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JUDICIAL REVIEW, JUSTICIABILITY AND THE LIMITS OF THE COMMON LAW METHOD

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I. INTRODUCTION

The Supreme Court frequently interprets such provisions as the first, fourth and fourteenth amendments in resolving complex questions concerning the protection of substantive constitutional rights. One enduring source of controversy in constitutional litigation, however, does not directly involve any of these provisions, although it has implications for all of them. This is the doctrine of justiciability—a doctrine of procedure and jurisdiction which prescribes the appropriate form for initiating challenges to the validity of government actions.

Grounded in the language of article III1 and in basic perceptions of the nature of judicial review, this doctrine imposes limitations upon access to federal courts and therefore is frequently determinative of the substantive rights that those courts ultimately vindicate. After decades of litigation and debate, the purposes and scope of justiciability limitations remain in dispute. Two aspects of existing doctrine draw the sharpest criticisms from scholars and practitioners: standing—whether the litigant before the court is a suitable party to challenge particular government action—and ripeness—whether the harm complained of by a litigant is sufficiently immediate to warrant adjudication.

According to traditional theory, justiciability limitations derive from the Court's decision in Marbury v. Madison,4 in which Chief Justice Marshall justified judicial review of federal legislation as merely an ordinary incident to the case-deciding function of common law courts. Under this line of reasoning, review is not appropriate absent a "case"; and standing and ripeness provide criteria for distinguishing between "cases" and other, nonjusticiable disputes. However, scholars have argued that Marshall's reliance upon the common law case method for his justification of review is misplaced3 and have charged that the doctrinal formulations growing out of this reliance are outmoded and confused.4 The Supreme Court

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1 U.S. Const. art. III, § 2.
2 5 U.S. (1 Cranch) 137 (1803).
3 See, e.g., A. Bickel, The Least Dangerous Branch (1962); C. Black, The People and the Court (1960); L. Hand, The Bill of Rights (1958).
itself has acknowledged that established standards are vague and inconsistently applied. Those attacking Marshall's justification of review, and the approach to justiciability that has evolved from it, have proposed alternative models that purport not to rely upon traditional elements of common law adjudication to regulate the form in which federal courts consider legal disputes. This article will argue that it would be a serious mistake for the Supreme Court to renounce the traditional approach to justiciability, with its insistence that constitutional challenges be made in proceedings that resemble common law cases. While the doctrines of justiciability have not been well articulated in the past, they are, for the most part, sound. Whatever the defects in Chief Justice Marshall's derivation of the power of judicial review, the common law method of establishing principles of law through the decision of particular cases remains the most appropriate way for courts to perform judicial review. Thus, traditional limitations are not merely a relic from the days of Chief Justice Marshall, but rather an integral part of the present success of the reviewing function. The importance of these doctrines, and of the traditional common law model in general, becomes readily apparent if, as will be attempted here, one reconstructs the connection between common law adjudication—the judicial function of applying law to cases—and judicial review—the power to disregard the dictates of those laws when they conflict with the Constitution.

II. Judicial Review and the Deciding of Cases

A. The Logic of Marbury

Central to Chief Justice Marshall's explanation of the constitutional basis for judicial review in Marbury v. Madison was the fact of a written constitution. For Marshall, the existence of the Constitution necessarily established its superiority over conflicting acts of legislation: the Framers had laid down certain principles of government in writing to ensure that the limits of those principles would not be transgressed. Unless the provisions of the resulting document controlled contrary laws, such an attempt at limitation of government would have been no more than a futile attempt to disregard the dictates of those laws when they conflict with the Constitution.


The problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of "the most amorphous [concepts] in the entire domain of public law."


exercise.\textsuperscript{7} The power of courts to identify those laws in actual conflict with the Constitution then followed naturally from the Chief Justice's assumption that the Constitution was not merely paramount, but a paramount species of \textit{law}:\textsuperscript{8}

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide upon the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty.\textsuperscript{9}

Notwithstanding Marshall's confidence in the strength of his logic, few commentators have found it persuasive as a justification for review.\textsuperscript{10} Professor Bickel was particularly forceful in attacking Marshall's approach to what Bickel saw as "the real question" of \textit{Marbury}\textsuperscript{11}—whether the courts were competent to interpret an admittedly superior constitutional text:

If two laws conflict, a court must obey the superior one. But Marshall knew (and, indeed, it was true in \textit{[Marbury]}) that a statute's repugnancy to the Constitution is in most instances not self-evident; it is, rather, an issue of policy that someone must decide. The problem is who: the courts, the legislature itself, the President, perhaps juries for purposes of criminal trials, or ultimately and finally the people through the electoral process?\textsuperscript{12}

To this, \textit{Marbury} provides only a partial response in the form of Marshall's argument from limitations—that the legislature should not be allowed to determine the extent of its own constitutionally limited powers. But, as Professor Bickel pointed out,\textsuperscript{13} such an argument proves nothing because it is equally applicable to the judiciary.

Chief Justice Marshall may not have offered sufficient explanation in \textit{Marbury} to show a relationship between judicial review and judicial function.\textsuperscript{14} Later courts, however, have adhered to his basic perception that

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\item \textsuperscript{7} 5 U.S. (1 Cranch) at 176-77.
\item \textsuperscript{8} The assumption was implicit rather than explicit: "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it." \textit{Id.} at 177.
\item \textsuperscript{9} \textit{Id.} at 177-78.
\item \textsuperscript{10} Professor Black, while rejecting Justice Marshall's logic, agreed in general terms with his treatment of the Constitution as a species of law to be interpreted by the courts. C. Black, \textit{supra} note 3, at 6-7, 26. Other commentators have been more critical, sometimes scathingly so. See authorities cited in notes 3-4 \textit{supra}.
\item \textsuperscript{11} A. Bickel, \textit{supra} note 3, at 3-4.
\item \textsuperscript{12} \textit{Id.} at 3.
\item \textsuperscript{13} \textit{Id.} at 3-4; see \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) at 178-79.
\item \textsuperscript{14} See, e.g., A. Bickel, \textit{supra} note 3, at 3; G. Gunther, Cases and Materials on Constitutional Law 17 (9th ed. 1975). Of course, to dismiss Justice Marshall's logic in \textit{Marbury} is not necessarily to deny the significance of his treatment of the Constitution as law. See, e.g., Monaghan, \textit{supra} note 4, at 1365. "That the Constitution was to be applied as 'ordinary law'
constitutional interpretation belongs squarely within the framework of common law adjudication with its traditional emphasis upon the resolution of legal issues through the process of deciding cases. A natural, if not necessary, corollary of Marshall’s premise that the power of judicial review is an incident of the obligation of courts to “apply the rule to particular cases” is that, absent a traditional case, courts must lack such power. It is this inference, which through the “judicial power” and “cases and controversies” language of article III has continued to influence the Supreme Court’s regulation of federal jurisdiction, that has been the target of recent criticism. Commentators have charged that no such limitation upon judicial competence does or should exist, and that in fact the traditional “case” model of review is neither appropriate to nor reflective of the realities of modern public law litigation.

The response to such views must be sought in Marshall’s “essence of judicial duty”—the traditional case-deciding functions of the common
law courts. An analysis of these functions affirms the continued significance of certain established restrictions upon the power of courts to revise pre-existing law. Such restrictions are equally applicable to common law and constitutional decisionmaking and provide continuing justification for the traditional requirement that constitutional determinations be made only within a proceeding resembling a common law case.

B. The Case Method and the Rule of Law

The central feature of the common law judicial model is the doctrine of stare decisis, which dictates that courts should resolve legal disputes by reference to past cases or precedent. The doctrine is distinctive in its accommodation between the need for authority and the need for discretion, between the constraints of the rule of law and the demands of individual justice.\(^2\) In focusing upon the relationship between the past and present patterns of fact, stare decisis circumscribes the ability of individual judges to make new law while allowing them a measure of discretion to consider the circumstances of particular cases.

Historically, centralization of judicial authority may have accounted for the emergence of the doctrine of stare decisis.\(^2\,2\) Administrative considerations alone would require that lower and appellate courts in a complex, modern legal system adhere to precedent. A more profound basis for the doctrine, however, is that it is essential to the functioning of a government of laws. If courts are to have a certain law-declaring role, then they must themselves be constrained by rules that dictate the relationship between the judiciary and society. One such rule is consistency of treatment; in a society of laws, elementary fairness requires that similar cases be decided in a similar fashion.\(^2\,3\) Adherence to precedent encourages consistency and, at the same time, protects the judicial process itself by preventing the biases of individual judges from tainting the development of rules of law.\(^2\,4\) Additionally, stare decisis ensures the predictability of legal consequences of particular future acts. In a legal system that attempts to regulate society in a rational manner by guiding primary conduct, the members of society must be able to rely upon prior declarations of what is or is not prohibited.\(^2\,5\) As Holmes wrote: "People want to know under

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\(^{22}\) See J. Salmond, Jurisprudence § 54 (7th ed. 1924).

\(^{23}\) R. Dworkin, supra note 21, at 113; J. Rawls, supra note 21, at 57-59, 237; see J. Salmond, supra note 22, § 60, at 198-99. Cf. F. James, Civil Procedure 27-28 & n.8 (1965) (discussion of stare decisis factors and characteristics of traditional cases).

\(^{24}\) See J. Rawls, supra note 21, at 235. But see R. Wasserstrom, The Judicial Decision 78 (1961) (past decisions may themselves embody biased social policies).

\(^{25}\) See J. Rawls, supra note 21, at 56. Although both predictability and consistency derive legal authority from past decisions, predictability involves broader implications of what Professor Rawls refers to as the need for "publicity" in a system of rules accepted by society: The publicity of the rules of an institution insures that those engaged in it know what limitations on conduct to expect of one another and what kinds of actions are permissible. There is a common basis for determining mutual expectations. Moreover, in a
what circumstances and how far they will run the risk of coming against what is so much stronger than themselves. . . .”

Although these features of the common law preserve the neutrality and rationality of our legal system, unquestioning adherence to precedent may cause undesirable results. The evolution of the common law may be stultified by the enforcement of pre-existing rules that are unresponsive to changes in society or to the significance for judge-made law of the action or inaction of other branches of government. Moreover, a basic tension exists between the manner in which common law decisions are initially made and the manner in which they are subsequently applied under stare decisis. Seeking to resolve current disputes, later courts look to earlier decisions for rules of general application. The rules they find, however, while possibly applicable according to their literal terms, may have been set out with entirely different situations in mind, and for this reason may be wholly inapposite. Mechanical application of rules drawn from the holdings of earlier decisions would preclude taking into account the factual variations that inevitably develop in later cases. To prohibit a court from considering the circumstances of the dispute before it would be irrational; while considerations of fairness account for the doctrine of stare decisis, with its requirement of adherence to precedent, countervailing considerations of fairness in the particular case may require deviation from existing rules.

well-ordered society, one effectively regulated by a shared conception of justice, there is also a public understanding as to what is just and unjust.

Id.; see id. at 133; id. at 238.

26 Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 457 (1897).
27 Cf. id. at 469:
It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

28 See A. Bickel, supra note 3, at 69-70:
[In striking down legislation, the Court] is not obligated to foresee all foreseeable relevant cases and to foreclose all compromise. Indeed, it cannot. It can only decide the case before it, giving reasons which rise to the dignity of principle and hence, of course, have forward momentum and broad radiations. But the compelling force of the judgment goes only to the actual case before the Court.

In discussing the nature of common law precedent, Professor Dworkin reaches similar conclusions by focusing upon the weaknesses of an analogy between statutes and the “rules” derived from past cases:

[A judge] will discover that many of the opinions that litigants cite as precedents do not contain any special propositions taken to be a canonical form of the rule that the case lays down. It is true that it was part of Anglo-American judicial style, during the last part of the nineteenth century and the first part of this century, to attempt to compose such canonical statements, so that one could thereafter refer, for example, to the rule in Rylands v. Fletcher. But even in this period, lawyers and textbook writers disagreed about which parts of famous opinions should be taken to have that character. Today, in any case, even important opinions rarely attempt that legislative sort of draftsmanship. They cite reasons, in the form of precedents and principles, to justify a decision, but it is the decision, not some new and stated rule of law, that these precedents and principles are taken to justify. Sometimes a judge will acknowledge openly that it lies to later cases to determine the full effect of the case he has decided.

R. Dworkin, supra note 21, at 110-11 (citation omitted).

29 See J. Rawls, supra note 21, at 239-43.
30 Cf. R. Dworkin, supra note 21, at 111 & n.1, 112-13 (reaching similar conclusion but proceeding from justification of why courts should ever follow precedent).
The common law decisionmaking process accommodates the potential for such conflict by providing that past decisions carry precedential weight only in factually similar circumstances. The inherent flexibility of the common law results from the fact that common law judges make legal decisions in the context of applying them. Although a judge is bound to the extent that the dispute before him resembles past cases, he is free to the extent that the factual settings differ. The determination whether particular circumstances are so distinguishable as to warrant a difference in treatment requires, within the constraints of principled decisionmaking, an exercise of independent judgment by the court. While such reevaluations are crucial given the evolutionary nature of the common law, the power of courts to adjust previously established precedent derives solely from the presence of specific facts in the case at bar that demonstrate a need to revise pre-existing rules. To allow courts to revise prior standards in the absence of distinctive circumstances would be to violate the principles of consistency and predictability—and therefore to undermine the notion of the rule of law.31

The nature of the factual distinctions that empower courts to revise existing articulations of law can be illustrated by analyzing the differences in judicial treatment of statutory, judge-made and constitutional rules. A legislature enacting a statute is not bound by existing declarations of legally recognized harms. As a democratic body, a legislature is competent to make determinations of policy. Thus, legislatures can lay down broad rules designating certain factual patterns as harms for which the courts are to provide remedies. In contrast, courts faced with situations in which particular litigants seek relief under existing judge-made law lack competence to make determinations of comparable scope. Instead, courts must focus on the existence of specific individual harm as justification for invoking their limited power to deviate from established precedent.32

Ordinarily, a court faced with application of a statute cannot make an independent determination of specific harm requiring a change in the law. Although the facts of the particular case remain significant with regard to whether the statute applies, the court must recognize that the legislature has already made the essential determination as to what set of circumstances are to constitute a legally remediable injury. However, when application of the statute would implicate constitutional considerations, the situation changes. Clearly, the court must first look to the higher authority of constitutional text; but the text itself does not provide a complete answer as to whether the Constitution’s strictures have been violated in a particular instance.33 To make such a determination, the

31 Cf. J. Salmond, supra note 22, § 58, at 194 (courts can disregard precedent when a different result would be “contrary to reason,” but “[w]henever a decision is departed from, the certainty of the law is sacrificed to its rational development”).

32 See id. § 60, at 202: “The prerogative of judges is not to make law by formulating and declaring it—this pertains to the legislature—but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is of no authority.”

33 A constitution, to contain an accurate detail of all the subdivisions of which its great
court must look to its traditional competence to assess the legal significance of facts based on the existence or nonexistence of concrete individual injury.

In certain circumstances, however, the relevant facts are themselves not susceptible of judicial determination. In such cases, the doctrine of "political questions" applies: absent judicially manageable standards for determining the Constitution's implications in the particular case, courts must relinquish certain issues to the definitive judgment of other branches of government. Although a particular individual may claim to be aggrieved, examination of the facts of that individual's situation does not aid in assessing the merits of his claim. Rather, the relevant "facts" involve competing considerations of policy, the constitutional significance of which courts are unable to evaluate. That this situation places limitations upon the ability of the courts to deal with certain types of problems is illustrated by the Supreme Court's initial attempts to remedy legislative malapportionment. In order appropriately to allocate voting power, legislative apportionment necessarily entails evaluation of legislative facts and a choice among theories of political philosophy; such determinations are ordinarily considered nonjusticiable. Accordingly, the Supreme Court could not recognize an equal protection challenge to a state system of legislative apportionment in Baker v. Carr until it rephrased the apportionment claim in terms of its effect upon the voting rights of individuals. By interpreting as a private wrong what was formerly considered an ill-advised political structuring, the Court effectively precluded consideration of political judgments, thereby making possible judicial resolution of a previously nonjusticiable problem.

C. The Case Method and "Activist" Approaches to Review

The previous section demonstrated that the flexibility of the common law case method is crucial to any law-declaring function for the courts. The basic premise of this analysis is that the Constitution is simply a law that the courts must interpret in the ordinary course of judicial business. Such an approach contemplates an essentially conservative role for the judiciary and may thus appear to ignore a significant aspect of the reviewing function—the special obligation of the courts to protect the rights of individuals and the interests of unpopular and unrepresented groups in a
fundamentally majoritarian society. It has been suggested that the justification for the institution of judicial review should come not from constitutional text or normal case-deciding functions but rather from the particular competence of the judiciary to vindicate such rights and interests.\textsuperscript{38} Notwithstanding the difference in emphasis that such "activist" approaches to review entail, their effectiveness in practice depends upon the framework that the case method provides.

The special role of the courts in protecting the interests of political minorities is derived from general principles of representative government.\textsuperscript{39} In a democracy, citizens exercise control over the political decisions that affect their lives through their selection of legislative and executive officials who are expected to ascertain, codify and implement the consensus of the majority. Although no individual has a right to implementation of his own preferred notions of government policy, it is the opportunity to participate generally in the creation of policy that justifies imposition of the majority's consensus upon all members of society and not merely upon those who concurred in its creation. In practice, however, not all members are participants in the development of consensus; through minority status, popular prejudice, or historical subordination, some may be denied effective political voice. The principle that those who bear the burdens of a decision should participate in its making requires that affected individuals be able to influence political decisionmaking; yet the realities of democracy give no guarantee that those in power will consider the interests of the unrepresented. Thus, it is argued under the.

\textsuperscript{38} The examples of alternative theories of review presented in this section are suggested by Shapiro, Judicial Modesty, Political Reality and Preferred Position, 47 Cornell L.Q. 175 (1962) and R. Dworkin, supra note 21. Professor Shapiro attempts an outspoken defense of a purely political justification of judicial activism; Professor Dworkin sees the source for judicial activism as derivable in principled terms from the Constitution itself.

\textsuperscript{39} See Shapiro, supra note 38, at 185-200. Professor Shapiro argues that the three branches of government are essentially coequal "power centers," id. at 189, upon which various interest groups operate to develop what is considered the democratic will. Under this model, the appropriate task of the courts is to represent those interest groups—"minorities"—that otherwise lack access to the alternative power centers—the executive and legislative branches. Id. at 195, 197, 199, 203. Compare the simple theory of representation set forth in the text of this article to the approach to standards of review set forth both in Justice Stone's famous "footnote 4" in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), where he asks whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry;

and in the more recent "suspect classification" equal protection cases, e.g., San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (indicia of suspect classifications include evidence that a particular group is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); Graham v. Richardson, 403 U.S. 365, 372 (1971) (use of Carolene Products "discrete and insular minority" language in decision subjecting state alienage classification to strict scrutiny). See also Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 933 n.85 (1973) (higher scrutiny justified for "we-they" than for "they-they" classifications).
activist approach that if such individuals are to be held to the obligations of society, and ultimately to obtain effective voice within the political process, the courts must act as their forum.40

The comparative isolation of the judiciary from the pressures of the political majority, achieved through life tenure and salary protection, is central to the ability of the courts to perform this activist review role. The limitation of that review to cases, however, adds significantly to its practical feasibility. Unpopular decisions are more likely to gain general acceptance if they appear to be compelled by the facts of specific cases rather than motivated by a cavalier disregard for the prerogatives of an elected branch of government.41 Moreover, the restrained and incremental nature of the evolution of legal principles through cases may itself serve to inhibit attempts by already effective elements of society to influence the judicial process.42

More importantly, decisions made in common law cases remain in fact as well as in appearance within the proper judicial domain. In utilizing judicial power to remedy societal conditions that the legislature has not previously designated as harmful, courts may appear to be serving as a source of policy that is unresponsive to majoritarian pressures; however, judicial review need not elevate the opinion of the courts over majoritarian will with respect to issues usually deemed legislative in nature. If courts refuse to make legal determinations except in the context of traditional cases, the types of issues that they decide will differ from the issues of policy appropriate for legislative resolution. Rather, the courts will simply perform their ordinary task of remedying specific injuries suffered by particular persons. Limiting the judiciary to this task precludes undue interference with popular will; moreover, it allocates to the courts a task for which they have a special competence.

Restricting challenges to legislative action to the form of cases has the additional advantage of emphasizing the surrogate nature of the forum that the courts are expected to provide.43 If review of a statute is limited to a case involving application of the statute, then participation in the challenge will be limited to those persons actually suffering the statute's adverse impact. If the challenge is unsuccessful, the precedential effect of the decision is thus limited to other cases involving similar situations. A later challenger has freedom to reargue the statute's invalidity as applied

40 See Shapiro, supra note 38, at 199 ("the Court can best define its special function as the representation of potential or unorganized interests or values which are unlikely to be represented elsewhere in government").


43 See Shapiro, supra note 38, at 197 (relationship between the nature of judicial proceedings and the effectiveness of courts as alternative forums).
to him to the extent that he has experienced the statute’s impact in a different way. The result is a form of representation that is specific to the judicial branch: the party who participates in a challenge to a statute represents himself and all others who are in a similar position. Thus, the common law method has salutary procedural consequences in that it brings into the legal decisionmaking process precisely those persons who bear the impact of a decision. The level of actual political involvement made possible by the participation of a few particular individuals in a given court challenge may be slight; but it does serve to increase the level of involvement in the political process itself of those unrepresented groups that this model of review is intended to protect.

The activist model views the judiciary as fulfilling important political functions, as important as those of the executive and legislative branches of government. Under such an approach, there is no “countermajoritarian difficulty” with judicial review. All branches of government are tested against their responsiveness to the political interests of some segment of society and, to the extent that it might be relevant, both courts and elected representatives can be seen as acting contrary to popular will when they act in accordance with the Constitution. However, to treat the courts and other branches of government as functionally similar would be to ignore another significant aspect of activist review—the unique competence of courts to identify and thus to protect such individual rights.

Under this approach, the structure of the Constitution itself justifies court interference with popular authority. As a source of specific rights

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44 Cf. E. Levi, An Introduction to Legal Reasoning 5 (1949) (emphasizing participation as source for the compelling force of law over litigants, who “are bound by something they helped to make”).

45 A. Bickel, supra note 3, at 16-17.

The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.

46 See Deutsch, supra note 41, at 170 (footnotes omitted):

The starring point for the recent debate has been Judge Hand’s eloquent Holmes lectures. In those lectures, Hand confessed his inability satisfactorily to justify a doctrine of judicial review that enables a Court not responsible to the electorate to nullify acts of political agencies deriving their powers directly from that electorate. Professor Wechsler’s essay on neutral principles, by rooting the power of judicial review in the text of the Constitution itself, attempts to lay the ghost of judicial usurpation raised by Hand.

Shapiro, so to speak, stands Hand on his head. He accepts as given—as the normal state of affairs—the very attempt of the Court to substitute its policy preferences for those of the political agencies that Hand found so difficult to justify even in exceptional circumstances.

47 Professor Bickel apparently did not realize, see note 45 supra, that if an individual legislator should choose to vote against popular legislation for reasons of constitutional principle, he too would be acting in a countermajoritarian fashion. Cf. The Federalist No. 78 (Wright ed. 1961) (A. Hamilton) (justification of judicial review as not countermajoritarian because the Constitution itself represents the highest statement of majority will). See generally G. Gunther, supra note 14, at 25-36 (competence of nonjudicial branches of government independently to interpret constitutional provisions).

48 See R. Dworkin, supra note 21, ch. 5.
that are inherently superior to the objectives of the majority, the Constitution places certain limitations upon the range of decisions that can properly be made by that majority.\textsuperscript{49} Because such rights are part of the initial frame of government, they need no justification for being counter-majoritarian. Moreover, being objective in nature, they are not subject to discovery and verification through the democratic process; they must instead be developed through the principled decisionmaking of the courts.\textsuperscript{50}

In form, such an argument accords with the thesis of Professor Bickel that the Constitution and the notion of law in general serve to justify the injection of principle into the democratic process:\textsuperscript{51}

It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law.\textsuperscript{52}

Because legislatures are essentially creatures of expediency in a democracy,\textsuperscript{53} the role of development of principle has traditionally and properly fallen to the courts. According to Professor Bickel, it is the common law system of deciding cases that uniquely prepares the courts for this task.\textsuperscript{54} The traditional method, with its emphasis upon the facts of the specific case, tends to lengthen the perspective of the decisionmaker, "providing an extremely salutary proving ground for all abstractions [and being] conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of principle by a process that tests as it creates."\textsuperscript{55} Time itself has similar effects; the inevitable delay between enactment of legislation and its application to a particular set of circumstances enables the courts to "appeal to men's better nature," and to act in light of "what Justice Stone called the opportunity for 'the sober second thought.'"\textsuperscript{56} In more general terms, traditional cases breed responsible decisionmaking,

\textsuperscript{49} Id. at 133.
\textsuperscript{50} See id. at 137-38, 140, 142-47.
\textsuperscript{51} For Professor Bickel, the special competence of courts as developers of principle justifies their limited interference with immediate majoritarian rule, but only insofar as the courts remain ultimately responsible to the political process through the "passive virtues" of judicial restraint. See A. Bickel, supra note 3, at 27-33, 68-72, ch. 4. Such a compromise is possible, and consistent with the concept of majority rule, because Bickel sees no inherent conflict between "principles" as elucidated by the courts and popular will; such "principles" are merely immediate expressions by the courts of those "enduring values" that must ultimately be vindicated or rejected through the operation of political forces. Id. at 24.
\textsuperscript{52} Id.; see id. at 23-25.
\textsuperscript{53} See id. at 24, 27.
\textsuperscript{54} See id. at 25-27, 69-70, 114-17.
\textsuperscript{55} Id. at 26.
\textsuperscript{56} Id.
"the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments."57

III. JUSTICIABILITY AND THE COMMON LAW MODEL

A. Expanding the Limits of Justiciability

In the ordinary run of litigation, decisionmaking occurs naturally within the context of a traditional case. Both the propriety of invoking the power of the court and the presentation of essential facts are assured without imposition of special doctrinal limitations. The old model of litigation, however, in which legal principles were merely an incidental by-product of resolution of particular disputes, has been supplemented by a new approach in which the individual case may be used as a vehicle for social change.58 Under the new model, lawsuits are initiated both to remedy private harms and to establish precedents that will govern future cases. Such lawsuits, whether intended to vindicate traditional legal rights of absent parties or the ideological goals of nontraditional plaintiffs, involve a significant shift in focus—a shift from concern with final determination of the rights of parties before the court to development of legal principle per se.

Commentators who have noted this shift in focus have generally believed that it does not present substantial problems. Under this view, justiciability doctrines would be reduced to a purely functional role; effective allocation of limited judicial resources becomes a primary factor in controlling access to the courts and legal challenges become amenable to judicial resolution when sufficiently specific facts are available to ensure that issues are presented with requisite clarity.59 Even given that courts can decline to adjudicate issues developed in inadequate form,60 the more basic question remains whether the development of such issues outside the confines of a traditional case provides an otherwise sufficient context for adjudication.

Both practical and theoretical problems arise in cases in which the litigant's concern with long-range political goals overshadows his concern with the immediate relief requested. The practical problems result from the litigant's increased willingness deliberately to rephrase issues so as to influence the eventual scope of the decision as precedent. Courts may ordinarily rely upon the parties to present a mass of information from which independent judicial determinations as to the legal significance of certain facts can be made. The random quality of reliance upon injured

57 Id. at 115; see id. at 69-70.
58 See, e.g., United States v. SCRAP, 412 U.S. 669, 687 (1973) (referring to use of legal process as a "vehicle for the vindication of the value interests of concerned bystanders"). See generally Chayes, supra note 6, at 1281-84; Monaghan, supra note 4, at 1365-71.
59 See, e.g., Scott, supra note 4, at 670-83.
60 Monaghan, supra note 4, at 1373.
parties for development of facts ensures the relative neutrality of these facts. In contrast, reliance upon the factual presentations of noninjured litigants who seek to challenge government action runs the risk that judicial determinations will be made upon a record implicitly directed toward the broader goals of such litigants. Only a litigant with a concrete injury can be relied upon to present the significant details which, although directed at eliciting the requested relief, are neutral with respect to their effect upon the development of precedent.

Moreover, litigants lacking traditional injury might not feel compelled to phrase a complaint in terms of facts provable at trial. Rather than seeking specific redress of injury, the nontraditional plaintiff might seek to establish that a particular collection of facts gives rise to a given cause of action. In such a situation—when legal issues are being resolved upon a motion to dismiss for failure to state a claim—the risk of manipulation is substantial. A plaintiff has almost complete control over the factual allegations in his complaint, which ordinarily are taken as true for the purpose of testing the legal sufficiency of the claim. The opposing party may be unable at this stage to demonstrate the inaccuracy of the allegations; moreover, he may have no incentive to do so if the claim is weakened by presentation in a broad, nonspecific manner. If this were to occur, the precedent established might have a substantial effect upon future litigants but would not be the product of litigation in which the parties made every effort to adduce factual support for the legal sufficiency of their claims.

In addition to the practical problems inherent in litigation brought for the sole purpose of creating precedent, compelling theoretical reasons require that courts refuse to entertain such suits. Earlier in this article, it was established that the doctrine of stare decisis and the requirement of

61 Cf. Deutsch, supra note 41, at 222-23 (discussing importance of randomness as device for controlling issues that reach the Supreme Court).

62 For an undisguised attempt to manipulate factual allegations in order to establish certain precedent, see Sierra Club v. Morton, 405 U.S. 727 (1972). In the Sierra Club litigation, the Club sought to halt construction of a recreational development in the Mineral King Valley on the grounds that federal officials had improperly approved the project in violation of federal law. Although the Club was legitimately concerned with activities in the Valley, it had as an additional objective the expansion of the conditions under which public interest groups could challenge agency action. Thus, the Sierra Club intentionally omitted from its complaint facts sufficient to establish standing under traditional doctrine and relied instead upon its ideological commitment to conservation. See id. at 735 n.8, 736, 740 n.15; note 81 and authorities cited infra.

63 For an example of how litigants can control the legal issues that the court decides through the structuring of their factual allegations, see Bolling v. Sharpe, 347 U.S. 497 (1954), one of the original desegregation decisions. Because the plaintiffs in Bolling sought to challenge the constitutionality of segregation per se, they did not allege that the schools attended by the black children were inferior to those attended by comparably situated white children. R. Kluger, Simple Justice 521 (1976).

64 See Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), discussed in A. Bickel, supra note 3, at 133-43. In Times Film, plaintiffs applied to the City of Chicago for a license to exhibit a movie that was potentially obscene. They refused, however, to submit a copy of the film to the licensing board, thereby forcing an abstract challenge to the constitutionality of prior censorship per se.
adherence to precedent derive from certain basic principles—consistency and predictability—that are essential to the acceptance by society of the rule of law. The development of precedent that governs future cases is not an end in itself; rather, it is a by-product of those adjustments to pre-existing rules that are compelled by considerations of fairness in the particular case. The limited, incremental development of precedent is necessary to justify deviation from prior rules and to preserve the proper relationship between the judiciary and a society governed by the rule of law. When a litigant seeks judicial revision of precedent without himself demonstrating a need to invoke the broader considerations of fairness that allow for such revision, the legitimacy of the law-declaring function of the judiciary is placed in doubt.

B. Justiciability: Doctrines of Ripeness and Standing

Justiciability limitations under the common law case method serve generally to prevent the use of the judicial process for the sole purpose of articulating principles of law rather than for settling the rights of injured parties. Ripeness focuses upon the temporal immediacy of harm to the litigant while standing focuses upon the nature of the interest the litigant asserts. While it is too late and would indeed be undesirable to deny adjudication on the ground that the litigant is motivated in part by a desire to influence the development of the law, doctrines of ripeness and standing serve to meet the risks inherent in such nontraditional adjudication without doing violence to the common law method. They achieve this objective by ensuring that challenges are framed with sufficient specificity—concreteness—and legal issues are presented by parties having an adequate stake in the outcome of litigation—adverseness.

One such use of justiciability limitations is illustrated by the judicial

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65 While courts should not entertain challenges in which the only motivation for the suit is a desire for determination of legal principles per se, neither should they penalize a litigant on the grounds that he has ideological purposes in addition to a desire to vindicate his own personal rights. In such situations, the complaint is specifically phrased because of the existence of an actual dispute. Furthermore, denial of a forum on the grounds that the litigants wish to use litigation for political purposes seems to penalize political expression and arguably borders on a first amendment violation. Cf. NAACP v. Button, 371 U.S. 415 (1963) (Court invalidated on first amendment grounds state barratry laws used to prosecute the NAACP for sponsorship of test litigation).

Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party has suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, sided by parties who argue within the context, is capable of making decisions.
approach to declaratory relief. The Declaratory Judgments Act\(^6\) allows a potential defendant to litigate at a point when prior procedure would have required him to wait and defend. One purpose of the Act is to alleviate the costs implicit in delaying adjudication of the validity of threatened government action. In particular, it was thought undesirable to force an individual to choose between forgoing his intended course of conduct and running the risk of legal sanctions. Such a procedure thus permits litigation for the sole purpose of affecting the outcome of an anticipated, not actual, dispute—a dispute that would occur only if the government were to undertake the action that a potential defendant challenges. The importance of predictability to a legal system that regulates society by guiding primary conduct militates strongly in favor of the availability of some such determinations prior to arguably prohibited conduct.\(^6\)

The inherent conflict that thus exists between the need for knowledge about the probable legal consequences of future conduct and the traditional requirement that legal issues be resolved only within the context of an actual controversy is met by the ripeness doctrine. Under the doctrine, courts may not intervene except in the presence of objective evidence of a threat of harm or enforcement.\(^6\) Ripeness ensures that a court will not be forced to rely upon a hypothetical factual situation to formulate rules of law with speculative ramifications.\(^7\) When a dispute arises out of a course of conduct involving both a potential defendant and the government, there is not only a need for judicial remedy,\(^7\) but also a strong incentive

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\(^7\) See Monaghan, supra note 4, at 1394 & n.188; J. Rawls, supra note 21, at 238-40.

The purposes of the Act do not extend to litigation in which the sole purpose is prede­termination of legal principles to govern disputes between other parties; however, the procedural innovations which the Act introduces are readily adaptable to that end. Whereas a defendant in a criminal trial has little, if any, control over the factual framing of the legal issues, a plaintiff seeking declaratory relief has a great deal. He need only hypothesize a set of facts and allege that government officials will attempt to prosecute him on those facts, in order to force resolution of constitutional issues upon a stipulated set of circumstances. In such a situation, adjudication of the legal issues would be contrary to the traditional requirement that legal questions be resolved only within the context of an actual controversy calling for adjustment and application of prior rules.


\(^6\) See, e.g., Boyle v. Landry, 401 U.S. 77, 81 (1971). See also Monaghan, supra note 4, at 1394, where the suggestion is made that there is a substantial risk of frivolity when declaratory relief is sought in an “as applied” attack upon a facially valid statute. Professor Monaghan argues that the defendant should be required to show that the criminal process will not provide an adequate forum for testing the constitutionality of the application of the law and that the “as applied” issue can be concretely presented prior to commencement of the prosecution.

\(^7\) In the absence of an immediate threat of enforcement, litigants suffer no harm when adjudication is delayed. A period of postponement can, however, be advantageous to the courts. Legislative enactments, agency rulemaking, or other contingencies may obviate the need for adjudication. Moreover, delay allows for development of a more concrete factual situation, thus facilitating eventual judicial resolution of the issues. In some instances, interested groups may take the opportunity to prepare data and to explore possible grounds for and ramifications of the decision.
for both parties to bring every significant factual detail to the attention of the court. Once a threat of harm is established, that the judgment will have res judicata effect as to the parties guarantees that the court is promulgating rules not in the abstract but incident to the determination of the rights of litigants before it. This effect is vitiated if those issues presented for judicial resolution and actually adjudicated fail accurately to reflect the facts of the parties' situation; only proof that a litigant faces a substantial threat of harm ensures that the force of res judicata will be compelling.

The ripeness doctrine allows for adjustment of the literal rules governing common law decisionmaking to accommodate the need for predictability. It thus incorporates basic notions about the function of law in society into a traditional framework of adjudication. The standing doctrine performs a similar function: it ensures the legitimacy of a judicial process that applies principles from previous cases to decide the claims of future litigants by requiring that such principles be derived only as an incident of determining the rights of the parties before the court. For this reason, it is somewhat analogous to constitutional limitations on the permissible res judicata effect of a decision.

Ordinarily, due process limits the permissible res judicata effects of a judgment upon persons not party to litigation and requires that persons who will be affected by a judgment have an opportunity to participate in its formulation—or, in class action litigation, to be represented by a similarly situated litigant. As the discussion of stare decisis indicated, however, even absent res judicata considerations the precedential significance of a decision for later cases may be substantial. Future litigants with claims similar to those resolved in a particular case are thus effectively placed in the position of absent members of a class action: they must rely upon the adequacy of representation provided by prior litigants whose claims, when resolved, will yield certain principles of law. Because the common law model focuses upon the vindication of private rights through limited holdings, the legal principles laid down in each case are

In some "hard cases," the Supreme Court may prefer to stage a full-scale dress rehearsal prior to the real performance. Compare Warth v. Seldin, 422 U.S. 490 (1975), with Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S. Ct. 1098 (1977). Compare also DeFunis v. Odegaard, 416 U.S. 312 (1974), with Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 97 S. Ct. 1098 (1977). The Court may even suggest the specific details it would find helpful. For example, in Warth v. Seldin, the Court suggested that a properly phrased challenge to exclusionary zoning would allege the denial of a specific building permit. 422 U.S. at 504. Such a challenge was subsequently presented and adjudicated on the merits in the Arlington Heights case.

Ordinarily, due process limits the permissible res judicata effects of a judgment upon persons not party to litigation and requires that persons who will be affected by a judgment have an opportunity to participate in its formulation—or, in class action litigation, to be represented by a similarly situated litigant. As the discussion of stare decisis indicated, however, even absent res judicata considerations the precedential significance of a decision for later cases may be substantial. Future litigants with claims similar to those resolved in a particular case are thus effectively placed in the position of absent members of a class action: they must rely upon the adequacy of representation provided by prior litigants whose claims, when resolved, will yield certain principles of law. Because the common law model focuses upon the vindication of private rights through limited holdings, the legal principles laid down in each case are


The modern declaratory judgment procedure answers the need for early adjudication of legal relations without doing violence to the case-adversary system of presenting issues to the courts. In this way the procedure supplies a useful but carefully limited extension of the judicial function.


74 Cf. Chayes, supra note 6, at 1294 (discussion of "stare decisis effect" of modern equitable litigation).
directly connected to the kinds of interests that the parties assert. Thus, a case cannot establish a legal principle except as an instance of the application of that principle to parties whose rights will be affected by it. A natural consequence of this method is that both the judicial process and the interests of future litigants are protected from improper representation: a person stating a claim based upon alleged violation of certain interests will necessarily be similarly situated to those persons whose rights or claims will be affected in the future.

When parties seek to challenge the validity of government action, however, the nature of the interests asserted as justification for invoking judicial power may be only indirectly connected with the nature of the relief sought.\(^75\) As the link between the interest asserted and the type of judicial intervention requested becomes attenuated, the risk of broadly phrased challenges increases; and further, the focus of the court shifts from remedying private wrongs to making abstract determinations of legal principle, with the corollary risk that the interest asserted by the plaintiff is merely an excuse for engaging the court in a discussion of government practices that the plaintiff finds objectionable. The doctrine of stare decisis requires that future cases raising similar issues be treated in similar fashion; however, the plaintiff may, because of the nature of his interests in these challenges, fail adequately to represent future plaintiffs who may be injured more directly by the challenged action. As the implicit goals of the parties become more expansive, the risk of breakdown in this system increases; thus, in effect, courts may be treating as “like” cases that are not in fact sufficiently similar. Here, natural protections of the common law model are absent; courts must thus look to standing doctrine to ensure the sufficiency of the injury to the plaintiff who seeks to challenge government action. Implicit in this requirement is a judicial inquiry as to who will be affected if the plaintiff loses the suit and a determination whether the injury alleged by the plaintiff is as serious or of the same kind as that suffered by other possible challengers.

In making this inquiry, courts have recognized that in some situations it may not be possible for affected parties to assert their own constitutional rights. The doctrine of third party standing delineates the situations in which it is necessary and permissible to allow a litigant to raise issues which do not implicate his own personal rights. Originally, the general rule was that litigants might not assert the rights of third parties, even in a traditional case in which the litigant undoubtedly had a personal stake. \(^76\)

Under the representational approach, which looks to the similarity of interest between the assertor of a claim and others who might later assert

\(^75\) See, e.g., United States v. Richardson, 418 U.S. 166, 176 (1974) (plaintiff asserted injury to his right to vote intelligently as grounds for attacking failure of Central Intelligence Agency to make public its budget); United States v. SCRAP, 412 U.S. 669, 684-85 (1973) (plaintiffs asserted injury to their enjoyment of natural resources as justification for attacking surcharge on railroad freight rates).

it, the rationale is clear: litigants should not be permitted to assert the
claims of groups of which they are not members. There is no reason to
refuse adjudication by appropriate representatives, however, when in-
jured individuals cannot themselves raise their claims, or when refusal to
adjudicate would, for practical reasons, amount to foreclosure of third
party rights.

For example, in Barrows v. Jackson,77 a white landowner who had sold
property to a black was permitted to assert the black’s equal protection
right as a defense in a private suit for breach of a racially restrictive
covenant. The black buyer had no means of asserting the right himself;
therefore, no future case could arise in which a black buyer would be
foreclosed by an adverse decision in the white seller’s suit. Rejection of the
white seller’s standing to raise the equal protection defense would have
made other white sellers unwilling to violate such covenants, thus injuring
blacks to the same extent as a loss on the merits. Another third party
standing situation arose in Griswold v. Connecticut,78 in which a doctor was
allowed to assert the privacy rights of his patients as a defense to a
prosecution for aiding and abetting the crime of using birth control
devices. If doctors were unable to challenge the law, and their convictions
were upheld, the constitutional rights of their patients effectively would
be denied. Still a third example is provided by NAACP v. Alabama,79 in
which the NAACP sought to protest an order to supply membership lists
to the state, asserting its members first amendment rights. The Court
allowed the group to do so, stating:

If petitioner’s rank-and-file members are constitutionally entitled to
withhold their connection with the Association despite the production
order, it is manifest that this right is properly assertable by the
Association. To require that it be claimed by the members themselves
would result in nullification of the right at the very moment of its
assertion. Petitioner is the appropriate party to assert these rights,
because it and its members are in every practical sense identical. . . .
The reasonable likelihood that the Association itself through di-
minished financial support and membership may be adversely af-
fected if production is compelled is a further factor pointing towards
our holding that petitioner had standing to complain of the produc-
tion order on behalf of its members.80

As indicated in the Court’s discussion, there are two factors that provide
safeguards which substitute for representation through similarity of situa-
tion. One is the plaintiff's own concrete stake in the dispute: as the Court
noted, the Association itself would suffer diminished financial support
and membership if it were unable to keep its membership lists secret.
Similarly, in Barrows, the constitutional claim constituted a complete de-
fense to the suit for breach of contract; and in Griswold, the patients’

77 346 U.S. 249 (1953).
78 381 U.S. 479 (1965).
80 Id. at 459-60.
claims, if successful, would have provided the doctor with a defense to
criminal charges. The presence of a concrete stake makes it unlikely that a
litigant would take unreasonable risks with his own case in pursuit of
long-range goals. Second, the Court said that the NAACP and its mem-
bers were "in every practical sense identical." Third party standing is most
justifiable when the litigant is in some way the affected individual's choice
of representative. In NAACP v. Alabama, the persons whose rights were at
stake had voluntarily chosen to join the organization; similarly, the af-
fected parties in both Griswold and Barrows had voluntarily entered into
relationships with the litigant prior to initiation of the lawsuit. The
litigants were therefore familiar with the individuals' circumstances and
interests, and were not merely self-appointed champions. In such situa-
tions, there are adequate safeguards to justify a decision on the merits;
moreover, to refuse the available representative standing to raise these
issues would be to leave the rightholders without means of redress.

Similar considerations are applicable with respect to the doctrine of
mootness, a doctrine which can be subsumed under general standing
theory. The basic deficiency of a moot case is that, at some point
subsequent to initiation of litigation, circumstances have intervened to
make personal relief for the particular litigant inappropriate, thereby
removing the adverse interest necessary to justify standing. The courts,
for reasons directly attributable to guarantees of effective representa-
tion, have been noticeably less reluctant to entertain such challenges
than to entertain other types of disputes in which the plaintiff lacks a
tangible stake. As with litigants who assert the rights of third parties, a
plaintiff whose claim has become moot may in some situations be a
suitable representative to enforce the rights of absent parties. Such a
litigant is not merely a self-appointed champion; because he was at one
time a member of the class of affected parties, he can be expected to be
sensitive to the interests of those persons whose rights are still directly at
stake. Moreover, in such cases the issues were framed at a point when the
litigant did have a concrete stake in the outcome of the dispute, thus
minimizing the risk of development of overbroad precedent. Finally, and
most importantly, complete denial of a right to adjudication on mootness
grounds would effectively foreclose judicial consideration of certain legal
issues.

81 In administrative law, organizations frequently have been held to have standing to
assert the rights of their members. See National Motor Freight Ass'n v. United States, 372
U.S. 246, 247 (1962); Stewart, Reformation of Administrative Law, 88 Harv. L. Rev. 1667,
1743 (1975).
82 See, e.g., Monaghan, supra note 4, at 1384; Tushnet, The New Law of Standing: A Plea
note 34, at 107-20.
83 See Hall v. Beals, 396 U.S. 45, 49 (1969) ("[t]he appellants 'cannot represent a class of
84 The standard that the Court has used in these situations is whether the challenged
action is "capable of repetition, yet evading review." Moore v. Ogilvie, 394 U.S. 814, 816

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C. Ideological Plaintiffs and the Case Method

Proposals for revision of the standing doctrine have focused primarily upon whether ideological litigants are suitable plaintiffs to initiate challenges to the validity of government action. Although the previous section illustrated that the case method can accommodate the need for certain types of litigation outside the literal constraints of the traditional case, litigation by purely ideological plaintiffs exceeds the permissible limits of such an accommodation. The ideological, or non-Hohfeldian, plaintiff does not have traditional legally protected rights at stake, nor do such plaintiffs have a concrete interest in the outcome of disputes in which they assert the legal rights of parties not before the court. Ordinarily, such plaintiffs are organizations that are concerned about the issue to be litigated. The injury sustained, if any, is to the ideology or social conscience of the plaintiffs; thus, their challenge is to the existence of certain practices or institutions rather than to any impact upon themselves. Such plaintiffs are unlikely to present a factual record appropriate to the formulation of legal principles that will affect future litigants who present similar challenges to government action but who assert more concrete injuries as a justification for obtaining review. In addition to this defect in representative capacity, the use of nontraditional plaintiffs sacrifices an important feature of judicial review: the sensitivity of courts to the impact of challenged laws upon affected individuals.

Those who favor an expanded model of review have suggested a number of alternative justifications for recognizing ideological plaintiffs as competent to represent those injured by government action. The criteria that have been proposed for allowing such challenges are impracticable, however, and should be applied only in conjunction with some variant

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82 Yale L.J. 1111, 1113 (1973) ("[o]ne way to promote [the litigation effort] was to raise the entire range of capital punishment arguments in every case where execution was imminent, thereby stopping the killing and eventually presenting any resumption of it as likely to lead to a blood bath").

86 The term "non-Hohfeldian" was adapted from Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 25 Yale L.J. 16 (1913), and was popularized by Professor Jaffe. See generally Jaffe, supra note 4.

87 See Chayes, supra note 6, at 1307-08; cf. Meltsner, Litigating Against the Death Penalty, 82 Yale L.J. 1111, 1113 (1973) ("[o]ne way to promote [the litigation effort] was to raise the entire range of capital punishment arguments in every case where execution was imminent, thereby stopping the killing and eventually presenting any resumption of it as likely to lead to a blood bath").

88 See authorities cited note 85 supra.

85 See generally Berger, supra note 6; Davis, Standing, Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968); Jaffe, supra note 4; Monaghan, supra note 4; Scott, supra note 4.

82 Yale L.J. 1111, 1113 (1973) ("[o]ne way to promote [the litigation effort] was to raise the entire range of capital punishment arguments in every case where execution was imminent, thereby stopping the killing and eventually presenting any resumption of it as likely to lead to a blood bath").

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Wade, 410 U.S. 113 (1973), a litigant was allowed to challenge a statute limiting her right to an abortion, even though she was no longer pregnant at the time of the Supreme Court decision. In DeFunis v. Odegaard, 416 U.S. 312 (1974), however, the Court dismissed a challenge to an affirmative action plan by a plaintiff denied admission to law school on the grounds that the lower court had granted the requested relief and the plaintiff's graduation was imminent. The mootness holding in DeFunis did not necessarily preclude future consideration of the affirmative action issue, since a lower court's denial of relief in a later case could preserve the adverseness of the situation pending Supreme Court review. Although the Court has failed to indicate decisively whether an issue must be capable of repetition with respect to the same plaintiff, the question has been largely obviated by the use of class actions. See Hart & Wechsler, supra note 34, at 23-29 (Supp. 1977) (relationship between mootness and class actions).
of current standing doctrine or in cases in which an ideological challenger is supporting a Hohfeldian plaintiff.\(^9\) One such criterion is willingness to pay litigation fees.\(^9\) A plaintiff's ability to cover the costs of litigation does not ensure that its interests are the same as those of persons genuinely injured by the challenged act; a political action group may well have objectives other than success in the particular case.\(^9\) Ideological commitment, another possible substitute for personal injury, is similarly unhelpful as an indicator of a plaintiff's competence as a representative. The very fact of ideological zeal may make such plaintiffs poor representatives because they tend to take risks in instituting broadly phrased challenges.\(^9\) Finally, any procedure for determining which parties are to litigate challenges to government action must be administered by the courts. Although under any criterion for an expanded model of review some potential plaintiffs must be excluded,\(^9\) serious questions are raised by the possibility of courts making access determinations between different ideological groups.\(^9\)

\(^9\) See Scott, supra note 4, at 672-82, 692. While courts should not entertain challenges in which the only motivation for the suit is a desire for determination of legal principles per se, neither should they penalize a litigant on the grounds that he has ideological purposes in addition to a desire to vindicate his own personal rights. In such situations, the complaint is specifically phrased because of the existence of an actual dispute. Furthermore, denial of a forum on the grounds that the litigants wish to use litigation for political purposes seems to penalize political expression and arguably borders on a first amendment violation. Cf. NAACP v. Button, 371 U.S. 415 (1963) (Court invalidated on first amendment grounds state barratry laws used to prosecute the NAACP for sponsorship of test litigation). Moreover, organizational support of test litigation is desirable because it offers legal services to those who might otherwise not be able to afford it. Standing doctrine effectively encourages support of litigation on behalf of private parties because the organization can become involved in court challenges only through a traditional plaintiff.

\(^9\) See Jaffe, supra note 4, at 1037-38.

\(^9\) See, e.g., Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971) (no case or controversy because both sets of parties to the litigation hoped for a decision upholding state anti-busing statute as constitutional). Even proponents of an expanded model of review may pause at the thought of self-appointed representatives dominating constitutional litigation. See, e.g., Chayes, supra note 6, at 1310 (use of litigation as a political pressure tactic).

\(^9\) See text accompanying notes 61-64 supra (specificity problems). But see Chayes, supra note 6, at 1295 (suggesting that the traditional plaintiff is less competent than the public interest group precisely because the former has narrower, less socially oriented goals).

One difficulty inherent in determining the adequacy of a representative is that neither party may be willing to raise or argue the issue. The plaintiff certainly cannot be expected to offer objections to his own standing, and the defendant will probably permit the plaintiff's lack of representative capacity to go unnoticed. This problem has arisen in the class action situation. O. Fiss, Injunctions 514 (1972). For discussion of the problem of conflict of interest, see Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849 (1975). See Meltsner, supra note 87 (discussing possible examples); Stewart, supra note 81; cf. NAACP v. Button, 371 U.S. 415, 462 (1963) (Harlan, J., dissenting).

\(^9\) See Monagahan, supra note 4, at 1371, 1376 (suggesting that the expanded model of review would require limitations upon the rate at which constitutional challenges could be initiated in order not to overwhelm both the courts and other branches of government); Scott, supra note 4, at 670-73.

\(^9\) For example, exclusion of plaintiffs on the grounds that they have not yet demonstrated commitment and competence through prior litigation success would run counter to a basic premise of the activist model of review—namely, that the courts serve an important function in providing forums for groups that are not effectively organized for political action.
One response to the difficulties inherent in expansion of the standing model is to suggest that Congress can confer standing upon plaintiffs whom the Court itself would have found to have an insufficient personal stake.95 This proposal stems in part from developments in administrative law that have afforded Congress a role in deciding who may challenge agency action. The Court has stated that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."96 Accordingly, Congress may, pursuant to some enumerated power, enact new legal rights and confer remedial rights of action upon private parties as a means of enforcing the statute. In some instances Congress may, in effect, create a new legal right simply to have agency officials act in accordance with their statutory authorization, doing so by conferring a right to challenge agency action without first expressly creating a primary private right.97 This is clearly a sensible role for Congress: when Congress authorizes challenges to agency action, it ensures that its own directives will be followed. Moreover, because agency action is ordinarily self-enforcing rather than requiring invocation of judicial power, the risk that the stare decisis effect of ill-considered challenges will foreclose later assertion of rights by more directly affected parties is minimal.98

When standing to assert constitutional rights is in question, however, the role of Congress is somewhat different. Congress may have a role, pursuant to the fact-finding competence associated with its enforcement powers under the fourteenth amendment,99 to facilitate equal protection challenges to state and local government action.100 It may even have a role in authorizing challenges to federal government action implicating questions at the margin between traditionally justiciable issues and political questions.101 In circumstances such as these, in which the constitutional

95 Monaghan, supra note 4, at 1376-79; see Tushnet, supra note 82, at 665-70.
97 Tushnet, supra note 82, at 666-67.
98 See Vining, supra note 6, at 1512 (suggesting that pre-enforcement review of agency action helps to ensure that the agency will not be able to manipulate the choice of both forum and opponent in order to influence the resolution of the issues). Moreover, the peculiar status of administrative agencies as both makers and enforcers of rules may require that access to the judicial process be facilitated. See generally Hart & Wechsler, supra note 34, at 324-72.
99 U.S. Const. amend. XIV, § 5.
101 Some authors have suggested that Congress should have a broader role in facilitating challenges to government action. See, e.g., Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81, 103-18. Professor Burt suggests a role that would allow Congress to interpret and enforce constitutional guarantees that the Court would consider to involve political questions. Congress can make distinctions among classes that the Court would itself be hard put to explain on principled grounds both because Congress is more sensitively tuned to the competing social interests that demand accommodation and because the institutional
issues might otherwise be thought nonjusticiable, adjudication would not jeopardize later assertions of private rights.

In contrast, in suits that are brought to litigate challenges to congressional action that would be considered traditionally justiciable, there are serious limitations upon the power of Congress to provide access to judicial review. These limitations derive from the courts' ultimate responsibility for safeguarding the accuracy and fairness of the judicial process. The notion of due process, implicit in the nature of a fair legal system and the rule of law, imposes upon the courts an obligation to ensure that the criteria for effective decisionmaking are met before they make decisions that will become part of the body of law governing future cases. The lack of res judicata effect of a decision that fails to satisfy these criteria is insufficient to justify making the decision in the first instance. The principles of predictability and consistency inherent in the common law model require that cases have precedential significance; due process requires that this significance not be tainted by decisionmaking in inappropriate circumstances.

If there is a role for congressionally authorized ideological plaintiffs who have no concrete stake in the outcome of litigation,\textsuperscript{102} it could only be in those situations in which Congress could, in a manner consistent with the limitations of the case method, authorize litigation of issues not otherwise adjudicable. In such cases, Congress would perform a traditional legislative function: it would identify a particular type of societal harm—although the definition here might be constitutionally inspired—and enlist the aid of the courts in remedying the condition. Potential future plaintiffs would not be unfairly affected and the authorization to sue would become, in effect, the creation of a new right of action—an approach that would reserve to the courts their constitutional duty to determine whether a particular plaintiff demonstrates the requisite injury to sue under an existing right of action.\textsuperscript{103} In contrast, in suits that are brought to litigate issues traditionally adjudicable by courts—whether or not such actions are congressionally authorized—considerations of institutional competence require that third party standing doctrine be invoked in a judicial assessment of the appropriateness of the plaintiff as a representative.

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\textsuperscript{102} There is a sense in which standing to assert the rights of third parties by a litigant already involved in a dispute is ideological, because the injury the litigant will suffer is not a direct result of violation of the rights he is asserting. As indicated earlier, however, these situations provide sufficient safeguards to allow such challenges to be adjudicated. See text accompanying notes 76-84 supra.

\textsuperscript{103} See Tushnet, supra note 82, at 672-74. Although Professor Tushnet's analysis is confused by his failure to articulate the relationship between standing and the existence of a cause of action, the distinction between standing to sue on an existing cause of action and congressional enactment of a new cause of action is a useful one.
IV. Conclusion

Some of the proposed revisions of justiciability doctrines undoubtedly stem from perceived inadequacies in present doctrinal formulations. Certain inadequacies are endemic to jurisdictional doctrines—for example, anticipation of the merits of the claim or failure to accept as true the allegations in the complaint. A more serious problem is that present formulations often provide only an ambiguous guide to probable holdings of justiciability; they are thus open to the criticism that they aid the courts in avoiding difficult decisions on the merits and in discouraging unpopular plaintiffs. Yet questions of justiciability, as difficult as they are, cannot be avoided; even an expanded model of review must provide a conceptual framework for dealing with such problems. To abandon the traditional model for some pragmatically oriented alternative would be an inappropriate response. Rather, a broader view of the role of the judiciary in society reveals that courts can only perform their necessary tasks if they restrict their attention to the demands of individual cases. Thus, the focus of commentators should not be upon enlarging justiciability limitations generally, but rather upon elucidating existing doctrines sufficiently to allow for consistent application.