postal Service."[239] Additionally, the Court noted that the legislative history did not indicate an intent to benefit postal workers. The Court distinguished other cases where the zone of interests test had been met by pointing to statutory language or legislative history creating interests in those instances.

*Air Courier* is important in showing that the zone of interests test is not toothless. The Court concluded that a person or group can claim to be within the zone of interests protected by law only if the statute's text or history justifies such a conclusion.

### Zone of Interests Test Likely Applies Only in Cases Under Administrative Procedures Act

There is a strong argument that the zone of interests test is an additional standing requirement only in cases seeking review of agency decisions under the Administrative Procedures Act. In *Clarke,* the Court explained that "[t]he principal cases in which the zone of interests test has been applied are those involving claims under the APA and the test is most usefully understood as a gloss on the meaning of §702 [which authorizes judicial review]."[240] The *Clarke* Court, however, spoke of the zone of interests protected by both statutory and constitutional provisions.

Furthermore, Professor Laurence Tribe persuasively argues that the zone of interests test is superfluous in constitutional litigation. Professor Tribe explains that in constitutional cases, the requirement that the plaintiff be within the zone of interests is "another way of saying that the right claimed is one possessed not by the party asserting it but rather by others."[241] If a person is asserting an injury to

[237] 522 U.S. 479 (1998).
[238] 498 U.S. 517 (1991).
[239] *Id.* at 524-525.
[240] 479 U.S. at 400 n.16.
[241] Laurence Tribe, American Constitutional Law (3d ed. 2000) 446.

his or her constitutional rights, the zone of interests test is met. If an individual is not asserting a personally suffered wrong, then the requirement for injury or at least the bar against third-party standing would preclude review.

## §2.6 RIPENESS

### §2.6.1 *Introduction*

#### Ripeness Defined

Ripeness, like mootness (discussed in the next section), is a justiciability doctrine determining when review is appropriate. While standing is concerned with who is a proper party to litigate a particular matter, ripeness and mootness determine when that litigation may occur. Specifically, the ripeness doctrine seeks to separate matters that are premature for review, because the injury is speculative and never may occur, from those cases that are appropriate for federal court action.[1]

Although the phrasing makes the questions of who may sue and when they may sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness. If no injury has occurred, the plaintiff might be denied standing or the case might be dismissed as not ripe. For example, in *O'Shea v. Littleton,* the Supreme Court declared nonjusticiable a suit contending that the defendants, a magistrate and a judge, discriminated against blacks in setting bail and imposing sentences.[2] The Court observed that none of the plaintiffs currently faced proceedings in the defendants' courtrooms and hence "the threat of injury from the alleged course of conduct they attack is too remote to satisfy the case-or-controversy requirement."[3] This decision could be placed under the label of either standing — no injury was alleged; or ripeness — the type of injury was adequate but had not yet occurred.

Perhaps the distinction between standing and ripeness is that standing focuses on whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff has personally suffered that harm, whereas ripeness centers on whether that injury has occurred yet. Again, while the distinction will work in some instances, in others it is problematic because the question of whether the plaintiff has suffered a harm is integral to both standing and ripeness concerns. For example, in *Sierra Club v. Morton,* the Supreme Court dismissed, on standing grounds, a challenge by an environmental group to the construction of a ski resort in a national park.[4] The Court emphasized

§2.6 [1] Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).
[2] 414 U.S. 488 (1974).
[3] *Id.* at 489.
[4] 405 U.S. 727 (1972), discussed in more detail in §2.5.2.





the failure of the plaintiff to allege that it or its members ever had used the park. This standing decision could be viewed as a ripeness ruling as well, if ripeness is understood as focusing on whether an injury that is sufficient to meet Article III has been suffered yet.

To the extent that the substantive requirements overlap and the result will be the same regardless of whether the issue is characterized as ripeness or standing, little turns on the choice of the label. However, for the sake of clarity, especially in those cases where the law of standing and ripeness is not identical, ripeness can be given a narrower definition that distinguishes it from standing and explains the existing case law. Ripeness properly should be understood as involving the question of *when may a party seek preenforcement review of a statute or regulation.* Customarily, a person can challenge the legality of a statute or regulation only when he or she is prosecuted for violating it. At that time, a defense can be that the law is invalid, for example, as being unconstitutional.

There is an unfairness, however, to requiring a person to violate a law in order to challenge it. A person might unnecessarily obey an unconstitutional law, refraining from the prohibited conduct, rather than risk criminal punishments. Alternatively, a person might violate a statute or regulation, confident that it will be invalidated, only to be punished when the law is upheld. A primary purpose of the Declaratory Judgment Act was to permit people to avoid this choice and obtain preenforcement review of statutes and regulations.

The Declaratory Judgment Act does not allow preenforcement review in all instances. Rather, it permits federal court decisions only "[i]n a case of actual controversy."[5] In upholding the constitutionality of the Declaratory Judgment Act, the Supreme Court emphasized that the statute did not permit advisory opinions because it limited federal court action to justiciable cases.[6] Ripeness, then, is best understood as the determination of whether a federal court can grant preenforcement review; for example, when may a court hear a request for a declaratory judgment, or when must it decline review?

The Supreme Court has stated that in deciding whether a case is ripe it looks primarily to two considerations: "the hardship to the parties of withholding court consideration" and "the fitness of the issues for judicial decision."[7] Ripeness is said to reflect both constitutional and prudential considerations. The focus on whether there is a sufficient injury without preenforcement review seems inextricably linked with the constitutional requirement for cases and controversies, whereas the focus on the quality of the record seems prudential.[8]

[5] 28 U.S.C. §2201.
[6] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937); for a discussion of the constitutionality of the Declaratory Judgment Act and why it is not an authorization for unconstitutional advisory opinions, *see* §2.4.
[7] Abbott Labs. v. Gardner, 387 U.S. at 149.
[8] At times, the Court describes ripeness as constitutional; *see, e.g.,* Public Serv. Commn. of Utah v. Wycoff Co., 344 U.S. 237, 242-245 (1952); but at other times, the Court describes the ripeness test as prudential; *see, e.g.,* Buckley v. Valeo, 424 U.S. 1, 114-118 (1976). In large part, this difference might reflect the aspects of ripeness at issue in particular cases.

and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice that they need have under the regime of the declaratory judgment and our constitutional system."[38]

More recently, in *Reno v. Catholic Social Services,* the Supreme Court held that a challenge to Immigration and Naturalization Service (INS) regulations had to be dismissed on ripeness grounds because it was too speculative that anyone would be injured by the rules.[39] The Immigration Reform and Control Act of 1986 provided that before illegal aliens residing in the United States could apply for legalization, they had to apply for temporary resident status. Temporary resident status required a showing that a person continually resided in the United States since January 1, 1982, and maintained a continuous physical presence since November 6, 1986. The INS adopted many regulations to implement this law.

A class of plaintiffs, Catholic Social Services, challenged some of the INS regulations. The Supreme Court, in an opinion by Justice Souter, applied *Abbott Laboratories v. Gardner* and held that the case was not ripe for review. The Court said that it was entirely speculative whether any members of the class would be denied legalization because of the regulations. The Court said that the case might be ripe for review if the immigrants took the additional step of applying for legalization.

In other words, *Poe v. Ullman* and *Reno v. Catholic Social Services, Inc.* emphasize that a case will be dismissed on ripeness grounds if a federal court perceives the likelihood of harm as too speculative. Obviously, courts have a great deal of discretion in deciding what is a sufficient likelihood of hardship to meet the ripeness requirement.

### §2.6.3 *Criteria for Determining Ripeness: The Fitness of the Issues and Record for Judicial Review*

#### Is There Significant Gain to Waiting for an Actual Prosecution?

The existence of substantial hardship without judicial review is one of the two criteria articulated by the Court for determining ripeness. The other issue concerns the fitness of the issues for judicial review. The more a question is purely a legal issue the analysis of which does not depend on a particular factual context, the more likely it is that the Court will find ripeness. But the more judicial consideration of an issue would be enhanced by a specific set of facts, the greater the probability that a case seeking preenforcement review will be dismissed on ripeness grounds.

For example, in *Socialist Labor Party v. Gilligan,* the Supreme Court dismissed on ripeness grounds a challenge to a state law that allegedly limited the ability of the plaintiff to place candidates on the ballot for elections.[40] The law required

[38] 367 U.S. at 513 (Douglas, J., dissenting).
[39] 509 U.S. 43 (1993).
[40] 406 U.S. 583 (1972).





candidates to sign an affidavit that they would not attempt to overthrow the government by force or violence. The Court concluded that "the record . . . now before this Court, is extraordinarily skimpy in the sort of proved or admitted facts that would enable us to adjudicate this claim."[41] The Court said that although the plaintiff might have standing to challenge the law, "their case has not given any particularity to the effect on them of Ohio's affidavit requirement."[42]

Another case in which the Court found an insufficient factual record to justify a conclusion of ripeness was *California Bankers Association v. Schultz.*[43]

A bank, its customers, and bankers' organizations and associations sued to enjoin enforcement of a federal law that created record-keeping and reporting requirements for banks and other financial institutions. The claim, in part, was that the reporting requirements violated the First Amendment rights of bank customers. The Court said that the claim was not ripe, emphasizing the need for a concrete factual situation to facilitate judicial review. The Court concluded: "This Court, in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred."[44]

#### Relationship Between the Two Ripeness Criteria

The interaction of these two requirements for determining ripeness is not clear. Some commentators have suggested that ripeness can be found if either is met. Professor Tribe, for example, states that "[c]ases in which early legal challenges are held to be ripe normally present either or both of two features: significant present injuries . . . or legal questions that do not depend for their resolution on an extensive factual background."[45]

But the Court's decisions seem to indicate that both requirements must be met. For example, in *Poe v. Ullman,* the case was deemed not ripe even though it was a purely legal question that did not depend on an extensive factual background. In his dissenting opinion in *Poe,* Justice Harlan said: "I cannot see what further elaboration is required to enable us to decide the appellants' claims, and indeed neither the plurality nor the concurring opinion . . . suggests what more grist is needed before the judicial mill could turn."[46] Conversely, in *Socialist Workers Party v. Gilligan,* the Court admitted the existence of standing (and thus of an injury), but deemed the matter to be unripe because of the absence of an adequate record.[47]

Thus, while it appears that preenforcement review is possible only if there is both hardship to its denial and an adequate factual record, it is unclear whether a

[41] *Id.* at 587.
[42] *Id.* at 588.
[43] 416 U.S. 21 (1974).
[44] *Id.* at 56.
[45] Laurence Tribe, American Constitutional Law 80 (3d ed. 2000).
[46] 367 U.S. at 528 (Harlan, J., dissenting).
[47] 406 U.S. at 588.

greater hardship might compensate for less in the way of a factual record or vice versa. Because the hardship requirement is constitutionally based, in all likelihood it is less flexible, whereas the prudential concern about the record is to be given less weight when there is a compelling need for immediate judicial review.

Finally, the relationship of ripeness to other doctrines should be noted. Ripeness is obviously closely related to requirements for exhaustion of administrative remedies before seeking federal court review; a case is not ripe until such exhaustion has occurred.[48] In fact, in cases claiming a government taking of property without just compensation, the Court has held that the matter is not ripe until compensation has been sought and denied through the available administrative procedures.[49]

## §2.7 MOOTNESS

### *§2.7.1 Description of the Mootness Doctrine*

An actual controversy must exist at all stages of federal court proceedings, at both the trial and appellate levels. If events subsequent to the filing of the case resolve the dispute, the case should be dismissed as moot. The Supreme Court, quoting Professor Henry Monaghan, explained that "mootness [is] the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[1]

#### Circumstances That Might Cause a Case to Be Moot

Many different types of events might render a case moot. For example, a case is moot if a criminal defendant dies during the appeals process or if a civil plaintiff dies where the cause of action does not survive death.[2] Also, if the parties settle the matter, a live controversy obviously no longer exists.[3] If a challenged law is

[48] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

[49] *See* San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005); Williamson County Regional Planning Commn. v. Hamilton Bank, 473 U.S. 172 (1984).

**§2.7** [1] United States Parole Commn. v. Geraghty, 445 U.S. 388, 397 (1980), quoting Henry Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973).

[2] Dove v. United States, 423 U.S. 325 (1976).

[3] *See, e.g.*, United Airlines, Inc. v. McDonald, 432 U.S. 385, 400 (1977) (Powell, J., dissenting) ("The settlement of an individual claim typically moots any issues associated with it."); Stewart v. Southern Ry., 315 U.S. 283 (1942). Settlement must be distinguished from a situation in which the defendant voluntarily agrees to refrain from a practice, but is free to resume it at any time. As discussed below, the latter does not moot the case.





repealed or expires, the case is moot.[4] Essentially, any change in the facts that ends the controversy renders the case moot. Thus, a defendant's challenge to a state law denying him pretrial bail was deemed moot after his conviction,[5] and a suit by students to enjoin a school's censorship of a student newspaper was dismissed as moot after the students graduated.[6]

#### Why Have a Mootness Doctrine?

The Supreme Court frequently has explained that the mootness doctrine is derived from Article III's prohibition against federal courts issuing advisory opinions.[7] By definition, if a case is moot, there no longer is an actual controversy between adverse litigants. Also, if events subsequent to the initiation of the lawsuit have resolved the matter, then a federal court decision is not likely to have any effect. Hence, neither of the prerequisites for federal court adjudication is fulfilled.[8]

Additionally, many of the values underlying the justiciability doctrines also explain the mootness rules. Mootness avoids unnecessary federal court decisions, limiting the role of the judiciary and saving the courts' institutional capital for cases truly requiring decisions.[9] On the other hand, mootness might not save judicial resources; nor is it necessary to ensure a concrete factual setting in which to decide an issue. When a case is dismissed on appeal, there is a fully developed record and an opportunity for a definitive resolution of an issue. Dismissing such a case as moot might cause the same question to be litigated in many other courts until it is finally resolved by the Supreme Court.[10]

Perhaps it is because of these competing policy considerations that the Supreme Court has spoken of "the flexible character of the Article III mootness

[4] *See, e.g.*, Burke v. Barnes, 479 U.S. 361, 365 (1987) (bill expired during pendency of appeal, rendering moot the question of whether the president's pocket veto prevented bill from becoming law); United States Dept. of Treasury v. Galioto, 477 U.S. 556 (1986) (amendment to federal statute rendered the case moot); Kremens v. Bartley, 431 U.S. 119, 128 (1977) (statutes providing for commitment of minors to institutions were repealed, rendering the case moot); *but see* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) (repeal of a city ordinance was not moot where the city was likely to reenact it after completion of legal proceedings), discussed below.

[5] *See, e.g.*, Murphy v. Hunt, 455 U.S. 478, 481-482 (1982) (challenge to a state law denying bail to those accused of violent sex crimes dismissed as moot after the defendant's conviction).

[6] Board of School Commrs. v. Jacobs, 420 U.S. 128, 130 (1975).

[7] *See, e.g.*, SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972); Hall v. Beals, 396 U.S. 45, 48 (1969). *But see* Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (arguing that mootness doctrine is primarily prudential and not constitutionally based).

[8] *See* Church of Scientology of California v. United States, 506 U.S. 9, 11 (1992).

[9] *See, e.g.*, Firefighter's Local 1784 v. Stotts, 467 U.S. 561, 596 (1984) (Blackmun, J., dissenting) (a central purpose of mootness doctrine is to avoid an unnecessary ruling on the merits).

[10] Chief Justice Rehnquist urged a new exception to the mootness doctrine for cases that become moot while pending before the Supreme Court. *See* Honig v. Doe, 484 U.S. 305, 330 (1988). *See also* Gene Nichol, Moot Cases, Chief Justice Rehnquist and the Supreme Court, 22 Conn. L. Rev. 703 (1990) (arguing that mootness should be regarded as prudential and that the Supreme Court should have discretion to avoid dismissing cases that become moot while pending before the Court).

doctrine."[11] This flexibility is manifested in four exceptions to the mootness doctrine. Cases are not dismissed as moot if there are secondary or "collateral" injuries; if the issue is deemed a wrong capable of repetition yet evading review; if the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; and if it is a properly certified class action suit. These exceptions are discussed below.

### Procedural Issues

Procedurally, mootness can be raised by a federal court on its own at any stage of the proceedings.[12] If a case is deemed moot by the United States Supreme Court, the Court will vacate the lower court's decision and remand the case for dismissal.[13] By vacating the lower court's decision, the Supreme Court leaves the legal issue unresolved for future cases to decide.

In *U.S. Bancorp Mortgage Co. v. Banner Mall Partnership,* the Court held that vacatur of a lower court opinion is not appropriate when a voluntary settlement of an underlying dispute makes a case moot.[14] The Court recognized that allowing such vacating of lower court opinions might facilitate settlements as losing parties may choose to settle in order to vacate an unfavorable opinion that could harm their position in future litigation. Also, vacating the lower court opinion could prevent an erroneous decision from remaining on the books. Nonetheless, the Court unanimously held that voluntary settlement does not justify vacatur of a lower court opinion. Nothing about the settlement undermines the reasoning of the lower court and warrants the vacating of its decision.[15]

### Overview of the Exceptions to the Mootness Doctrine

Most of the cases dealing with the mootness issue have focused on the exceptions to the mootness doctrine. These are situations where a federal court should not dismiss a case as moot even though the plaintiff's injuries have been resolved. The common issue concerning each of these exceptions is whether the policy considerations served by them justify allowing review in a case where there is not an actual dispute between adverse litigants and where a favorable court decision will not effect a change. On the one hand, critics of these exceptions

[11] United States Parole Commn. v. Geraghty, 445 U.S. at 400. For an excellent argument that mootness should be regarded as prudential and not constitutional, *see* Evan Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 Harv. L. Rev. 605 (1992). Others argue that it is partially a prudential doctrine. *See, e.g.*, Matthew I. Hall, The Partially Prudential Doctrine of Mootness, 77 Geo. Wash. L. Rev. 562 (2009).

[12] *See, e.g.*, North Carolina v. Rice, 404 U.S. 244, 246 (1971).

[13] United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.")

[14] 513 U.S. 18 (1994).

[15] *See* Jill E. Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991).





might argue that expediency does not justify a departure from Article III and that the Court wrongly has been much more flexible in carving exceptions to mootness than it has been in dealing with parallel doctrines such as standing. But others might argue that important policy objectives are served by the exceptions and that the exceptions effectuate the underlying purpose of Article III in ensuring judicial review of allegedly illegal practices.

## §2.7.2 *Exceptions to the Mootness Doctrine: Collateral Consequences*

The first exception occurs when a secondary or "collateral" injury survives after the plaintiff's primary injury has been resolved. Although this is referred to as an exception to the mootness doctrine,[16] actually the case is not moot because some injury remains that could be redressed by a favorable federal court decision.

### Criminal Cases

For example, a challenge to a criminal conviction is not moot, even after the defendant has completed the sentence and is released from custody, when the defendant continues to face adverse consequences of the criminal conviction. Criminal convictions, especially for felonies, cause the permanent loss of voting privileges in many states, prevent individuals from obtaining certain occupational licenses, and increase the severity of sentences if there is a future offense. Thus, the Court has concluded that even if the primary injury, incarceration, no longer exists, the secondary or collateral harms are sufficient to prevent the case from being dismissed on mootness grounds.

In *Sibron v. New York,* two defendants challenged the legality of evidence seized from them during a stop-and-frisk.[17] Although the defendants had completed their six-month sentences, the Court held that their challenge to the constitutionality of their convictions was not moot. The Court explained that "the obvious fact of life [is] that most criminal convictions do in fact entail adverse collateral legal consequences. The mere possibility that this will be the case is enough to preserve a criminal case from ending ignominiously in the limbo of mootness."[18]

Similarly, in *Carafas v. LaVallee,* a defendant convicted of burglary in state court was allowed to present a petition for habeas corpus in federal court challenging the constitutionality of his conviction despite the fact that he had been unconditionally released from custody.[19] The Court stated that "[i]n consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified time; he cannot vote in any election held in

[16] Sibron v. New York, 392 U.S. 40, 53 (1968) (describing collateral consequences as an exception to the mootness doctrine).

[17] 392 U.S. 40 (1968).

[18] *Id.* at 55 (citations omitted).

[19] 391 U.S. 234 (1968).

federal court dismiss a case as moot when a defendant voluntarily halts a challenged practice.

### §2.7.5 *Exceptions to the Mootness Doctrine: Class Actions*

The Supreme Court has taken a particularly flexible approach to the mootness doctrine in class action suits. In a series of cases, the Supreme Court has held that a properly certified class action suit may continue even if the named plaintiff's claims are rendered moot. The Court has reasoned that the "class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the [plaintiff]," and thus so long as the members of the class have a live controversy, the case can continue.[83] Furthermore, the Court has concluded that a plaintiff may continue to appeal the denial of class certification even after his or her particular claim is mooted.

#### Properly Certified Class Action Not Moot

*Sosna v. Iowa* was the first major departure from traditional mootness rules for class action suits.[84] The plaintiff, Mrs. Sosna, initiated a class action suit challenging an Iowa law requiring residence in the state for one year in order to obtain a divorce from an Iowa court. The class action was properly certified, and the district court ruled against the plaintiffs on the merits. While the appeals were pending, Mrs. Sosna satisfied the durational residency requirement, thus resolving her claim. The Supreme Court, in an opinion by Justice Rehnquist, held that the suit was not moot. The Court emphasized that the controversy "remains very much alive for the class of persons she has been certified to represent."[85] The Court explained that a class action suit should not be dismissed on mootness grounds so long as the named plaintiff had a live controversy when the suit was filed, there was a properly certified class action, and there are members of the class whose claims are not moot.

The Supreme Court applied *Sosna* in other cases involving class action suits. For example, in *Gerstein v. Pugh,* a properly certified class action suit challenged the constitutionality of a Florida practice of holding individuals without a judicial hearing determining probable cause.[86] Although the named plaintiff's claim was resolved because the pretrial detention ended, the case was not moot because there was a properly certified class action and the members of the class continued to present a live controversy.

[83] Sosna v. Iowa, 419 U.S. 393, 399 (1975).
[84] *Id.*
[85] *Id.* at 401. The Court also explained that the case could fit into the exception for wrongs capable of repetition yet evading review because of the fact that residency requirement was shorter than the usual course of litigation. *Id.* at 401 n.9.
[86] 420 U.S. 103 (1975).





In several cases, decided the same year as *Sosna,* the Supreme Court concluded that the mootness doctrine required the dismissal of class action suits that were not properly certified when the named plaintiff's claim became moot.[87] The underlying rationale seems to be that when there is a properly certified class action, the entire class is the actual plaintiff, and as long as a live controversy exists for some of the plaintiffs, the case should not be deemed moot.

The Court expanded the exception for class action suits in *Franks v. Bowman Transportation Co.*[88] In *Franks,* the plaintiff brought a class action suit challenging alleged employment discrimination. By the time the case came to the Supreme Court, it was clear that the named plaintiff did not have a possible claim of discrimination even though other class members did. The Court said that even if the named plaintiff never had a legitimate claim for relief, a class action is not moot when it was properly certified and when some members continue to have live claims.

#### Appeals of Denial of Class Certification Not Moot

*Sosna, Gerstein,* and *Franks* all involved properly certified class actions. The Court first considered noncertified class actions in *United Airlines, Inc. v. McDonald.*[89] There the Court held that a member of the proposed class may intervene to challenge and appeal the denial of class certification after the named plaintiff's claims are mooted.

Subsequently, the Court held that a person seeking to initiate a class action suit may continue to appeal the denial of certification even after his or her own claims are rendered moot. In *United States Parole Commission v. Geraghty,* a prisoner who was denied parole on the basis of the Parole Commission's guidelines sought to bring a class action suit challenging the guidelines.[90] The district court refused to certify a class action, and the plaintiff appealed. While the appeal was pending, the plaintiff was released from prison.

Even though a class action never was certified, the Court held that the case was not moot. The Court explained that the members of the proposed class still had a live controversy, justifying continued federal judicial consideration of whether the class should be certified. The Court stated "that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in a reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in

[87] *See, e.g.,* Indianapolis School Commrs. v. Jacobs, 420 U.S. 128 (1975); Weinstein v. Bradford, 423 U.S. 147 (1975); *see also* Pasadena City Bd. of Educ. v. Spangler, 427 U.S 424 (1976); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).
[88] 424 U.S. 747 (1976).
[89] 432 U.S. 385, 393 (1973).
[90] 445 U.S. 388 (1980).

*Sosna*."[91] Similarly, in *Deposit Guaranty National Bank v. Roper,* decided the same day as *Geraghty,* the Court held that the named plaintiffs in a proposed class action suit could continue to appeal the denial of class certification even after the plaintiffs settled their personal claims.[92] In *Roper,* the plaintiffs sought to bring a class action suit to challenge the interest charged by Bank Americard. The plaintiffs agreed to a settlement that paid them the full sum they claimed as damages. The Court said that the plaintiffs could continue to appeal the denial of class certification. The Court explained that the plaintiffs maintained a "personal stake in the appeal" because they had "a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails."[93] The Court explained that other class members had a live controversy, and allowing the settlement to end the litigation would give defendants an incentive to "buy off" named plaintiffs in class action litigation.[94]

The exception for class action suits makes sense in that it focuses on the interests of the class, rather than simply looking to the named plaintiff's claims. As long as the class presents a live controversy, the status of any particular member's claim is irrelevant. Thus, the Court has properly concluded that a properly certified class action is not moot simply because the named plaintiff's controversy is resolved. Nor should the mootness of the plaintiff's claim prevent an appeal of the denial of class certification. This mootness exception furthers the underlying purposes of the federal rules concerning class actions and is consistent with Article III, because there is an actual dispute between adverse litigants and a favorable federal court decision will make a difference for the class members.

## §2.8 THE POLITICAL QUESTION DOCTRINE

### *§2.8.1 What Is the Political Question Doctrine?*

#### Definition

The Supreme Court has held that certain allegations of unconstitutional government conduct should not be ruled on by the federal courts even though all of the jurisdictional and other justiciability requirements are met. The Court has said that constitutional interpretation in these areas should be left to the politically accountable branches of government, the president and Congress. In other words, the "political question doctrine" refers to subject matter that the Court deems to be inappropriate for judicial review. Although there is an allegation that the

[91] *Id.* at 404.
[92] 445 U.S. 326 (1980).
[93] *Id.* at 336.
[94] *Id.* at 339.





Constitution has been violated, the federal courts refuse to rule and instead dismiss the case, leaving the constitutional question to be resolved in the political process.

#### Why Is the Political Question Doctrine Confusing?

In many ways, the political question doctrine is the most confusing of the justiciability doctrines. As Professor Martin Redish noted, "[t]he doctrine has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity . . . , but they also have differed significantly over the doctrine's scope and rationale."[1] First, the confusion stems from the fact that the "political question doctrine" is a misnomer; the federal courts deal with political issues all of the time. For example, in *United States v. Nixon,* the Court decided that President Nixon had to comply with a subpoena to produce tapes of presidential conversations that were needed as evidence in a criminal trial — a decision with the ultimate political effect of causing a president to resign.[2] The Supreme Court's direct involvement in the political process long has included ending racial discrimination in political primaries and elections.[3]

Second, the political question doctrine is particularly confusing because the Court has defined it very differently over the course of American history. The Court first spoke of political questions in *Marbury v. Madison*.[4] Chief Justice John Marshall wrote: "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. The subjects are political. [B]eing entrusted to the executive, the decision of the executive is conclusive. Questions, in their nature political, or which are by the constitution and laws, submitted to the executive can never be made in this court."[5] Chief Justice Marshall contrasted political questions with instances where individual rights were at stake; the latter, according to the Court, never could be political questions.[6]

The Court's definition of political questions in *Marbury v. Madison* was quite narrow. Included only were matters where the president had unlimited discretion, and there was thus no allegation of a constitutional violation. For example, presidents have the choice about whether to sign or veto a bill or who to appoint for a vacancy on the federal judiciary. Because the Constitution vests the president with plenary authority in these areas, there is no basis for a claim of a constitutional violation regardless of how the president acts. But if there is a claim of an

**§2.8** [1] Martin Redish, Judicial Review and the Political Question, 79 Nw. U. L. Rev. 1031 (1985).
[2] 418 U.S. 683 (1974), discussed in §4.3.
[3] *See, e.g.,* Nixon v. Herndon, 273 U.S. 536 (1927) (declaring unconstitutional racial discrimination in the Democratic political primary in Texas). The Court said that a claim that the matter was a political question because it involved the political process was "little more than a play upon words." *Id.* at 540.
[4] 5 U.S. (1 Cranch) 137 (1803), discussed above in §2.2.
[5] *Id.* at 165-170.
[6] *Id.* at 170.

infringement of an individual right, in other words, if the plaintiff has standing, there is not a political question under the formulation presented in *Marbury v. Madison*.[7]

In sharp contrast, the political question doctrine now includes instances where individuals allege that specific constitutional provisions have been violated and that they have suffered a concrete injury.[8] The political question doctrine definitely is not limited to instances in which the president is exercising discretion and there is no claim of unconstitutional conduct. But the Court never has explained the differing content given to the term political question; in fact, the Court even invokes *Marbury* in its modern, very different cases.

### The *Baker* Criteria and Their Limited Usefulness

Finally, and perhaps most important, the political question doctrine is confusing because of the Court's failure to articulate useful criteria for deciding what subject matter presents a nonjusticiable political question. The classic, oft-quoted statement of the political question doctrine was provided in *Baker v. Carr*.[9] The Court stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable 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.[10]

Virtually every case considering the political question doctrine quotes this language. But these criteria seem useless in identifying what constitutes a political question. For example, there is no place in the Constitution where the text states that the legislature or executive should decide whether a particular action constitutes a constitutional violation. The Constitution does not mention judicial review, much less limit it by creating "textually demonstrable commitments" to other branches of government. Similarly, most important constitutional provisions are written in broad, open-textured language and certainly do not include "judicially

[7] Howard Fink & Mark Tushnet, Federal Jurisdiction: Policy and Practice 231 (2d ed. 1987) ("But notice the effect of *Marbury's* classification: Standing is just the obverse of political questions. If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question.").

[8] *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1949) (declaring nonjusticiable a suit brought under the republican form of government clause even though the effect was to leave people in jail who contested the constitutionality of their conviction), discussed below in §2.8.3.

[9] 369 U.S. 186 (1962).

[10] *Id.* at 217.





discoverable and manageable standards." The Court also speaks of determinations of a kind "clearly for a nonjudicial determination," but that hardly is a criterion that can be used to separate political questions from justiciable cases.

In other words, it is impossible for a court or a commentator to apply the *Baker v. Carr* criteria to identify what cases are political questions. As such, it hardly is surprising that the doctrine is described as confusing and unsatisfactory.

The political question doctrine can be understood only by examining the specific areas where the Supreme Court has invoked it. Specifically, the Court has considered the political question doctrine in the following areas: the republican form of government clause and the electoral process, foreign affairs, Congress's ability to regulate its internal processes, the process for ratifying constitutional amendments, instances where the federal court cannot shape effective equitable relief, and the impeachment process. Section 2.8.2 considers the basic normative question of whether there should be a political question doctrine. Sections 2.8.3 to 2.8.8 consider, in turn, each of the areas mentioned above.

## §2.8.2 *Should There Be a Political Question Doctrine?*

### Justifications for the Political Question Doctrine

The underlying normative issue is whether the political question doctrine should exist at all. Defenders of the doctrine make several arguments. First, and most commonly, it is argued that the political question doctrine accords the federal judiciary the ability to avoid controversial constitutional questions and limits the courts' role in a democratic society. Professor Alexander Bickel was the foremost advocate of this position.[11] Professor Bickel wrote:

> Such is the foundation, in both intellect and instinct, of the political question doctrine: the Court's sense of lack of capacity, compounded in unequal part of
>
> (a) the strangeness of the issue and its intractability to principled resolution;
> (b) the sheer momentousness of it, which tends to unbalance judicial judgment;
> (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be;
> (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[12]

[11] *See, e.g.*, Alexander Bickel, The Supreme Court, 1960 Term: Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 46 (1961); Alexander Bickel, The Least Dangerous Branch 184 (1962).

[12] Bickel, *id.*, The Least Dangerous Branch at 184. It is interesting to consider the application of the Bickel justifications for the political question doctrine to *Bush v. Gore*, 531 U.S. 98 (2000). I address this in Erwin Chemerinsky, *Bush v. Gore* Was Not Justiciable, 76 Notre Dame L. Rev. 1093 (2001). *Bush v. Gore* is discussed in detail in Chapter 10.