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# The Concept of Mandatory Jurisdiction

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> It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, *direct or indirect*, occurs in the federal system.[1]

## INTRODUCTION

The legal doctrine examined in this Article is that of "mandatory" jurisdiction—the notion that courts *must* exercise a valid investment of judicial authority over all cases that come within the terms of the jurisdictional grant of power. The concept of mandatory jurisdiction has often been invoked by courts when it suits their interests, and for the same reason is often ignored. When the doctrine of mandatory jurisdiction has not been applied, however, courts invariably have taken care to disclaim any notion that the concept was not being followed. This degree of care is understandable for the concept of mandatory jurisdiction lies at the very root of constitutional government as fashioned by the judiciary in this country.

The notion that a federal court must exercise its jurisdiction in all cases that are justiciable is found in *Marbury v. Madison*,[2] and indeed rose to *ex cathedra* proportions in *Cohens v. Virginia*,[3] in which Chief Justice Marshall asserted:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.[4]

It is interesting that in articulating the doctrine of mandatory jurisdiction, not only were Marshall's statements unsupported and his premises unproved but the position asserted has remained virtually unchallenged

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1. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955) (emphasis added).

2. 5 U.S. (1 Cranch) 137 (1803). A theory of discretionary power to decline to exercise jurisdiction "is something that cannot exist within the four corners of *Marbury v. Madison*." Bickel, *Foreword: The Passive Virtues, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 46 (1961).

3. 19 U.S. (6 Wheat.) 264 (1821).

4. *Id.* at 404.

since its utterance.[5] Perhaps Marshall thought the truth of the matter so self-evident that an explanation of the obvious was unnecessary; and perhaps this myth has prevented serious inquiry into the doctrine. Yet, the proposition that courts may not decline to exercise jurisdiction validly conferred is not self-evident.[6] Rather, if the doctrine of mandatory jurisdiction, or some variant thereof, is to be accepted as a component of modern jurisprudence, it must be because the doctrine possesses utility, that it somehow furthers by permissible means the ends and purposes for which courts, as political institutions, have been created.[7]

In assessing the utility of the doctrine of mandatory jurisdiction, it is beneficial to examine its historical origins. This benefit is not derived because historical investigation provides the proper resolution of the problem; rather, the use of history will aid in discerning *why* the doctrine of mandatory jurisdiction has come to be "accepted" as an integral component of common law jurisdiction. History has a part to play. It allows us to gain some perspective and evaluate the soundness of continued adherence to a doctrine, the origin of which has, to date, been unexplored. After the historical origins of the doctrine, both in England and in the United States, have been examined, the development of exceptions to the command of mandatory jurisdiction will be inspected. Finally, the current utility of adherence to the doctrine will be assessed in light of the purposes to which the doctrine is put, and the demands of modern judicial institutions. The conclusion offered is that although the doctrine of mandatory jurisdiction may have some utility in upholding respect for courts as neutral decisionmakers, it is not an essential component[8] of an adjudicatory system.

## I. THE HISTORICAL ORIGINS OF THE DOCTRINE OF MANDATORY JURISDICTION

### A. *The Concept of Mandatory Jurisdiction under the Early Common Law*

The status of the doctrine of mandatory jurisdiction at common law

5. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

6. *See, e.g.*, Bickel, *Foreword: The Passive Virtues: The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961).

7. *Id.* at 49, 50. It is interesting that the responses to Professor Bickel's argument largely avoided acknowledging the *political* role of the courts in modern society. *See e.g.*, Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10 (1964). This lack of acknowledgement necessarily resulted in different attitudes regarding the propriety of judicial declinations of jurisdiction. Different attitudes concerning utility would arise anytime the object of inquiry was different for each inquirer. At the minimum, those who disagree with Professor Bickel's observations are obliged to explain how they differ with his views regarding the "political" role of the Court. If the Court's politics have come to equal or outweigh its traditionally conceived judicial function, then our notions of what proper, utilitarian practices the Court may engage in must necessarily be adjusted.

8. There are certain criteria that one intuitively demands of a system of adjudication, such as impartiality of decisionmakers, technical competence, judiciousness, and equality. These criteria would be "essential" in any case, while others may be so considered on a nonintuitive basis.

was not clear, although several decisions do rest in part upon such a doctrinal formulation. At several points in his work, *On the Laws and Customs of England*, Bracton described a judicial system that at least with respect to access questions was, in theory, not based upon discretion.[9] In describing an "action" that had to be pursued in a judicial proceeding, Bracton described it as "the right of pursuing . . . what is due to one." Bracton further noted that the king, from whom all civil judicial power emanated, was "vicar of God on earth." Thus the king was obligated to distinguish "*jus* from *injuria*," "equity from inequity."[10] It was not a duty that could be declined, inasmuch as the king had sworn a coronation oath to provide justice and peace to his subjects.[11] As the judges represented the king, this obligation was in turn vested in the courts.[12] Whatever the practical reality of notions of mandatory jurisdiction in twelfth and thirteenth century England, there was a conceptual basis for ingraining into the system a sense of obligation to decide cases properly brought before the court,[13] although one would be hard pressed to argue that functionally any "right" to judicial proceedings existed.

With the separation of the courts from the king's household, a period of uncertainty arose. The basis of the court's power or, more accurately, the judges' perception of the basis of their right or power to adjudicate,

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9. Bracton defined an "action" thus: "What is an action? It is nothing other than the right of pursuing in a judicial proceeding what is due to one." 2 BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 282 (S. Thorne trans. 1968). There is substantial doubt over the accuracy of ascribing the work to Bracton. *See* Wiener, *Did Bracton Write Bracton?*, 64 A.B.A.J. 72 (1978). And perhaps even greater dispute over the accuracy of certain passages as translated in the work. *See* Wiener, *Bracton in English After Seven Hundred Years*, 55 A.B.A.J. 964 (1969). Nonetheless, the problems do not appear to diminish the importance of the work as indicative of the existence of a perceived right to a judicial remedy no matter how circumscribed that right actually was in the formative period of the English judicial system—the period that Bracton's work chronicles.

10. "The king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*, equity from inequity, that all his subjects may live uprightly, none injure another, and by a just award each be restored to that which is his own." 2 BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 305 (S. Thorne trans. 1968).

11. *Id.* at 304.

12. *See generally* R. GOLDFARB, THE CONTEMPT POWER 11-14 (1963). *See also* 2 BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 306-07 (S. Thorne trans. 1968).

13. The concept of jurisdiction at common law is always difficult to discuss adequately because it was a far larger issue than functionally defining the composition and competency of courts. As noted by Pollock and Maitland:

> Courts exist for the purpose of defining and enforcing the rules of substantive law. But when we are dealing with the middle ages, we can not thus regard what we may call the "law of jurisdiction" as merely subsidiary or "adjective." It is intertwined with the law of property and the law of personal status and this in many different ways. In the first place, jurisdiction is a proprietary right, or the subject matter of proprietary rights, profitable, alienable, inheritable rights, which are often bound up with the tenure of land. In the second place, jurisdiction is one of the main ties which keeps society together; the man is bound to his lord by this as well as other bonds; he is not merely his lord's man and his lord's tenant, but he is also his lord's "justiciable"; his lord is his "sovereign"; he owes to his lord not merely service but also suit; and thus once more the law of jurisdiction is implicated with the land law.

1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 527-32 (2d ed. 1898) (footnotes omitted). Jurisdiction theory today likewise must be seen as one of the main indicia of the relationship we wish to establish between individuals and their government. Unfortunately, we often lose sight of the larger values in favor of a functional analysis of court organization.

remains shrouded in historical dark ages. That a system of independent Royal Courts did arise is recognized and that they fenced and parried with each other to extend their jurisdictional powers has been well documented. Perhaps one reason attention was not given to the question of mandatory jurisdiction in the early common law cases lay in the rule that jurisdiction ordinarily could not be challenged.[14] Certainly, a court that refuses to allow challenges to its subject matter competence will not feel any compunction about exercising all of the jurisdiction that it can.

An essential feature in the development of the common law was that the jurisdiction of the Royal Courts was ill defined. Jurisdiction was acquired by assertion.[15] The rule of capture prevailed.[16] Thus, the successful exercise of jurisdiction was a fundamental constitutional tool for determining the constellation of judicial power that could be exercised by a common law court.[17] Into this model the concept of mandatory jurisdiction fits very nicely. A court desirous of exercising jurisdiction quickly develops a thesis that controversies within its purview must be entertained. To do otherwise raises the possibility that jurisdiction might be lost to another court ready to provide a remedy. The assertion of the doctrine of mandatory jurisdiction was then a tool, perhaps a necessary tool, but nonetheless only a means by which the judicial system itself was created and in time extended.

For example, in *Ward's Case*[18] the court, in language that carried a striking parallel to Marshall's statement in *Cohens v. Virginia*, stated: "We, the judges, must maintain the jurisdiction of our Court, if the case is not plainly and evidently outside its jurisdiction. . . ." When this statement is viewed in the context of the policy being developed, however, a different reason for the use of the doctrine appears. *Ward's Case* involved the question whether it appeared from the pleadings that the plaintiff's claim arose outside England. This was important because English law at the time was insistent that actions based upon debt or covenant have some relationship with an English county, i.e., the county in which the agreement was made or in which the defendant might be best brought in to answer.[19]

14. Dobbs, *The Decline of Jurisdiction By Consent*, 40 N.C.L. REV. 49, 59, 66 (1961).

15. Just as the lack of assertion resulted in the loss of jurisdiction, *cf.* H. CAM, LAW-FINDERS AND LAW-MAKERS IN MEDIEVAL ENGLAND 37 (1962) ("Enforce the law; if you will not, my sheriff or my justice shall, and you lose your 'court.' ").

16. The Rule of Capture authorizes the causing of something to migrate so as to be reduced to physical ownership and possession by the mover. Although modern day application of the doctrine is generally limited to mineral resources, *see, e.g.*, Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391 (1935), in the formative years of the common law courts when jurisdictional rules were self-imposed and jurisdictional concepts vague and ambiguous, the power to adjudicate could be acquired legitimately from another court simply through assertion by the first court. Jurisdiction was respected as a matter of comity and self-preservation (the remedy of a usurped court being self-help—"go and do likewise"), not as a matter of legal right. *See* note 22 *infra*.

17. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. Rev. 49, 54-55 (1961).

18. 82 Eng. Rep. 245 (K.B. 1662).

19. Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 21-25 (1949).

Expanding English commerce, however, was resulting in the making of agreements outside of England. This was apparently the situation in *Ward's Case*, as the obligation at issue bore date at Hamburg, in what is now Germany. The decision in *Ward's Case* allowed suit to be maintained in England inasmuch as (1) the declaration did not on its face show that the instrument was made in a foreign country, and (2) the court was not prepared to take judicial notice that Hamburg was not in the county in which the action was laid.[20]

It can be stated that the observation of the court in *Ward's Case* that it must exercise jurisdiction is nowhere supported in the decision. Why then is it uttered? The statement certainly provided implicit support for the approach the court took in justifying its willingness to assert jurisdiction in a case where, from the perspective of precedent, that exercise was palpably inappropriate. If the court did not have to exercise jurisdiction, it had less justification in treating the failure of the pleading to establish the location of Hamburg as immaterial. Since, however, the court had to exercise jurisdiction unless it was "plainly and evidently" improper to do so, it could more easily ignore the somewhat obvious fact that Hamburg was *not* located in England. The use of the concept of mandatory jurisdiction aided the court in establishing its subject matter competence by allowing the court to avoid the impact of the then rigorous insistence of English law, incompatible with growing trade and commerce, that the claim arise at least partly in England.

Consideration of the jurisdiction issue, as by the court in *Ward's Case* was rare. Most of the time the Royal Courts simply extended their jurisdiction without discussion. For example, in *Stradling v. Morgan*,[21] the Court of Exchequer read with great liberality a statute apparently intended to ameliorate some of the harshness attendant to the Confiscation Acts of Henry the Eighth to reach a construction that the statute vested jurisdiction in Exchequer over certain actions normally entertained in the Court of Common Pleas. Jurisdiction was constantly seen as concurrent; this left it to the self-interest of parties to select the court that could provide the best remedy, which in turn redounded to the economic benefit of the court.[22] The greatest remedy after all must be seen as access to a court; without

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20. In Roberts v. Harnage, 91 Eng. Rep. 561 (K.B. 1704) this principle would crystalize into the famous pleading from fiction that allowed English courts to pretend that such exotic locales as Majorca or the East Indies were in London, England.

21. 75 Eng. Rep. 305 (Ex. 1559).

22. Judges of the Royal Courts received a considerable portion of their income from fees. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 252-55 (7th ed. 1956). This in turn engendered conscious designs to usurp the jurisdiction of local manorial courts because they were profitable, *see* Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 57 (1964), and spurred competition among the Royal Courts to increase jurisdiction. *See* 1 R. NORTH, LIVES OF THE NORTHS 203 (London 1826). And, of course, the English lawyers accelerated these expansionistic policies since they practiced before certain courts rather than for predetermined parties. It thus tended to advance their interests to increase the jurisdiction of the court before which they practiced.

access, no judgment and no remedy carrying the legal sanction of the state is available.

On the other hand, the notion of mandatory jurisdiction was not accepted unquestioningly. Chief Baron Saunders, concurring in *Stradling v. Morgan*, did articulate a doctrine of discretionary jurisdiction, a doctrine that, according to Saunders, had been practiced by Exchequer for several centuries.[23] Saunders was of the view that, contrary to the opinion of the other members of the court, jurisdiction in Exchequer over the matter at issue in *Stradling* did not arise out of the fairly recent Act of Parliament but was of ancient origin. Although the point was contraverted, it was asserted that since ancient times Exchequer had been a proper court to entertain common pleas between any of the king's subjects. Jurisdiction had been declined not because of any want of power, but rather by reason of the demands of the king's business. While Exchequer had ceased to hold pleas between common people, it had done so as a matter of discretion, not *de rigore juris*.

Although there are few concrete precedents on which to base an opinion, the weight of available evidence favors the conclusion that the common law did support a doctrine of mandatory jurisdiction; it did not do so, however, by any clearly reasoned thesis. The doctrine of mandatory jurisdiction rested neither exclusively upon natural right nor exclusively upon the felt needs of society as defined by the then existing social milieu. Rather, the doctrine was founded upon the desire of common law courts, their functionaries, and their adherents to establish a sphere of power that would accrue to their own benefit *and* be consistent with the emerging political demands of society.[24] The doctrine of mandatory jurisdiction was thus a means by which certain desired ends could be achieved. The means were not in any sense of the term "neutral"; rather, they were consciously designed to allow the courts to reach the ends and goals that the courts, and the larger society, wished to achieve.

### B. *The Incorporation of the Doctrine of Mandatory Jurisdiction into American Jurisprudence*

Although the acceptance of the common law in America was at times

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23. 75 Eng. Rep. 305, 318-21 (Ex. 1559).

24. Although the desire to increase revenues underlie many jurisdiction disputes, it must not be forgotten that jurisdiction expansion by the Royal Courts served a larger social purpose:

> Was the crown not interested then in the financial aspect of the expansion of its law courts? We are far from saying this and certain correlations which can be noticed between the price of certain writs and their numbers, suggest a very watchful awareness on the part of the crown (if tariffs for writs of grace were put too high, numbers went so much down that overall income decreased). Nor will anyone deny that these kings could be ingenious when it came to feeding the treasury. But we do submit that the crown's desire to see the law respected and to gain control of its administration was the fundamental motive in the creation of the common law system, together with the country's passion to take all possible litigation to the king's justices.

VON CAENEGEN, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILLE 173-176 (Selden Society Series No. 77, 1959), *reprinted in* S. KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 87-88 (1966).

halting, the early influence of a largely English trained and educated bar and judiciary could not be denied.[25] By the beginning of the nineteenth century, the common law, or more accurately the common law system, had clearly established itself as an integral part of American legal institutions, particularly in the new federal government.[26]

Incorporation of the concept of mandatory jurisdiction into American jurisprudence owes a particular debt to Justices Marshall and Story, who together used the doctrine first to justify constitutional judicial review and then, once the Supreme Court's new role had been established, to insulate it from partisan attacks.

The Marshall-Story contribution can only in part be predicated upon the legislative mandate expressed in section 25 of the Judiciary Act of 1789, which allowed for review by the United States Supreme Court of state decisions involving federal questions.[27] Although Story, in articulating a principle of mandatory jurisdiction in *Martin v. Hunter's Lessee*,[28] relied upon the provision extensively, and Marshall found consistency between his view of mandatory jurisdiction and the same section 25 in *Cohens v. Virginia*,[29] reliance upon section 25 provides, in the end, no satisfactory resolution of the question here presented. To state that Congress has expressly required by enacted legislation that there shall be a right of access to a federal forum does not establish the proposition that the courts therefore must provide a forum.[30] Such a formulation of the issue simply begs the question whether Congress can require the federal courts to exercise jurisdiction. While the existence of precedents such as *Martin v.*

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25. J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 3-8 (1971); 1 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL 126-150 (1970).

26. J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 151-59 (1971); 1 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL 186-202 (1970).

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> [A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favour of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

Judiciary Act of 1789, ch. 20, 1 STAT. 73, 85-86 (footnotes omitted).

28. 14 U.S. (1 Wheat.) 304 (1816).

29. 19 U.S. (6 Wheat.) 264 (1821).

30. The basic question is the assessment of the permissible bounds of involvement by Congress into the affairs of the Court. Some involvement is constitutionally mandated: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Yet, how much is too much cannot be determined by a literal review of the language of the Constitution. The question can be resolved only by either a more explicit constitutional provision or an elaboration of "attitudes" that underlie the development and formulation of constitutional jurisprudence.

*Hunter's Lessee* and *Cohens v. Virginia* is respectable authority for the proposition that Congress can so require, both decisions fail to articulate a compelling reason why this is so. Indeed, in neither *Hunter's Lessee* nor *Cohens* is the concept of mandatory jurisdiction bottomed on section 25. Rather, in both cases (as in *Marbury v. Madison*, which was not a section 25 case), the concept of mandatory jurisdiction was predicated upon a theory of jurisprudence shared by Marshall and Story, and which found forceful articulation in their written opinions.

Although Mr. Justice Story's role should not be minimized, I would like to direct attention to the philosophy and attitudes of Chief Justice Marshall as it related to the development of the doctrine of mandatory jurisdiction. This is due to the preeminence of Marshall's opinions in American constitutional jurisprudence and because, at least insofar as it affects the matter at hand, no perceptible difference separated the views of the two men.[31]

It is natural that Marshall's jurisprudence should find articulate expression in his treatment of the Constitution. During his arguments before the Virginia ratifying convention, Marshall had stated the necessity of judicial review:

> Is it not necessary that the federal courts should have cognizance of cases arising under the constitution, and the laws of the United States? What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here? To what quarter will you look for protection from an infringement on the constitution, if you will not give power to the judiciary? There is no other body that can afford such a protection.[32]

Marshall, while a believer in the Blackstonian concept that courts are but tools of the law,[33] did not tie the concept to a literal interpretation of law apart from existing social or economic theories to which he held allegiance. Thus, for Marshall, the role of the Court was to accommodate

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31. "[O]f the Justices of the Supreme Court of the United States, no two were ever closer in views or in personal relations than Chief Justice Marshall of Virginia and Joseph Story of Massachusetts. . . ." C. WARREN, THE STORY-MARSHALL CORRESPONDENCE 1819-1831 7 (1 Anglo-American Legal History Series No. 7, N.Y.U. Sch. of Law 1942). This is not to say that Marshall and Story always saw issues in the same light; on the important issues involving the Supreme Court, however, their views were inseparable. *See* G. DUNNE, JUSTICE JOSEPH STORY 111-14 (describing a point of difference) 115 (noting their basic sense of unanimity) (1970). *See generally* 4A A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 59-116 (1919), which concludes with the following observation:

> Events thus sharpened the hostility of Jefferson and his following to Marshall, but drew closer the bonds between the Chief Justice and Joseph Story. Once under Marshall's pleasing, steady, powerful influence, Story sped along the path of Nationalism until sometimes he was ahead of the great constructor who, as he advanced, was building an enduring and practicable highway.

*Id.* at 116.

32. DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA, CONVENED AT RICHMOND, ON MONDAY THE SECOND DAY OF JUNE, 1788, 393 (2d ed. 1805).

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, . . . can never be made in this court.")

the Constitution to the fundamental natural law proposition that laws are meant to protect and are certainly presumed to respect the general principles governing private rights.[34]

It is well recounted of Marshall that he came to view the judiciary as primary protector of the theory of Lockean liberalism that was thought by him to underlie the Constitution, and against which constitutional adjudication was to be measured.[35] The interests of the state were to prevail, to promote the general welfare. With respect to the political arrangements established by the Constitution, each separate department was to concentrate upon creating a "real" government, a government unlike that previously existing under the Articles of Confederation, a government of true sovereign power.[36] Within this jurisprudential viewpoint, the necessity that courts exercise their duly ordained jurisdiction became clear. The judicial power having been established by the Constitution, it was to be exercised consistently with the sovereign interests of the State or else, since no other branch could exercise the judicial function, governmental interests would suffer.

34. *See* R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 77-78 (1968):

> In short, for state, nation, and foreign countries, over subsidiary courts and sovereign political powers alike, the federal judiciary was to perform the liberal tasks for which it had been erected, as Marshall thought, by the people. Judicial review ensured that its judgments could not be authoritatively challenged. The individual's rights were secured, his protector dominant. As the sphere of private interest was extended by Lockean liberalism to edge out the dignity intrinsic to community life, and thus to depreciate the importance of political stature, office, and action, one might note that the place of that judiciary which protects private rights increased correspondingly. The polity was broken into state and society, the first ministerial to the second. The judiciary was the branch of the state that directly secured to men the place earned by industrious talent exercised in the economy, as well as a chance to engage as they wish in the other, less fundamental activities of society. As liberal society elevated the ordinary and everyday interests of most men to unqualified primacy, the courts as guardians of such concerns became pervasive in extent as well as first in dignity among the departments. Man, wrote David Hume almost at the beginning of his essay *Of the Origin of Government*, is engaged to establish political society, in order to administer justice, without which there can be no peace among them, nor safety, nor mutual intercourse. We are, therefore, to look upon all the vast apparatus of government, as having ultimately no other object or purpose but the distribution of justice, or, in other words, the support of the twelve judges. Kings and parliaments, fleets and armies, officers of the court and revenue, ambassadors, ministers, and privy counsellors, are all subordinate in their end to this part of administration." Liberalism as well as judicial review accounts for the place of courts in America, and, as we will see, judicial review itself was, in good part, a means of preserving liberalism.

*See generally*, R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 45-56, 66-71, 85-90, 103-08 (1968). *But see* M. COHEN, THE FAITH OF A LIBERAL 178-80 (1946). Cohen argued that Marshall's decision in *Marbury* was less the product of his philosophical principles than his fear of impeachment. Nevertheless, however secure or insecure Marshall was in his tenure as Chief Justice in 1803, he certainly was sufficiently secure during the great phase of the Marshall court (1815-1830) to render de minimis any concerns he may have once had regarding his possible "political" impeachment.

35. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819); R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 47-48 (1968).

36. Marshall well expressed these sentiments in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (1824):

> [W]hen these allied sovereigns [colonial states] converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

Under the settled nature of Marshall's jurisprudence, it was the responsibility of the Court to guard the Constitution. Since that responsibility had been entrusted to the judiciary, it could not be avoided. In *Craig v. Missouri*,[37] this issue of entrustment was explicitly set forth by Marshall. Again, as in earlier cases,[38] the question of state sovereignty and the power of the federal government had been raised at cross purposes. In response to the states' rights arguments raised by Missouri and the veiled threats of forceful resistance to the Supreme Court's mandate, Marshall responded:

> In the argument, we have been reminded by one side of the dignity of a sovereign state; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity: by the other, of the still superior dignity of the people of the United States; who have spoken their will, in terms which we cannot misunderstand.
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> To these admonitions, we can only answer: that if the exercise of that jurisdiction which has been imposed upon us by the constitution and laws of the United States, shall be calculated to bring on those dangers which have been indicated: or if it shall be indispensable to the preservation of the union, and consequently of the independence and liberty of these states: these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law; and can tread only that path which is marked out by duty.[39]

Thus, we can see the basis for Marshall's statements, implicit in *Marbury* and explicit in *Cohens*, that the Court must exercise jurisdiction in a controversy within its purview. The doctrine of constitutional review was not political; but was in its very essence legal. In Marshall's view, this constituted a fundamental justification of the practice. And since it was legal rights the Court was safeguarding under the aegis of constitutional decisionmaking, it was certainly appropriate, if not essential, that the Court fulfill its constitutional role by providing a forum in which those same legal rights could be protected.[40]

Marshall was not unaware that the battle over the constitutionality of Supreme Court review of state court decisions touched deeply the continuing validity of the federal government. Marshall wrote: "The true and

37. 29 U.S. (4 Pet.) 410 (1830).

38. *See* Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161-81 (1913).

39. Craig v. Missouri, 29 U.S. (4 Pet.) 410, 437-38 (1830). *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), in which to the contention that the Court had no power to review final decisions of state courts, Marshall replied:

> It is, then, we think, too clear for controversy, that the act of congress, by which this court is constituted, has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them.

*Id.* at 541.

40. Modern defenders of the concept of mandatory jurisdiction have based their arguments largely upon the "entrustment" argument used by Marshall in Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1803), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY xii (1977) ("Legal rights may then be identified as a distinct species of a political right, that is, an institutional right to the decision of a court in its adjudicative function.").

substantial dividing line between parties . . . [amounts to the question whether] our constitution is essentially a *League* and not a *Government*."[41]

On a less lofty note, the consequences of nullifying Supreme Court review by revocation of section 25 were well stated in Warren's interesting account of the view of one protagonist in the twilight years of the battle over section 25:

> In April, 1832, when the excitement over the Georgia situation was at its height, Hammond, in an article in the *Cincinnati Gazette*, of which he was editor, commented on the curious fact that when, in 1821, Ohio "was enacting nullification and Supreme Court was restraining her within her constitutional orbit," South Carolina and Georgia then stood by the Supreme Court against Kentucky and Ohio; but that now in 1832 "when South Carolina and Georgia wage the war, Ohio and Kentucky breast it." And he concluded with the following sensible and loyal statement:
>
> "During the Ohio contest in which circumstances made me rather a conspicuous actor, I was forcibly struck by a remark in the *National Intelligencer* in relation to the controversy and my part in it. The remark was to this effect: 'If Mr. Hammond is the man we take him to be, we warrant he would give one or two of his fingers to get honorably and safely out of his situation and have the conflict ended.'
>
> I felt that the *Intelligencer* was right, and I doubt not that thousands of the South Carolinians and Georgians feel now in the same way. The fact is, the government of the United States is the source of all our prosperity. Without its salutary restraints, the sectional collisions that unavoidably spring up will soon engender violent feuds terminating in open war.
>
> It is only through the Supreme Court that this salutary restraint can be made impartially and effectually operative. It is somewhere remarked by Chief Justice Marshall that a single State may often seek to control the action of the government of the United States; but no State will ever agree that another State than itself shall exercise this control. Herein is the safety of the Union."[42]

The doctrine of mandatory jurisdiction thus again served as the means by which a substantive end (preservation of the Union) was achieved. It is interesting to observe the similarities between the method by which both the common law courts and Chief Justice Marshall engrafted the doctrine of mandatory jurisdiction onto the law. Both used means that did not themselves receive clear development or subsequent critical commentary. For example, Marshall's decisions, which established the supremacy of the Supreme Court over state courts, were bitterly criticized on the merits but that criticism does not appear to have been directed toward the concept of mandatory jurisdiction itself. Perhaps this was reflective of the fact that the battle over the Court's jurisdiction had moved to Congress. Here it now lay

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41. Letter from John Marshall to Thomas F. Grimké, October 6, 1832 (ALS, Original in the Archives Division of the Virginia State Library), *reprinted in* R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 100-01 (1968) (footnotes omitted).

42. Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 174 (1913) (footnotes omitted).

in the interest of those who would restrict the Court's jurisdiction to argue that Marshall was correct, that the Court's jurisdiction when vested was mandatory, for this would support the theory that in the absence of a vesting of jurisdiction by Congress, the Court would be powerless to act. It became the interest of all concerned to champion the cause of mandatory jurisdiction, though for different reasons and for different goals.

In considering the incorporation of the concept of mandatory jurisdiction into American law, it is also helpful to note the interrelationship between the jurisprudence of Marshall and his views of the American experience under the Articles of Confederation. Marshall's perceptions of the then recent experience of governance under the Articles of Confederation was a fundamental factor in formulating the jurisprudential views he would articulate during his term as Chief Justice. For Marshall, the doctrine of mandatory jurisdiction would constitute a means by which central government supremacy, which Marshall espoused as a remedy to political difficulties realized under the Articles of Confederation, would not be lost.[43]

In this vein, Marshall provides us in his biography of George Washington with a very explicit statement of his views of the situation in the country during the critical period from 1783 to 1787.[44] In Marshall's eyes, the clear defect in the government under the Confederation was its inability, as a central government, to enforce its will. Rather, it depended upon the solicitousness of the states to approve any action that the Congress undertook. This manifested itself in several ways. First, it was shown by the inability of the national government to make safe and satisfy the trade debts and other obligations incurred prior to the Revolution, and the indebtedness incurred during the Revolution as a means of financing the war effort.[45] In this context, Marshall's concepts of the obligations of a government to its creditors were entirely consistent with his judicial views of the primacy of property interests as a means by which the goodness and benefit of government upon all the people could be realized.[46] Second, other points of disquietude voiced by Marshall that pointed to the ineffectiveness of the central government under the Articles of Confederation

43. Even though there was a divergence of views regarding the proper scope a new reconstituted government should take, there certainly was a general consensus during this epochal period (1783-87) that a change in the structure of government under the Articles of Confederation had to be achieved. *See generally* C. WARREN, THE MAKING OF THE CONSTITUTION 6-14, 27-29, 44, 45, 54 (2d ed. 1937); 3 W. WILSON, A HISTORY OF THE AMERICAN PEOPLE, 38, 59-60 (1902).

44. 4 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 140 (1925).

45. *Id.* at 141-47, 177-79.

46. Thus, Marshall observed in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810), that courts are by definition "those tribunals which are established for the security of property, and to decide on human rights. . . ." That in referring to "rights" Marshall contemplated property rights, as opposed to moral rights such as equality, is clear. *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 345-47 (1827) (Marshall dissenting):

> If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude that

likewise had an origin and terminus in the inability of the central government to exercise real sovereign power. Thus, the inability of the central government to regulate commerce had a devastating effect upon the commercial system pursued by the traders of the new American republic. With the conclusion of the Revolutionary War, ports previously open to American traders were closed. As noted by Marshall, "[F]ew were so sanguine as to hope that thirteen independent governments, jealous of each other, could be induced to concur for a length of time, in measures capable of producing the desired effect."[47] Thus, the creation of a central government with the authority to regulate trade and commerce would provide a mechanism by which the government of the United States and the independent European powers would be equally important to each other, and therefore commercial intercourse of a nature beneficial to both might be established. Without such an arrangement, however, these interests could not be protected.[48] Third, there was a general realization by the European powers, and by a growing number of Americans, that government under the Articles of Confederation, while perhaps consistent with republican norms, was hardly efficient or beneficial in the long run. The first and foremost manifestation of this was the inability of the central government to comply with various treaty provisions by which the Revolutionary War had been concluded. Because the central government was unable to comply, the other signatory, Great Britain, felt no compunction to comply either.[49] The effect of the inability of the central government to enforce treaty obligations[50] had a rippling effect upon other nations that claimed or retained an interest in the New World, and thus gave rise to a potentially devastating movement by which the western territories of the

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those original and pre-existing principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation. . . .

[The obligation of contract is intrinsic and] results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society but are brought into it. . . .

This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present, and of past ages.

*Id. See generally* R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 5-8, 71-79 (1968).

47. 4 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 180 (1925).

48. *Id.* This was aggravated by the refusal of the British to conclude a treaty of commerce with the new American nation. Thus, ports formerly open to American shipping became foreign ports and were closed against them. *See* J. BASSETT, THE FEDERALIST SYSTEM 58-59 (1906); 3 W. WILSON, A HISTORY OF THE AMERICAN PEOPLE 32 (1902).

49. 3 W. Wilson, A HISTORY OF THE AMERICAN PEOPLE 56 (1902).

50. *Id.* at 20:

The Confederation bound itself to urge upon the States unconditional amnesty for the loyalists and a complete restoration of their estates and civil rights, and to prevent so far as possible, any legal obstacles being put in the way of the collection of the debts due British merchants at the outbreak of the war. Dr. Franklin had very candidly explained to the British commissioners that the Congress of the Confederation had no power to enforce these articles: that it could only advise the States, and that they would be free to follow or to disregard it entirely and even scornfully, being bent upon . . . virtually wiping out all debts owed to Englishmen.

new American nation may have been wrested from the new government, because the territories might find that it was in their own interests to align with the Spanish interests in the Mississippi River and the port of New Orleans.[51]

This is not meant to serve as an historical review of the experiences under the Articles of Confederation. Rather, it is intended to sketch lightly the experiences during that time, as perceived by Marshall, with the intuitive expectation that these perceptions would have a meaningful impact upon Marshall when, as Chief Justice, he was in a position to influence the development of constitutional doctrine. Indeed, Marshall provided just such a justification for several of the controversial decisions rendered in the period between 1815-1830. In writing to Story, concerning the Bank of the United States case, Marshall observed: "But prejudice will swallow anything. If the principles which have been advanced on this occasion were to prevail, the Constitution would be converted into the old confederation."[52]

Again writing to Story, commenting generally on several vitriolic criticisms leveled at his decision affirming the power of the Court to declare state acts unconstitutional, Marshall observed:

> In support of the sound principles of the Constitution [and] of the Union of the States, not a pen is drawn. In Virginia the tendency of things verges rapidly to the destruction of the government [and] the re-establishment of a league of sovereign states. I look elsewhere for safety.[53]

Marshall's most trenchant criticisms were delivered in a letter to Story, dated September 18, 1821. Marshall noted:

> A deep design to convert our government into a mere league of states has taken strong hold of a powerful [and] violent party in Virginia. The attack upon the judiciary is in fact an attack upon the union. The judiciary department is well understood to be that through which the government may be attacked most successfully because it is without patronage, [and] of course without power. *And it is equally well understood that every subtraction from its jurisdiction is a vital wound to the government itself. The attack upon it therefore is a masked battery aimed at the government itself.*[54]

The receiver of this correspondence was of a like mind. Story had written to Marshall in June, 1821, and, with respect to the attacks leveled upon the Court as a result of the decision in *Cohens v. Virginia*, commented:

> As to the decision of the Supreme Court in *Cohens v. Virginia*, I believe it meets with general approbation among our professional gentlemen. I have not heard of any diversity of opinion respecting it among any of our party lawyers. The people here are disposed to place confidence in Courts; & when

51. *See* J. BASSETT, THE FEDERALIST SYSTEM 69-72 (1906).

52. C. WARREN, THE STORY-MARSHALL CORRESPONDENCE (1819-1831) 2-3 (1 Anglo-American Legal History Series No. 7, N.Y.U. Sch. of Law 1942).

53. *Id.* at 16.

54. *Id.* at 17 (emphasis added).

> they decide after full argument, they are generally satisfied. But on subjects like this we are as yet inoculated with no disease. Massachusetts is attached to the Union & has no jealousy of its powers; & no political object to answer in crying up 'State rights'—We should dread to see the government reduced as Virginia wished it, to a confederacy; & we are disposed to construe the Constitution of the U.S. as a *frame of government* & not as a petty charter granted to a paltry corporation for the purpose of regulating a fishery or collecting a toll. The opinion of our best lawyers is unequivocally with the Supreme Court, heartily & resolutely. They consider your opinion in *Cohens v. Virginia* as a most masterly & convincing argument, & as the greatest of your judgments. Allow me to say that nowhere is your reputation more sincerely cherished than here; & however strange it may sound in Virginia, if you were known here only by this last opinion, you could not wish for more unequivocal fame.[55]

Although there is certainly nothing in the experience under the Articles of Confederation that leads directly to the establishment of the doctrine of mandatory jurisdiction, it is certainly consistent with Marshall's desire that a mechanism be present within the central government by which the experiences under the Confederation would not be repeated. It is, moreover, entirely consistent with Marshall's September 18th letter in which he equated attacks upon the Court's jurisdiction as attacks upon the government. Both the new government and the Court were essential; both had to stand or fall together. It thus appears that the development of the doctrine of mandatory jurisdiction as an article III requirement finds justification not by reason of its inherent validity as legal doctrine, but rather as a mechanism by which the position being asserted by the Court would be facilitated. Moreover, in the face of a quite pronounced antagonism towards the role being adopted by the Court while Marshall was Chief Justice, the concept of mandatory jurisdiction served as a deflecting rod by which the Court could point out that it desired not to usurp power but merely served as the chosen mechanism under the Constitution by which necessary decisions, however unpopular, were to be rendered. In essence, since jurisdiction was mandatory and had to be exercised, the Court could not exercise its discretion to refuse to decide a case, but had to proceed to a determination because the Constitution, which the Court had sworn an oath to uphold,[56] so demanded.

### C. *Summary*

Thus far, I have attempted to outline the historical development of the doctrine of mandatory jurisdiction. If the material is sketchy, it is in great part reflective of the absence of its articulation and incorporation into constitutional doctrine. In each case (at early common law or during the time of the Marshall Court) in which the doctrine found initial early

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55. *Id.* at 7.

56. Just as Bracton recounted the king has sworn a coronation oath to provide justice and peace to his subjects. *See* note 11 *supra.*

acceptance, it did not constitute the main holding of the case. Rather, it was a means to an end. While one cannot ignore the presence of the doctrine in the cases, one should not necessarily accept that the doctrine is therefore impregnable. Viewed as a tool, the doctrine served a purpose in formulating, for purposes of American jurisprudence, the primacy of the Supreme Court as the final interpreter of the Constitution. That task is accomplished, however, or so it seems, and attention should now be directed to assessing what function the doctrine plays in our present era, given the role the Court has chosen to play, or has been compelled to play, in society. Having fulfilled its original purpose, is the tool of mandatory jurisdiction still needed or can it be directed to new ends?

## II. THE JUDICIAL NEGATION OF THE CONCEPT OF MANDATORY JURISDICTION

Although the doctrine of mandatory jurisdiction was not expressly delineated in *Marbury v. Madison*, a theory of discretionary power to decline to exercise jurisdiction is theoretically inconsistent with the spirit of the decision.[57] It was that implicit assumption of obligatory jurisdiction that allowed the Court to expound so forcefully the primacy of the Court as the ultimate oracle of constitutional doctrine. Without establishing the validity of the premise that courts must exercise jurisdiction, Marshall used the premise (in much the same vein as was done in *Ward's Case*) to provide a sympathetic context for rejection of the claim that the Court's original jurisdiction could be expanded by statute. If followed that since the Court was obligated to hear cases properly before it, the result reached in *Marbury* rested upon a firmer foundation than judicial restraint; rather, it rested upon a bedrock of constitutional interpretation that the Court had an obligation to undertake. Certainly *Marbury* could have been decided without raising or considering the unarticulated premise of mandatory jurisdiction, but its brooding omnipresence lent an aura of compellingness and hence persuasiveness that otherwise would have been lacking.[58] Similarly, in a succession of cases decided by the Marshall Court in which the

57. *See* note 2 *supra*.

58. Had Marbury rested upon the mere discretionary disinclination of the Court to provide a forum, the formidable edifice of judicial review would have lacked the necessary cornerstone of compulsion. *See* D. CURRIE, FEDERAL COURTS, CASES AND MATERIALS 6 (2d ed. 1975):

> [S]everal important and timely issues of judicial power depend in large part upon one's conception of the policy or the philosophy of government that gives rise to judicial review.
>
> The opinion in *Marbury v. Madison* is ambiguous on this score. Sometimes Marshall appears to treat judicial review as something of an accident, an incidental consequence of the court's basic job of deciding particular cases, a sort of clean-hands doctrine for judges:. . . .
>
> In the same vein is the suggestion that judges ought not themselves to violate the Constitution, and their oath to support it, by enforcing invalid laws. Notice that this theory is in accord with a widely accepted view of the law-making powers of the courts in all kinds of cases.
>
> Other passages in the opinion, however, suggest that Marshall viewed judicial review as an instrument for keeping the Congress within constitutional bounds, a vital element in a system of checks and balances. . . .

supremacy of the federal government and the Supreme Court was established, a common thread throughout was a sense of obligation to decide, a sense of duty imposed by law, whatever the consequences.[59]

At the time of the Marshall Court, the doctrine of mandatory jurisdiction possessed a fair degree of utility. It aided in the creation of a sense of correspondence between the higher ideals of observance of law and the baser motive of the establishment and assertion of power. If the doctrine of mandatory jurisdiction was a judicial "makeweight," as it historically had been, it was a device that was sensitive to the myths and principles that underlie the ideal of law. That it gave sustenance to the vision of government expressed in the Constitution by its "Federalists" proponents was, of course, helpful.

Thus, the doctrine of mandatory jurisdiction was instrumentally functional; it closed the gap between law as it was and what it was believed law needed to be. That the Marshall Court was successful in its endeavors is obvious to any student of the federal courts and the federal system today. Yet, the gap between law and the social necessities of society has a perpetual tendency to reopen. Doctrines formulated in one era to close the gap may be irrelevant, may indeed be a hindrance, when applied to the gaps of a subsequent era. Because our legal system is founded upon a theory of precedent, however, legal doctrines have a tendency, as Maitland noted, to rule us from the grave. This respect for precedent is in part composed of respect for accumulated learning and experience, and in part upon the wish not to transgress the superstitious disrelish for change that a legal system always exhibits.[60]

In the aftermath of *Marbury*, *Hunter's Lessee*, and *Cohens*, the social necessities changed from establishing the idea of the supremacy of federal law to defining the scope of that idea as applied to specific problems of government. Indeed, the whole fabric of constitutional decision making changed as Congress forcefully began to assert a federal presence, and it now befell the Court to define the scope of power possessed rather than establish the bare existence of the power.

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59. Perhaps this sense of duty was best conveyed by Justice Story who expressed his views in a letter to Professor George Ticknor of Harvard College, March 8, 1832:

> We have just decided the Cherokee case, and reversed the decisions of the State Court of Georgia, and declared her laws unconstitutional. The decision produced a very strong sensation in both houses; Georgia is full of anger and violence. What she will do, it is difficult to say. Probably she will resist the execution of our judgment, and if she does I do not believe the President will interfere unless public opinion among the religions [*sic*] of the Eastern and Western and Middle States should be brought to bear strong upon him. The rumor is that he has told the Georgians he will do nothing. I, for one, feel quite easy on this subject, be the event what it may. The Court has done its duty. Let the Nation now do theirs. If we have a Government, let its command be obeyed; if we have not, it is as well to know it at once, and to look to consequences.

*Quoted in* Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 170 (1913).

60. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 587-89 (1958); Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613 (1954).

Had the Court been free of the methodology by which the decisions in *Marbury* and its progeny were reached, perhaps a neater accomodation of competing federal-state interests could have been achieved. As it was, broad assertions of congressional power, expressed in loose grants of jurisdiction to the federal courts, threatened to besiege and inundate the federal courts in a series of matters that only lightly involved federal interests,[61] or that presented the problem at a time that was premature insofar as then-developed concepts of federal interest and concern were involved.[62]

The response of the Court was to pay homage to the expressed ideal of mandatory jurisdiction while at the same time eviscerating the concept by a series of exceptions that soon swallowed the rule whenever, in the eyes of the Court, the rule needed to be swallowed.

Perhaps the clearest expression of the Court's Janus-faced approach to the concept of mandatory jurisdiction was expressed in an abstention[63]

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61. An example of this is the grant of general federal question jurisdiction that was statutorily phrased in terms that were the mirror image of the boundaries of federal judicial power expressed in the Constitution. The consequence of this loose phrasing was that the federal courts were engulfed in cases in which the federal interest was limited to the fact that one of the parties had a federal charter, *see, e.g.*, The Pacific Railroad Removal Cases, 115 U.S. 1 (1884), or the predecessor in title was the federal government—a particularly ironic situation since the policy of the federal government was simply to divest itself of the title through private settlement. *See* M. CLAWSON & B. HELD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT 22-27 (1957). As a result of the caseload pressures upon the federal courts thus engendered, the Court restricted the scope of federal jurisdiction by articulating a series of rigid, formal doctrines that effectively removed from the original jurisdiction of federal courts large classes of cases in which federal interests were generally marginal. And while the line of demarcation between true federal cases and cases only containing federal issues was highly artificial, it was compelled largely because the Court felt constrained to retain allegiance to the concept of mandatory jurisdiction. This allegiance was in turn maintained by "strained" interpretations and constructions of federal jurisdiction statutes that, while parroting a theme of obligatory jurisdiction, allowed the federal courts to avoid accepting the case by "finding" that the case did not come within the jurisdictional grant. *See generally* Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

62. Thus, federal jurisdiction over individuals deprived of their liberty by the states, which had been provided by Congress by the Habeas Corpus Act of 1867, 14 Stat. 385 (1867) (current version at 28 U.S.C. § 2254 (1976)), was delayed by a judicially created exhaustion requirement. *See Ex parte* Royall, 117 U.S. 241, 251 (1886):

> We cannot suppose that Congress intended to compel . . . [the federal courts] . . . to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts. . . . The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it.

The Court's assessment of congressional intent is particularly interesting when it is remembered that the extension of habeas to state prisoners was intended by Congress to provide a safe harbor for Negroes against hostile state practices. *See* 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES - RECONSTRUCTION AND REUNION 1864-88, 448 (1971). Viewed more charitably, what manifestly occurred was that the need, or perception of need, for immediate federal involvement had disappeared with the End of Reconstruction.

63. Although there are variant forms of abstention, *see* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1147-62 (1974), abstention generally is predicated upon a desire to avoid unnecessary federal adjudications of constitutional dimension. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941).

case, *England v. Louisiana Board of Medical Examiners*,[64] in which the Court stated:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."[65]

The Court, having expressed an obligation to decide the controversy, immediately proceeded to dismantle the requirement by inexplicably noting that delay in providing a forum does not infringe upon the duty to decide:[66]

> Nor does anything in the abstention doctrine require or support such a result. Abstention is a judge-fashioned vehicle for according appropriate deference to the "respective competence of the state and federal court systems." *Louisiana P. & L. Co. v. Thibodaux*, 360 U.S. 25, 29. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the

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64. 375 U.S. 411 (1964).

65. *Id.* at 415-16, *quoting* Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) (footnotes omitted).

66. The Court's distinction between delay and total avoidance in receiving the case was tenuous at best. First, delays caused by abstention imposed stays are generally lengthy. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 994 (2d ed. 1973).

> One of the principal costs of abstention is the prolonged delay it often brings in its wake. In Spector Motor Serv., Inc. v. O'Connor, for example, over six years elapsed between the Supreme Court's decision requiring abstention, 323 U.S. 101 (1944), and the Court's ultimate decision on the merits, 340 U.S. 602 (1951), while in United States v. Leiter Minerals, Inc., 381 U.S. 413 (1965), the case was dismissed as moot eight years after abstention was ordered. The burdens of delay seemed great enough to Justice Douglas to warrant a complete reexamination of the Pullman doctrine, see England v. Louisiana State Bd. of Medical Exam'rs, 375 U.S. 411, 423 (1964) (concurring opinion). And though other members of the Court have not gone that far, protracted delay and its consequences have not infrequently been cited among the reasons for refusing abstention in particular cases. *See, e.g.*, Harman v. Forssenius, 380 U.S. 528 (1965); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 228-29 (1964).

Second, several variants of the abstention doctrine involve not delay but actual dismissal of the federal action, with the promise of later federal review of the complaint being illusory. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (action to enjoin state criminal prosecution, denied); Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) (abstention ordered in *diversity action* involving dispute over water rights on private land.) In the *Younger*-type action, the injury issue (being illegally subjected to state criminal proceedings) is largely mooted if the federal court *delays* asserting jurisdiction. *See Developments in the Law - Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

> [T]he decision to discuss *Younger* in forum allocation terms is itself a decision of constitutional significance. It is a decision that the only constitutional issue at stake is the validity of the challenged state law—that *being prosecuted* under an arguable (or actually) invalid law is not itself a deprivation.

> primacy of the federal judiciary in deciding questions of federal law. Accordingly, we have on several occasions explicitly recognized that abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise."[67]

Surely, it might be said that the Court is never more decisive than when it comes to avoiding decisions.

The abstention doctrine is just one of the devices by which the exercise of federal jurisdiction is stilled. The abstention doctrine is aided and abetted by a variety of devices that in their essence either delay eventual federal review, or tend to deny federal court review at a certain level, generally the level of the federal district court.[68] Judicial avoidance of the

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*Id.* at 1285-86 (emphasis in original) (footnotes omitted). In the diversity action, since state law issues are determinative, delay is the equivalent of avoidance since there is *nothing* for the federal court to do after the state court has disposed of the state law issues. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) (federal jurisdiction depends upon claim or defense asserted arising under the Constitution, laws, or treaties of the United States and is limited to those claims and defenses); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 998 (2d ed. 1973): "[I]f all the issues in the case are issues of state law, the usual consequence of abstention would be not merely to postpone but to relinquish the exercise of federal jurisdiction." Finally, where a federal court stays its preceedings by abstaining, the normal course is for the plaintiff to present both his state and federal issues to the state court for resolution. In England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964), the Court specifically noted that such a procedure "preserves" the litigants federal issues:

> [A] party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the "reservation to the disposition of the entire case by the state courts" that we referred to in *Button*. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than *Windsor* required and fully litigated his federal claims in the state courts. When the reservation has been made, however, his right to return will in all events be preserved.

*Id.* at 421-22 (footnotes omitted). It should be noted that the Court's approach nicely eviscerates the statutory provisions contained in 28 U.S. C. § 1738 (1948), which require federal courts to give full faith and credit to state court proceedings. *See* Fischer, *Institutional Competence: Some Reflections on Judicial Activism in the Realm of Forum Allocation between State and Federal Courts*, 34 U. MIAMI L. REV. 175, 207-11 (1980).

Judicial attempts to reconcile the principles of finality and repose that underlie 28 U.S.C. § 1738 (1948), the goals of the civil rights legislation, and the normative attitudes that underlie congressional grants of concurrent jurisdiction over civil rights cases to state and federal courts have been unavailing. *Compare* Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) (prior state court adjudications no bar to maintenance of civil rights action and relitigation of issues attendant thereto in federal court), *with* Taylor v. New York City Transit Auth., 433 F.2d 665 (2d Cir. 1970) (prior state judicial and administrative adjudications bar maintenance of civil rights action and relitigation of decided issues of fact in federal court). *See generally* Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 COLUM. L. REV. 610 (1978).

67. 375 U.S. 411, 415-16 (1964) (footnotes omitted).

68. These avoidance-deferral devices include exhaustion, *see, e.g.*, McNeese v. Board of Educ., 373 U.S. 668 (1963) and Monroe v. Pape, 365 U.S. 167 (1961); certification, *see* Lehman Bros. v. Schein, 416 U.S. 386 (1974); *cf.* Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 HARV. L. REV. 111 (1949); Note, *Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use*, 22 U. FLA. L. REV. 21 (1969). The certification device seems to have the approval of the commentators. *See, e.g.*, Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. REV. 888 (1971); McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 ME. L. REV. 33 (1964),

obligation to decide has generally been predicated upon a concern that a federal court in exercising jurisdiction either would needlessly meddle in affairs of concern to the states,[69] or would accomplish no more than provide a duplicate forum and raise the possibility of different results and

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although doubts as to its utility remain. *See In re* Elliot, 74 Wash. 2d 600, 640, 446 P.2d 347, 371 (1968) (Hale, J., dissenting):

> The majority opinion suggests that the certification statute will usher in a new era of efficiency and speed up the now ponderous and sometimes seemingly immobile processes of the law, but this idea seems hardly borne out by the experiences cited. If there ever was a way in which to delay a case as it moves slowly through the courts, in my opinion, it would be the very procedure whereby at one stage the case comes to a halt in the federal system, moves over into the state system to await docketing, briefing, hearing, writing, filing of the opinion and petition for rehearing and then moves back again into the system of origin to take its place on the judicial conveyer for resumption of proceedings in the federal system. I think a reading of all cases cited in the majority opinion and common sense as well will demonstrate that the certification procedure is a dilatory one and in the long run compounds the very delays it is claimed to help curtail and magnifies the uncertainties it is claimed to eliminate.

*See also* Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969). Further avoidance-deferral devices include justiciability concepts that operate on the borderline of article III requirements and judicially devised, nonconstitutional prudential standards, that channel and divert from the federal courts cases raising questions of constitutional dimension. *See* Warth v. Seldin, 422 U.S. 490 (1975). In *Warth* the plaintiffs had probably met the article III injury in fact and causation test that appears to constitute the constitutional requirement, *see* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978), yet, the Court found the case *not* to be justiciable. The clear implication is that the Court avoided the case for nonconstitutional, prudential concerns. *See* note 71 *infra*. Federal jurisdiction may also be avoided by a refusal to apply a literal interpretation of jurisdiction clauses of the Constitution.

> *See, e.g.*, Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379 (1930).
>
> The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the state. . . . The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to the Courts of the United States. Therefore they do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes.

*Id.* at 383-84, *citing* Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898). Although there exists a similarity in approach between the Supreme Court's limitation of federal question jurisdiction, *see* note 60 *supra*, and what the Court accomplished in *Popovici*, the difference is significant. Limitations of federal question jurisdiction are reversible by congressional edict; limitations on federal jurisdiction because of a total commitment to the state judiciary under the Constitution resist legislative revision. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1186-92 (2d ed. 1973).

69. *See* Younger v. Harris, 401 U.S. 37, 43-44 (1971):

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. . . .
>
> The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. . . .
>
> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their

interforum conflict,[70] or that judicial involvement at a particular stage of the controversy, although possible, would be premature because a sufficiently specific resolution of the case is not available due to the current state of the record.[71]

The propriety of the use by federal courts of avoidance-deferral devices has been both criticized[72] and approved.[73] Interestingly, the criticism that has been voiced has largely relied upon the immutability of the concept of mandatory jurisdiction. Yet, as previously noted, the doctrine of mandatory jurisdiction is not a self-evident truth in any sense of the term.[74] Indeed, the doctrine has been shown to basically have been developed to facilitate the achievement of larger, substantive goals. Yet, the legacy of the doctrine has tended to confuse the issue whether jurisdiction avoidance-deferral practices are proper. Not having examined the roots of the doctrine or the reasons for its creation, we find ourselves tied to applying the doctrine to situations in which the utility of its use is less than compelling. Indeed, in many instances adherence to the doctrine has resulted in palpably bad legal decisions and doctrines.[75] The time has come

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separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."

70. *See* Lear Siegler, Inc. v. Adkins, 330 F.2d 595, 600 (9th Cir. 1964):
The Federal Declaratory Judgments Act affords a new remedy, whereby one charged with infringement can initiate an action in the federal court. This creates possibilities of conflict between the federal court and a state court whenever there is a contract between the parties relating to the patent, and the patent holder has brought an action in the state court based upon the contract. It is not only in patent cases that the Federal Declaratory Judgements Act has opened up such possibilities of conflict, and it is in cases involving such possibilities of conflict that the courts have upheld the exercise by a federal court of its discretion to withhold declaratory judgment pending decision of the state court action.

71. *Compare* Warth v. Seldin, 422 U.S. 490 (1975) (attack by developers on exclusionary zoning ordinance not justiciable absent allegations that a viable construction project *currently* was blocked by defendant's ordinances or refusal to grant approvals or variances) *with* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (attack by developer on exclusionary zoning ordinance justiciable). One ground for distinguishing the two cases is that relief in *Warth* would have been based upon the facial constitutionality of the exclusionary zoning ordinance itself rather than a mere *application* of the ordinance to a specific problem, as in *Arlington Heights*. Seen in this light, the process is in keeping with a general theme of the Court to exercise restraint in shaping judicial remedies and in recognizing legal rights. The adequate and independent state grounds doctrine, Murdock v. City of Memphis 87 U.S. (20 Wall.) 590 (1874), can likewise be considered as falling within this justification. When the state law issue may make the exercise of federal jurisdiction a nullity, deferral until the question of final determination by state law has been resolved avoids "premature" assertions of federal interest and concern.

72. *See, e.g.*, Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

73. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS (1962).

74. In the pure Lockean sense, a "self-evident truth" was an uncontrovertible proposition: "The mind cannot but assent to such a proposition as infallibly true, as soon as it understands the terms." 2 LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 227 (Fraser ed. 1894).

75. The problem largely arises because the Court, in attempting to sustain an equilibrium between the mutually exclusive notions of mandatory jurisdiction and federalism's regard for the proper allocation of spheres of influence to state and federal governments, has undertaken not only an impossible task but also one beyond its authority. *See* Fischer, *Institutional Competence: Some*

for us to examine whether or not the doctrine of mandatory jurisdiction—a doctrine that served courts well in the formative period of the Republic—is a viable, utilitarian doctrine in an era when federal courts are called upon to run penal systems,[76] school systems,[77] mental hospitals,[78] and generally project an increasingly pervasive and visible influence over the way we are as a political society.

## III. THE VALUE OF ALLOWING FEDERAL COURTS TO DECLINE TO EXERCISE JURISDICTION VALIDLY CONFERRED

> "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."[79]

Justice Jackson's observation was a sage one. Simply to point out the deficiencies of a past practice and argue for its elimination may, for the long-term, do more harm than good. Legal doctrines do not exist in isolation; rather, they tend to affect aligned and tangential doctrines; they give rise to expectations regarding the course law will likely take, and tend ultimately to define the relation that comes to exist between man and law. Hence, while the doctrine of mandatory jurisdiction is of suspect origins, many legal scholars have come to identify the doctrine as having a central place in American constitutional jurisprudence.[80] We thus should reject continued adherence to the doctrine, or pretensions of adherence, only if we can state that on average we will be better off, that the benefits derived from rejecting continued allegiance to the concept of mandatory jurisdiction will outweigh the costs incurred by rejection.[81]

### A. *Values and Costs of the System of Mandatory Jurisdiction*

The doctrine of mandatory jurisdiction is a procedural device. As

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*Reflections on Judicial Activism in the Realm of Forum Allocation between State and Federal Courts*, 34 U. MIAMI L. REV. 175 (1980).

76. Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972).

77. *See, e.g.*, Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975).

78. Wyatt v. Stickney, 344 F. Supp. 373 and 344 F. Supp. 387 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781 (M.D. Ala. 1971), *modified on appeal sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

79. Michelson v. United States, 335 U.S. 469, 486 (1948) (Jackson, J.).

80. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

81. Adherence to the doctrine of mandatory jurisdiction does have some utility. First, by retaining correspondence to the doctrinal formulations of past judges, the acceptability of judicial decision-making is to some extent enhanced since supporters of such a function can point to the impersonality of such a mode of decisionmaking and "their reasoned foundation, as manifested both by the respect accorded to them by successor judges and by their staying power." *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 589 (1958). Hart and Sacks further pointed to another valid reason for adherence to a doctrine whose deficiencies can be cured only at great cost to the system itself: "The necessity, considering the amorphous nature of the limits upon judicial power and the usual absence of an effective political check at the ballot box, that judges be subject to the discipline and the restraint of an obligation to build upon the prior law in a fashion which can withstand the test of professional criticism." *Id.*

such, viewed from an instrumentalist perspective, we ought to ask what values of our procedural system are enhanced by the doctrine of mandatory jurisdiction.[82]

Procedure, as part of a larger system of law, can be thought of as an attempt to advance a series of overlapping, and at times mutually exclusive, ends—ends which fall into three generic categories. First, procedure strives to realize those ends or values that tend to define individuals as persons deserving respect before the law. These values, which can be grouped together as "humanity" values, include procedural acknowledgement of equality, fulfillment of expectations, sense of participation in the adjudication process, and respect for human dignity.[83] The second category is deterrence oriented. Here procedure is structured to induce individuals to conform to certain desired modes of behavior.[84] The third category involves utilitarian values that allow a court to function effectively and economically within the confines of whatever resources a society chooses to allocate to its system of legal adjudication.[85]

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82. This view of the doctrine of mandatory jurisdiction is purely instrumentalist. Instrumentalism looks at the procedural system as simply a mechanism, as the means, so to speak, by which certain societal goals (ends) are achieved. Although instrumentalism may have a normative component (the means chosen may violate some independent societal norm such as a ban against torture to achieve confessions), instrumentalism is most characteristically evaluated by assessing how well certain societal goals are achieved (result orientation). Accordingly, emphasis is often placed upon the worth of the goals themselves as the measure of the procedural system created to implement those goals.

83. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172-75; Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Values*, 44 U. CHI. L. REV. 28 (1976). Thus, Mashaw notes:

> Yet the popular moral presupposition of individual dignity, and its political counterpart, self-determination, persist. State coercion must be legitimized, not only by acceptable substantive policies, but also by political processes that respond to a democratic morality's demand for participation in decisions affecting individual and group interests. At the level of individual administrative decisions this demand appears in both the layman's and the lawyer's language as the right to a "hearing" or "to be heard," normally meaning orally and in person. To accord an individual less when his property or status is at stake requires justification, not only because he might contribute to accurate determinations, but also because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.

*Id.* at 49-50 (footnotes omitted).

84. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1175-76: "Litigation is often . . . viewed as a process, or part of a process, for constraining all agents in society to the performance of duties and obligations imposed with a view to social welfare." Deterrence values may also be somewhat more functional as, for example, avoidance of civil jury trials by rigorous judicial insistence upon technical compliance with the formal requirements for making the jury demand. *See* Devitt, *Federal Civil Jury Trials Should be Abolished*, 60 A.B.A.J. 570 (1974) (jury trials are too expensive a means of deciding civil cases: the best available solution is to discourage the exercise of the right to jury trial). *See generally* P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE, CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION 215-16 (2d ed. 1977).

85. *See* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973). *Compare* White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 521 (estimated cost of nationwide substitution of replevin for self-help repossession placed at $143 million), *with* Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116, 147-49 (1973) (the judicial process may have a benign effect on the process of work-out or settlement, it may deter wrongful conduct by creditors, and hence avoid the need for judicial intervention altogether, and it might assure better resale prices thus avoiding the institution of deficiency actions).

Insofar as humanity values are concerned, only a weak case can be made that they are enhanced by the doctrine of mandatory jurisdiction. The argument that certain procedures enhance these values speaks, if at all, to the argument that some formal judicialization of a process ought to be undertaken. For example, the question may be posited whether creditors upon a debtor's default ought to be allowed to use self-help to obtain possession over chattels in which they hold a security interest, or whether creditors ought to be required to use pre-established, judicially supervised procedures. The argument, however, always turns upon the advisability of recourse to courts in general, not to particular courts.[86] Hence, to accept that proceduralization of a process is appropriate because certain humanity values are enhanced does not lead one to conclude that access to a particular court is a necessarily included component of that decision. Indeed, unless it can be shown that an alternative court is institutionally unable to recognize the humanity values that proceduralization seeks to enhance and that it consequently would not recognize them, or that only one judicial system exists to which proceduralization can be referenced, there is no compelling connection between humanity values and the doctrine of mandatory jurisdiction. Humanity values simply demand that courts recognize those values in exercising adjudicatory functions, not that *all* courts must provide access as an incident of their existence. It is only when no alternative court exists for the recognition of humanity values that a utilitarian claim can be advanced that access to a particular court should be guaranteed.[87]

The second category, deterrence values, is likewise of no consequence to the argument in favor of mandatory jurisdiction. To suggest that a court must exercise jurisdiction to enhance deterrence values amounts to an argument that the alternative of litigating in another court is socially undesirable and hence is to be deterred and discouraged. The short answer to that assertion is that it has rarely been the policy of the American judicial system to discourage litigation in alternative forums that have been vested with concurrent jurisdiction over the subject matter of the

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86. A similar argument could be made by an individual-rights theorist who might assert that a judicial forum must be provided in repossession cases because a failure to do so would deprive a litigant of a preexisting right, such as the protection against nonconsensual taking of property without a prior hearing, which the political system must guarantee even at the expense of social and economic policies that inure to the benefit of the majority. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 197-204 (1977). Acceptance of the rights thesis does not appear to require that "rights" be adjudicated and determined in one particular court as opposed to another court. The critical requirement is that the manner and mode of adjudication be consistent with those principles which properly shape the essential judicial function. *Id.* at 110-23. It appears that any institution that satisfied that criterion could properly pass upon and determine individual rights.

87. This is reflected in the Supreme Court's unwillingness to exercise collateral review unless there is an error in the proceedings that suggests a miscarriage of justice or adversely affects the accuracy of the decision-making process. *See* Stone v. Powell, 428 U.S. 465 (1976). *See also* Fischer, *Institutional Competence: Some Reflections on Judicial Activism in the Realm of Forum Allocation between State and Federal Courts*, 34 U. MIAMI L. REV. 175, 181 (1980).

dispute.[88] Indeed, even when qualifications to this principle have been recognized, those qualifications are not really *discretionary* qualifications to the exercise of jurisdiction by a particular court, but are examples of grants or reservations of exclusive jurisdiction by which one court is vested with sole authority to adjudicate the matter at issue.[89] Thus, it can be said that it has *never* been the accepted policy of American courts to discourage access to alternative forums.[90] It has, of course, been the policy of many American courts to discourage access to *that* court;[91] yet, problems of self-denial are what raise the mandatory jurisdiction problem. Policies that flout the argument of mandatory jurisdiction, do not, by their terms, establish the validity of the argument. At best they amount to a tautology.[92]

It is only utilitarian values that truly affect our continued adherence to a doctrine of mandatory jurisdiction. Insofar as these utilitarian values are concerned, the case for mandatory or discretionary jurisdiction is influ-

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88. *See* Fischer, *Institutional Competence: Some Reflections on Judicial Activism in the Realm of Forum Allocation between State and Federal Courts*, 34 U. MIAMI L. REV. 175 (1980). *But see* note 89 *infra*. While the policy of American courts has not been to discourage access to other forums, courts generally have discouraged multiple litigation in different forums even though *each* forum was technically open to the litigants. *See* note 70 *supra*. Because of difficulties functionally and pragmatically encountered in trying to induce another forum to relinquish jurisdiction asserted, constraints generally have been self-imposed. *See* notes 63-78 and accompanying text *supra*. *Cf.* 28 U.S.C. § 2283 (1976) (anti-injunction statute prohibiting federal courts from enjoining state court proceedings except under specified circumstances); Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183 (1957) (noting that courts generally have ignored sister-state injunctions against further proceedings in the forum and have permitted the action to proceed).

89. *See, e.g., In re* Burrus, 136 U.S. 586 (1890). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id* at 593-94 (dictum). *See* Sutton v. English, 246 U.S. 199 (1918).

> The present suit being, in an essential feature a suit to annul the will of Mary Jean Hubbard, and a proceeding of this character being. . . . merely supplemental to the proceedings for probate of the will and cognizable only by the probate court, it follows from what we have said that the controversy is not within the jurisdiction of the courts of the United States.

*Id.* at 208. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1186-92 (2d ed. 1973).

90. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 686 (2d ed. 1973):

> The Supreme Court early and consistently held that an agreement by a foreign corporation, exacted by a state statute, not to remove to a federal court any case brought against it in a state court was ineffectual to oust jurisdiction when the corporation later removed a case in defiance of the agreement. The agreement was condemned independently of the statute on the basis of the common law doctrine that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." And it was held that the statute gave the agreement no added force, since the state was without power to impose conditions repugnant to the Constitution and laws of the United States.

91. *Id.* This has resulted in the genesis of such access constraining doctrines as exhaustion and abstention. *See* notes 62-70 *supra*.

92. A tautological statement is a purported proof that is true only by virtue of its "form," not by virtue of its substance. In this case the tautology is as follows:

> Legal systems that do not freely allow access to their courts abridge the right of mandatory jurisdiction and hence constitute a wrong or injury to society. That wrong ought to be deterred. Thus, mandatory jurisdiction is a doctrine whose justification is established through a conscious decision to avoid infliction of wrong or injury upon society.

The vice of the above statement is that it assumes what it purports to prove—that a "right" to mandatory jurisdiction exists and is of "benefit" to society.

enced by the extent to which a legal system elects to avoid the diseconomies occasioned by duplicative litigation *or* seeks to warrant its legitimacy by enhancing the perception that it is an impartial, neutral, decision-making tribunal. Utilitarian values can also be asserted as justifying a system of discretionary jurisdiction either because the case for mandatory jurisdiction is not established on the merits or because that case, however made, is outweighed by the values that a court believes underlie a doctrine of discretionary jurisdiction. These latter values include self-preservation as an effective decision-making tribunal and the avoidance of premature involvement in controversies that may be better resolved if allowed to play a little longer before final judicial decisionmaking takes place.

One further consideration is important but will not be specifically addressed in this Article. This latter point involves those substantive values that a legislature may wish to advance by confining judicial adjudications before one particular system of courts. Thus, it may be desirable that a particular tribunal develop expertise in the statutory scheme created by Congress,[93] that a litigant be allowed or not be allowed to forum shop,[94] that the scheme for political reasons favor one type of claimant over another,[95] or that the application and enforcement of the new statutory scheme be readily subject to legislative review for alteration, modification, or revocation. The list is certainly not exclusive. Yet, it does articulate a set of criteria for which a doctrine of mandatory jurisdiction may prove particularly helpful by *confining* litigation within those tribunals which are perceived as being most responsive to implementing the substantive goals of legislation. In essence, a doctrine of mandatory jurisdiction prevents a court from sidestepping those duties that are properly assigned to it, and hence incrementally aids in the achievement of the larger legislative ends. Nevertheless, since these consequential values are solely of legislative concern,[96] they will not be addressed here nor will the doctrine of mandatory jurisdiction, which is essentially a judge-made rule, be addressed in terms of specific, substantive, statutory concerns.

### B. *The Relation Between "Principled" Decisionmaking and Jurisdiction Declination in American Jurisprudence*

The ultimate acceptance or rejection of the doctrine of mandatory

93. *See e.g.*, Economic Stabilization Act of 1970, Pub. L. No. 92-210 § 211, 85 STAT. 748-50 (1971), *as amended by*, Credit Control Act, 12 U.S.C. § 1904 (1970), Emergency Petroleum Allocation Act of 1931, Pub. L. No. 93-159, 87 STAT. 628 (1973), 15 U.S.C. § 6201 *et. seq.* (1975).

94. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1285 (1977).

95. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 569 (2d ed. 1973). "There is some historical evidence to support the conclusion that Congressional policy favored jury trials in F.E.L.A. cases, and possibly for plaintiff-favoring reasons, but it is far from conclusive." *Id.* (citations omitted). *See also* Hill, *Substance and Procedure in State FELA Actions—The Converse of the* Erie *Problem?*, 17 OHIO ST. L. J. 384, 397 (1956) (noting the premise that juries tend strongly to favor injured railroad workers).

96. *See* Fischer, *Institutional Competence: Some Reflections on Judicial Activism in the Realm of Forum Allocation between State and Federal Courts*, 34 U. MIAMI L. REV. 175 (1980).

jurisdiction rests upon considerations relevant to our own time and present circumstances. A utilitarian argument of potential merit has been noted that accepts the doctrine of mandatory jurisdiction as an aspect of a judicial system's internal and external quest for acceptability. Sometimes, however, the argument is cast in normative terms. If a particular type or category of case is traditionally heard by courts under a jurisdictional grant, the courts would be operating outside the norm of principle were they to decline to entertain a particularly difficult case for reasons "unique" to that case, but otherwise falling within the general principles articulated in an earlier case or series of cases. Since "principled" decisionmaking is treated as an essential feature of the judicial function, mandatory jurisdiction is the end product of a "principled" decisionmaking that requires of courts that they render holdings that are consistent and of general application.[97] So important becomes the ideal of "principle" that in most instances the question of mandatory jurisdiction is reduced in the eyes of its defenders and detractors to a question regarding the legitimacy of judicial review itself.[98]

This argument of principled decisionmaking was presented and contrasted in an illuminating trilogy of constitutional commentaries authored by Professors Wechsler, Bickel, and Gunther.[99] Wechsler took the position that the Constitution required that constitutional adjudications proceed on a basis of principle. This was not, according to Wechsler, simply to say that like cases be decided in a similar manner, but rather that as a mode of legal reasoning, the holding of a case of constitutional magnitude should be transcendental.[100] Wechsler tied the doctrine, insofar as applicable here, to the notion that the decision whether to accept or reject jurisdiction be principled, a position critiqued by Bickel but defended by Gunther. A problem involving the proper range of factors that could be considered in making the decision had developed as the federal courts took an increasingly active role in political controversies, a role that exposed the myth that cases and controversies decided by the federal courts under the mandate of *Marbury v. Madison* were private disputes, nothing more.[101]

Wechsler asserted that judicial review was legitimate for the very

97. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15, 19 (1959).

98. *Id.*

99. Bickel, *Foreword: The Passive Virtues, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961); Gunther, *The Subtle Vices of the "Passive Virtues" - A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

100. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15, 19 (1959).

101. There is an argument that the thesis of neutral principles represented, in part, a movement away from a rigorous philosophy of legal realism because it gave rise to an anomalous relationship between judicial freedom and democratic government. This, in turn, produced a revisionism that seemed to find articulation in Wechsler's defense of judicial review through his argument of principle.

reason that judicial decisionmaking was argued as being "principled" as opposed to policy oriented.[102] Wechsler argued that courts, in exercising the constitutional mandate of judicial review, should decide cases by a standard that was not tied to a contemporaneous social goal, i.e., policy; rather, the proper standard was a transcendental principle, consistently applied. The essence of judicial decisionmaking was not the result reached in a case or series of cases, but rather that process by which the result was reached. It was the requirement that judicial decisionmaking conform to this mode of reasoning that justified judicial review and distinguished judicial review from legislative acts.[103]

Unfortunately, Wechsler's argument seemed to partake of two divergent factors. First, the principle of consistency seemed to be just that—a demand that like cases be decided alike. In this vein, the principle did not materially differ, Wechsler's protestations to the contrary, from the doctrine of stare decisis. To say that like cases should be decided in a like manner would be a poor prop upon which to affix the doctrine of judicial review. Uniformity and certainty in the application of law, while components of procedural fairness, do not provide, of themselves, normative support for judicial supremacy in constitutional adjudications. What did provide support was the added qualification that the court would, in accordance with a principle of consistency, review the controversy against neutral principles without regard for the result(s) of the particular case.[104] Thus, for example, Wechsler argued that the desegregation case, *Brown v. Board of Education*,[105] should have been decided by reference to the neutral principle of freedom of association rather than the policy factors of societal and individual deprivation expressed by the Court.[106]

Nevertheless, the attempt to justify the current state of judicial decisionmaking on the basis of neutral principles is impossible. That courts decide cases on the basis of, or at least with some consideration to, principle may be conceded; yet this does not amount to a concession that such principles are "neutral" in any sense of the term. The mode of judicial decisonmaking currently exercised demands that the principle asserted provide some guidance concerning the correct or most correct resolution of the problem. A simple example will demonstrate this point. In *MacPherson v. Buick Motor Co.*,[107] the New York Court of Appeals was faced

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102. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-20 (1959). As a corollary, at least in the field of constitutional judicial review, when judicial decisionmaking was not "principled," it was not legitimate. This corollary is necessarily implied, although it was not developed by Wechsler.

103. *Id.*

104. *Id.*

105. 347 U.S. 483 (1954).

106. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959). *See* Friendly *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 29-32 (1978).

107. 217 N.Y. 382, 111 N.E. 1050 (1916).

with a question whether to extend liability in tort to the manufacturer for the negligent construction of an automobile in favor of one not in privity of contract. In holding that liability did so extend, the court was required to account for a series of earlier precedents as part of the resolution of the exact question before the court. Justice Cardozo, for the court, explicitly noted:

> The foundations of this branch of the law, at least in this state, were laid in *Thomas v. Winchester*, 6 N.Y. 397, 57 Am. Dec. 455. A poison was falsely labeled. The sale was made to a druggist, who in turn sold to a customer. The customer recovered damages from the seller who affixed the label. "The defendant's negligence," it was said, "put human life in imminent danger." A poison, falsely labeled, is likely to injure any one who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury.[108]

Having articulated the principle, Cardozo now proceeded to the gist of the judicial function—application of the principle to the facts of the case.

> Cases were cited by way of illustration in which manufacturers were not subject to any duty irrespective of contract. The distinction was said to be that their conduct, though negligent, was not likely to result in injury to anyone except the purchaser. We are not required to say whether the chance of injury was always as remote as the distinction assumes. Some of the illustrations might be rejected today. The principle of the distinction is, for present purposes, the important thing. *Thomas v. Winchester* became quickly a landmark of the law. In the application of its principle there may, at times, have been uncertainty or even error. There has never in this state been doubt or disavowal of the principle itself.[109]

It should be noted that the this reference to "the principle of the distinction" does not constitute a rule of law in the general sense of the term.[110] To say that "[b]ecause the danger is to be foreseen there is a duty to avoid the injury," does not resolve the case, but it does point the way. It is, moreover, a standard of consistency—a principle that allowed the court to demonstrate a commonality with prior decisions of a similar nature.

Once some guidance is provided, however, the principle loses it neutrality. It no longer defines the controversy; it points toward its proper

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108. *Id.* at 385, 111 N.E. at 1051.

109. *Id.*

110. I would here identify a rule as a legitimized command that provides, if applicable, clear guidance to the resolution of a particular dispute. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY 46 (1977); Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1089-96 (1977). Legal principles seem to defy systematic regimentation. The best one is often a play on Justice Stewart's "I know it when I see it" statement. Principle, as opposed to rule, finds articulation as the result of a process of legal reasoning, Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1093 (1977), that, unfortunately, justifies itself as based upon principle. Indeed, the attempt to define principle seems to be one of Dworkin's major achievements. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, ch. 2-3 (1977). Nevertheless, proper characterization of a policy as a rule or principle is more the result of an understanding of the underlying process of adjudication than the mere application of labels.

resolution.[111] The concept of "neutral principles" thus appears not only to be internally inconsistent,[112] but extraneous to the manner and mode by which courts exercise the judicial function. Principles by their nature must lose their neutrality, indeed if they ever have any, once application of the principle is sought. In reality, there is little functional difference between rules and principles, save for their breadth—rules being more constrained but more certain, in their application than principles. Yet, with both rules and principles it is not enough simply to note their existence. Rather, we must ask two further questions: first, why have rules or principles; second, assuming we should have rules or principles or both, which rules or principles should we apply to the case at hand? Yet, as soon as we attempt to answer either question, our attempt to achieve objective neutrality is lost. Rather, we seek to impart by reliance upon "neutral" principles the aura of objectivity, and hence infallibility, to what can only be subjective, intuitive value assessments.

Courts should be required to articulate frankly and openly the conflicting policies and values that are at issue in the particular case or will be affected as a consequence of the particular case. Once this point is reached, however, neutral principles take us down a path that is primrose but little else. Consistency of reasoning asks no more of judges than of common man; but it does demand that a judge investigate all reasonable possibilities and evaluate the product of all such investigations. Do we ask of anyone that he do less in formulating his life judgments; if he does less, do we excuse his failure to use common sense, logicality, and reasonableness to solve life's problems? The concept of neutral principles in the end demands of judges that they use common sense, a wise admonition, but one that brings us only to the starting gate, not the finish line.

An even greater problem with "neutral principles," and a doctrine of

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111. A truly neutral principle would perhaps be akin to the Court's statement in Angel v. Bullington, 330 U.S. 183 (1947), that "for purposes of diversity jurisdiction a federal court is, 'in effect, only another court of the state.' . . . *Id.* at 187 (citations omitted). Such a principle possesses general application while not purporting to influence resolution of the matter in favor of either litigant, although reference of the case to a particular court or body of law for resolution does involve value-laden preferences. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1052-53 (2d ed. 1973) (commenting upon reasons generally given for creation of diversity jurisdiction). Thus, it is difficult to comprehend how any "neutral principles," few as they are, could ever provide a sound foundation for the doctrine of judicial review. Their universe is too narrow for the task assigned. *See* note 117 *infra*.

112. In the sense that to be a "principle" is to lose any claim to neutrality, *see* Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1082-89 (1977). *See also* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

> Neutrality, if it means anything, can refer only to the thought processes of identifiable human beings. Principles cannot be neutral or biased or prejudiced—obviously. The choices that are made by judges in constitutional cases always involve value consequences, thus making value choice unavoidable. The principles which judges employ in projecting their choices to the future, or in explaining them, must also refer to such value alternatives, if given empirical reference. A principle might, in Professor Hart's term, be "durable," but only because enough human beings want it to be so.

*Id.* at 664.

judicial review predicated upon their existence, is the incompatibility between "neutral principles" and the doctrine of judicial review. A grudging tolerance of judicial review will find expression in an uncompromising requirement that courts decide cases in full conformity to requirements of fully articulated principle. As recognized by Wechsler, the hard case will often not be resolvable by reference to neutral principles. Thus, Wechsler notes of *Brown v. Board of Education* that the only neutral principle supportive of the decision was freedom of association.[113] That principle, however, was itself compromised. The Court in essence held that blacks were free to associate with whom they pleased, yet whites were not free to associate according to their own desires. The absence of a neutral principle would then argue against judicial intervention into the controversy. Indeed, it is hard to conceive of many cases of constitutional magnitude that would be subject to judicial review were courts limited to such formulas for issue resolution.[114] Of course, a principle may be designed that will seem to suffice. For example, it might be argued, as Bickel did, that the desegregation case was susceptible to a principle outlawing all forms of racial classification by the state.[115] But what supports treatment of such a standard as a neutral principle? No court has ever treated such a standard so unrelenting as the neutral principles standard would demand.[116] Does such a standard, any more than the concept of freedom of association, satisfy Wechsler's criterion that the "principle" not favor either party to the controversy?[117] Does it not suffer from the problem that to be truly neutral it must, in essence, form the center of some consensus relative to the scope and reach of the standard sought to be applied? Yet, if there is consensus, there is no real controversy; if there is no consensus, the neutral principles standard provides no guidance to a proper resolution of the controversy.

In the end, acceptance of a role for judicial decisionmaking of constitutional dimension within the framework of a federal tripartite system

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113. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

114. It is just this realization that has caused modern supporters of a strong philosophy of judicial review, such as Dworkin, to base their justification of the practice in terms of moral principles that are value-laden as opposed to the neutral principles proposed by Wechsler.

115. A. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS 57-58, 63, 69 (1962).

116. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). Recently, the question of racial discrimination has undergone a subtle twist in legal emphasis. It is only those racial classifications that stigmatize, disgrace, or shame that necessitate eradication under the equal protection clause. Such a principle could not be deemed neutral since application of the principle would depend on characterization of the classification as helpful or inimical to the interests of the classified group. *See* United Jewish Organizations v. Carey, 430 U.S. 144, 168-79 (1977) (Brennan, J., concurring).

117. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). It might be urged that Wechsler's principle of association could be formulated into a "neutral principle". Thus, it might be argued that freedom of association means the right to associate, not disassociate. Or put another way, one would be required to associate with those who wanted to associate with him, even if he did not want to associate with them. Such a formulation seems neutral; blacks *must* associate with whites just as whites *must* associate with blacks. Yet, the neutrality is superficial. If *required* association

of government revolves around the system's willingness to perceive judicial review as consistent with the goals and aspirations of our society. As noted by Bishin:

> But the only way in which it has been shown that judicial review is undemocratic has been to point to the fact that it is so obviously a nonmajoritarian institution. It is not a principle of the American democracy, however, that all decisionmaking must be by majoritarian agencies. Why, then, is not judicial review—whose existence is at least hinted at in articles III and VI of the Constitution and which concededly is supported by considerable legislative history—simply another one of the nonmajoritarian phenomena of which the system partially consists?
>
> To phrase it another way, if the United States is a democracy, as the critics of judicial review and many others seem to assume, then those nonmajoritarian elements which are an accepted part of the system are consistent with democracy. In this sense, could it not be said, indeed, that they are democratic? Similarly, if judicial review is an accepted part of the system, is it not also consistent with democracy? Of course, it can be argued that judicial review is not an accepted part of the system. But if this argument is made, it must be supported by something other than the remark that it is not decisionmaking by the majority's representatives. There must be something else wrong with it.[118]

The acceptance of judicial review bespeaks, I believe, a popular willingness to treat the function as consistent with the theory of democratic institutions expressed by the Constitution. By the same token, judicial review will only be tolerated so long as it remains in touch with the popular willingness to accept it. To restrict courts in matters of constitutional adjudications to "neutral principles" prevents the courts from assessing societal needs as the political system matures. Moreover, it hinders the courts in building a base of popular support by responding to societal needs through the accommodation of conflicting interests. Emphasis upon principle is misdirected and counterproductive. Recognizing that constitutional adjudications are founded upon accommodations of policy presents difficulties, not the least of which is disagreement with the result reached.

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can be seen as neutral, it is only in a totally abstract sense, divorced from all reality and human values. Required association is itself a policy or value. To treat it as a "neutral principle" implies that a consensus exists that the principle is acceptable. Yet, the dispute itself is over the acceptability of the principle. As perceptively pointed out by Miller and Howell:

> The position taken by Hart and Wechsler is based on a view of life and the social process in which litigants (and others) are in agreement on the basic essentials—the goal values—and all that remains is the settlement of preferred ways to reach those ends. Put another way, their position is bottomed on a theory of a fundamental harmony of interests of all members of the American community. But that is precisely what may *not* be present in most important constitutional litigation, such as racial relations, where disagreement is over ends or goals and not the means or tactics to attain them; the administration of the criminal law, where an antisocial being is jousting with something called society; and in many of the civil liberty cases, where again the disagreement is over fundamentals.

Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 687, (1960).

118. Bishin, *Judicial Review and Democratic Theory*, 50 S. CAL. L. REV. 1099, 1109 (1977) (footnotes omitted).

However, to ignore policy is to sterilize the institution by emphasizing the veneer instead of the quality of wood underneath.

Constitutional review should not be treated as different in kind from other exercises of the judicial function. In essence, once judicial review is accepted, its application does not differ according to the nature of the case before the court. If courts articulate policy in nonconstitutional cases, as they obviously do, then courts in exercising the judicial function in constitutional cases should be able to do likewise.[119] Of course, the policy considerations in constitutional cases will differ from the tenor of such considerations in nonconstitutional decisions; however, that is merely a factor for the court to consider—not a reason to exclude policy from constitutional cases. In effect, the question becomes, what is the role of policy in the exercise of the judicial function?

In the realm of judicial decisionmaking outside the arena of constitutional adjudications, insistence upon principle is not so compulsive. Indeed, it is recognized that considerations of policy play a primary role. As observed by Justice Shaefer:

> Baldly stated, I suppose that whether a precedent will be modified depends on whether the policies which underlie the proposed rule are strong enough to outweigh both the policies which support the existing rule and the disadvantages of making a change. The problem is not different in kind from that which is involved in the decisions of other regulatory organs, private or public. In the case of any one decision we may be able to explain why this or that consideration has prevailed, but it is hardly possible to state a general formula which will describe the process in its totality.[120]

In applying these considerations, the court will no doubt search for a unifying principle—as did the court in *MacPherson*; however, the disposition of the case will be determined, controlled, and directed by the impact that policy has upon the principle understood by the court to be common to the prior cases. A principle such as that extracted in *MacPherson*, "because the danger is to be foreseen, there is a duty to avoid the injury," divorced from policy, can support a case such as *Winterbottom v. Wright*[121] as well as *Greenman v. Yuba Power Products, Inc.*[122]

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119. The argument is offered that the texture of constitutional adjudication is different than pure private dispute resolution because in the former the judiciary must begin with an existing value choice and decide whether that value choice is prohibited by the Constitution. *See* Mueller and Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. REV. 571, 585 (1960). The distinction proposed, however, has no material impact upon the scope of judicial review in constitutional adjudications. A court in a simple civil action to determine whether a contract has been breached starts from a premise that a party has made a value choice, i.e., am I bound by the contract terms, and the court must now determine whether that choice was prohibited by the law of contract. If a difference exists between the institutional role of the courts in constitutional as opposed to nonconstitutional adjudications, it is a difference measured only in degree, not in kind. *See* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248-49 (1972).

120. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 12, (1966).

121. 152 Eng. Rep. 402 (Ex. 1842) (manufacturer not liable to one not in privity of contract for injuries resulting from use of manufacturer's product).

122. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (manufacturer liable to user of defective product without regard to privity of contract).

Principle, as everything else in life, makes no sense if viewed in isolation. When, however, courts assert their role as constitutional guardian, the concept of policy is placed in the closet and principle is brought out in its place as though through this metamorphosis institutional credibility would be established. We seem to be able to recognize that courts do make policy within and without constitutional adjudications. Yet, as with the Blackstonian notion that courts did not so much make law as declare it, we seem unable or unwilling to accept the inevitable realization that courts, and the Supreme Court in particular, establish policy through their interpretation and explication of constitutional doctrine. Accepted as such, the fuss over a court establishing policy seems much ado about nothing. If policy will, as it must, be called upon to give color to the picture of judicial review so that it becomes recognizable, why not accept the role of policy and view the institution of judicial review in its true, as opposed to its idealized, light. In the end, if so illuminated, judicial review proves to be incompatible with the theory of democratic institutions, then so be it. Within a system of checks and balances founded upon suspicion and distrust of aggrandizement of government power, however, we in all likelihood have less to fear from the judiciary than the other branches of government. The judiciary has only the power to persuade; it lacks completely any power to enforce. So viewed it seems rather foolish to continue insisting that we ignore what we know the courts are doing, and must do, if they are to continue to operate as effective media for the resolution of conflict between men and government.

Now viewed in the above light, principle certainly has a role in the justification of judicial review. It serves as a mechanism by which courts are required to demonstrate a meaningful connection with like decisions in the past. Principle, as here envisioned, is not a standard representing a moral or natural right; rather, it is a means of identifying the process by which a judicial decision is made.[123] It is reflective of an intuitive requirement that change effected through the judiciary ought to be incremental and gradual. As noted by former Chief Justice Traynor of the California Supreme Court:

> The very caution of the judicial process offers the best of reasons for confidence in the recurring reformation of judicial rules. A decision that has not suffered premature birth has a reduced risk of premature death. Insofar as a court remains uncommitted to unduly wide implications of a decision, it gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with little disturbance to the evolutionary course of the law and to those who act in reliance upon judicial decisions.
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> After a generation of experience, I believe that the primary obligation of a judge, at once conservative and creative, is to keep the inevitable evolution of the law on a rational course. Twenty years ago I wrote that the danger was

123. The process is described in Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

> not that judges would exceed their power, but that they would fall short of their obligation. Better the active pilot, sensitive to the currents of the river, than an armchair captain hidebound to a dated rulebook. The pilot who knows the river, however, must above all know the moorings well. If he disengages his bark from one, he must be certain he can reach another.[124]

### C. *The Extent and Limit of Mandatory Jurisdiction*

The preceding discussion of the role of principle and policy in the explication of judicial decisionmaking evidences that the doctrine of mandatory jurisdiction is not tied to the judicial function by an umbilical cord of principle any more than the fundamental judicial function of judicial review in constitutional adjudications. Rather, if the doctrine of mandatory jurisdiction is to be tied to the inherent judicial function, it is to be accomplished because it is determined that those benefits realized by adoption of a policy outweigh whatever costs are sustained. Hence, we return to the earlier formulation of the defined policies or values that underlie the argument for the acceptance or rejection of the doctrine of mandatory jurisdiction.

#### 1. *Avoiding Premature Expressions of Positions on Matters of Exigent Political Policy*

The common law doctrine of stare decisis is not the formidable edifice that it once was. Nonetheless, it remains a structural barrier to flippant overruling of decided cases. The preferred treatment is to put inconvenient old rulings aside as factually distinguishable. The wealth of potential factual distinctions marks every decision as a candidate for relegation to a position of inconsequence in the caselaw. This is not to say, however, that the overruling of precedent is a common occurrence. On the other hand, it is not an uncommon occurrence.[125] It must be remembered, however, that adoption of a particular legal position or policy will be more difficult when an ill-conceived decision, particularly a recent decision, stands in the way, preventing the court from writing on a clean slate.

> A judge must elucidate painstakingly a decision that involves the overruling of an earlier one. He soon learns that a bad precedent is easier said than undone. If the discarded precedent was intrinsically unsound from the outset, he must undertake an exposition of the injustice of [sic] confusion it engendered. When he thus speaks out, his words may serve also to quicken public respect for the law as an instrument of justice. If the discarded decision has merely become obsolete, he must also specify how it fails to mesh with contemporary laws or with other judicial rules or statutes.[126]

In this sense, it can be argued that, for a court which serves as an ultimate decision-maker, the consequences of refusing to acknowledge a privilege

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124. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 7 (1977).

125. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 457 (1975).

126. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 9 (1977).

to decline to exercise jurisdiction can be disadvantageous. The court may be faced with an inappropriate vehicle to articulate policy. The facts may be insufficiently developed to allow the court to obtain a glimmer of the probable path the doctrine will take. The court may prefer to allow other courts and commentators free leave to explore possible alternatives before the long-run consequences of a "freezing" of doctrine occurs. For all these reasons, the court may perceive that while the case is ripe in the constitutional sense, the time is not. That judicial diffidence is sound because in the long run it will facilitate the development of a coherent, sensible, and stable body of law.

If a limited doctrine of discretionary power to decline to assert jurisdiction can be perceived as sound for the reasons stated above, it can only be so if two important qualifications are noted. First, this doctrine of discretionary power can only be applied to a court from which no review can be taken. It is only when a court sits as a highest court that the benefits of deferral can be realized. Indeed, to extend the doctrine of discretionary jurisdiction to lower courts would be counterproductive, since the higher court would lose the benefit of the sharpening of issues that is occasioned by the lower court decisions. Moreover, the benefits realized from deferral should not be obtained at the cost of denying the litigants any forum whatsoever. This holds true even when the decision rendered in the interim will eventually be determined to be incorrect. Making available to the litigants a forum in which to resolve *their* dispute advances definite social goals such as repose, peace, and finality to civil disputes, even at the cost of submerging for the moment the goal of "correct" decisions.[127] Second, it goes too far to suggest that a discretionary power to accept or reject a case may be implemented in an unprincipled fashion. To avoid decision-making through the use of unprincipled means places courts, as institutions, in disrepute. No practice so sorely injures the political process as a lack of candor when governmental actions are explained to the public. In an era of mass dissemination of commentary and criticism, the subterfuge is not hidden for long. The unfortunate result is that a lack of candor will generally be perceived as evidence of deviousness. A decision not to decide, which in reality rests upon an unreadiness to cross unsailed shoals but which is disposed of by having a justiciability standard do yeoman's work, will be perceived as resting upon shameful decisions by the court not to recognize certain rights. The solution, however, is not to require that the court provide a forum whenever a litigant demands; rather, reality requires that we recognize the right to be prudent. Reflection is a slow process; it

127. Whether or not a particular lower court should exercise jurisdiction turns essentially upon the reasons for which access to particular tribunals was created. *See* Fischer, *Institutional Competence: Some Reflections on Judicial Activism in the Realm of Forum Allocation between State and Federal Courts*, 34 U. MIAMI L. REV. 175 (1980). Thus, for example, if Congress wished in creating a jurisdiction statute to confer upon litigants a "right" of immediate access to federal courts, that right ought to be respected and access correspondingly afforded no matter what the status of pending actions in state courts. *Id.* at 198-203.

would seem appropriate that in the exceptional circumstances described above courts be allowed to avail themselves of the benefits that critical reflection engenders. To allow a supreme court to avoid rendering a decision when it is institutionally unsure of the proper resolution does not result in an ousting of a class of litigants from a judicial forum. The litigants, in such cases, are only denied review in front of a particular court whose decision, if jurisdiction were accepted, would have repercussions far beyond the private dispute posted by the litigants. It is important that we allow sufficient leeway to permit sound principles to germinate and not by a too hasty inclination to tread uncharted paths which "confuse the production of ideas with their distribution."[128] On the other hand, when a court is not candid, when it relies upon unarticulated standards to avoid a decision, the equivalence of a decision on the merits does take place since the principle of consistency will apply to this latter situation but not the former.[129] Thus, it is one thing for a court to state it is not yet prepared to decide the issue; it is quite another for the court to accomplish the same result by a disingenuous analysis of constitutional and statutory grants of jurisdiction. Simply because a court is unsure of the best resolution of a problem at one point in time does not give rise to the expectation that it will be similarly uncertain at another point in time after a suitable period for critical reflection and inquiry has elapsed. The availment of such a reflective process is not unprincipled, nor does it amount to judicial sanctioning of illegal practices since the court is presently unsure of the proper identification of legal rights and remedies.

### 2. *Judicial Self Preservation as an Effective Political Entity*

Courts in general, and supreme courts in particular, are powerful only as long as they can persuade the public and the coordinate branches of government to respect their judgments. This need to instill and maintain public confidence in the judiciary is a point that unfortunately is all too often ignored or disregarded.

The perceived benefits of self-preservation strategy have often underpinned significant judicial lawmaking. Perhaps the foremost example is the Supreme Court's whittling down of the "arising under" language in the general federal question jurisdiction granted by Congress to the federal courts. That the Court's limiting construction of the "arising under" language was encouraged by the caseload burdens occasioned by an open-textured jurisdictional grant is beyond doubt, as is the realization that the lines between actions properly commenced in state courts as opposed to federal courts have been largely beneficial to the cooperative federalism

128. Frankfurter, *The Conditions for, and the Aims and Methods of, Legal Research*, 15 IOWA L. REV. 129, 135 (1930).

129. *See* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 7-8 (1964).

that is the mainspring of our political system.[130] Yet, the self-preservation doctrine is often suggested in terms that are radically different in kind from the forum allocation decisions that shaped our present doctrine of federal question jurisdiction. The tenor of the argument presented by Professor Bickel is, perhaps, reflective of the strain of self-preservation arguments that one suspects underlies most arguments in favor of discretionary power to decline to exercise jurisdiction. Professor Bickel suggested that even if the Court believed that a program, for example, affirmative action, was unconstitutional, the Court could legitimately refuse to decide the case if it were also of the belief that the unconstitutional action was socially beneficial.[131] While the notion that a court would knowingly contenance an unconstitutional result cannot be accepted, the problem of decision avoidance, where avoidance itself is seen as socially beneficial, deserves further consideration.

The proposition that judicial reticence does not always have adverse consequences can be accepted. The *Dred Scott*[132] decision is perhaps the best example of a case in which the Supreme Court was presented with a "no win" situation—no decision could forestall the upcoming civil war, while a decision could perhaps hasten it. Similarly, Professor Fairman presents an interesting account of the Supreme Court's avoidance of an immediate decision in *Ex parte McCardle*[133] and observes that there were manifest, long-term benefits to construing the post war Reconstruction Acts as "political," since, had the Court declared the acts unconstitutional in the spring of 1868 as it appeared it was prepared to do, there would have been no fourteenth amendment and the recently freed slaves in America would have achieved, through the Civil War, the eradication of the legal badge of slavery, but not the incidents of servitude.[134]

Nevertheless, over both the long and short-term, it is impossible to discern how a court should respond to an institutional threatening situation. The problem is not so much deciding how to respond as it is deciding when to respond. Truly institutional threatening situations do not arise in isolation, solely to threaten the judicial system. It is not surprising that both *Dred Scott* and *Ex parte McCardle* arose in the period of tremendous societal upheaval contemporaneous with the American Civil War. On the other hand, what is perhaps viewed as an institutional threatening situation often turns out to have been inaccurately perceived, once the hoopla

130. *See* note 61 *supra.*

131. A. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT BEFORE THE BAR OF POLITICS 57-72 (1962). The argument posed by Bickel is critiqued in Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudications*, 11 GA. L. REV. 1069, 1087-89, 1106-10 (1977).

132. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

133. 74 U.S. (7 Wall.) 506 (1868).

134. C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES—RECONSTRUCTION AND REUNION 1864-88, 498-501 (1971).

and notoriety surrounding the controversy has subsided.[135] Finally, and most ironically, whether the Court treats the situation as institutional threatening and defers, as in *McCardle*, or proceeds, as in *Dred Scott*, seems to work out in the long run, and who can say with any assurance that had the result gone otherwise in *McCardle* or *Dred Scott* the long-term effects would have been any different from those engendered by the actual result or that they would have been achieved at any greater or lesser cost.

If, as I believe it is, the argument of institutional self-preservation is so fluid as to defy reasonable containment, then it appears best to allow the Court some leeway to find for itself the best solution to an impossible situation. Preordaining a hard and fast rule that jurisdiction must always be accepted will do little to aid the Court when the truly hard case is presented.

### 3. *The Problem of Concurrent Jurisdiction*

Grants of concurrent jurisdiction force additional nuances into the description of a proper doctrine of mandatory jurisdiction. The existence of concurrent jurisdiction allows the same case to be simultaneously litigated in two different forms. Does mandatory jurisdiction *require* duplication of efforts? An unthinking, mechanical application of mandatory jurisdiction could place tremendous practical demands upon the federal courts, demands that would reduce their decision-making effectiveness.[136] Easy access to courts is not the sole goal of a legal system,

135. The hyperbole of the moment often seems to drown out the sense of perspective that is essential to any informed evaluation. For example, the "Watergate crisis" that precipitated Richard Nixon's resignation from the Presidency was often related in terms of constitutional crisis narrowly avoided. Yet, what that crisis was has never been illuminated. The possible destruction of evidence—the Nixon tapes—was hardly equivalent to the burning of the Reichstag. To suggest that a morally bankrupt Presidency, faced with a hostile Congress controlled by the opposition party, posed a real threat to the Constitution is ludicrous. The "Watergate crisis" generated much heat but about as much light as a black hole.

136. As Judge Friendly recently observed: "A fourth consideration is Justice Jackson's never refuted observation that '[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones.' The thought may be distasteful but no judge can honestly deny it is real." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149 (1970) (footnote omitted). *See also* Hart, *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 94-101 (1959). The alternative of prejudicing the occasional meritorious application may be seen as denying access for all applications, if the problem is viewed in either-or terms. Certainly this is no help to the federal plaintiff to whom half a loaf is better than no bread at all. The problem of burgeoning caseloads cannot, however, be dealt with so facilely. A judge has only so much time to devote to his work. Time spent reviewing worthless applications or those that do not immediately impact upon constitutionally or congressionally defined areas of federal concern necessarily detracts from those cases that involve matters of compelling federal concern. It would seem as easy to destroy the federal courts as effective institutions within our constitutional scheme by giving them too much to do as by giving them nothing to do. One solution is simply to increase the number of federal judges. This, however, also raises some difficulties. Again, Judge Friendly has pointed to the problem. Writing in his recent work, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) Judge Friendly observed that:

> [T]here must come a point when an increase in the number of judges makes judging, even at the trial level, less prestigious and less attractive. Prestige is a very important factor in attracting highly qualified men to the federal bench from much more lucrative pursuits. Yet the largest district courts will be in the very metropolitan areas where the discrepancy between uniform federal salaries and the financial rewards of private practice is the greatest, and the

particularly when accentuation of one goal may prejudice the achievement of others. On the other hand, acceptance of common-sense limitations upon the concept of mandatory jurisdiction poses difficulties in definition. There is probably little consensus concerning what is commonsensical and what is not. Decisions to decline to exercise jurisdiction might be "expressly" grounded on common-sense reasons when, in fact, the decision to decline jurisdiction rests upon other grounds. Of course, the possibility that courts will not be candid cannot be protected against absolutely; nevertheless, there is a danger in creating superficially appealing tests that, because of their euphemistic generality, encourage judicial nondisclosure. The test is thus to devise a rule that recognizes the values inherent in the principle of mandatory jurisdiction, preserves the courts as *effective* decision-making tribunals, and reduces the opportunities for courts to decline to entertain controversies for improper reasons.

I have argued elsewhere that a critical analysis of the intent of the Congress, the political body initially responsible for defining jurisdiction grants, must be undertaken in evaluating the scope of jurisdictional investment.[137] Hence, when Congress creates a jurisdictional scheme that allows for access to either state *or* federal courts, its emphasis upon whether certain jurisdiction statutes were designed to implement other goals would provide meaningful guidance insofar as the question of mandatory jurisdiction was implicated. Thus:

> [C]ongressional creation of concurrent jurisdiction might more profitably be viewed as a congressional statement that uniformity in the creation and application of federal law is less important than is making available to American citizens the most sympathetic forum they can find to seek redress for claimed infringements of their federal rights. In essence, creation of concurrent jurisdiction could support a finding that Congress desired that litigants be allowed to forum shop between state and federal courts. Such a finding would not be illogical. Congress could certainly have intended for federal litigation to be brought in the most sympathetic forum, and concurrent jurisdiction would allow forum shoppers to correct for local variations between state and federal judiciaries.[138]

Consequently, judicial recognition of the doctrine of mandatory jurisdiction should occur when to do so would directly assist in the implementation of statutory objectives attendant to the creation of concurrent jurisdiction. On the other hand, when nonjurisdictional objectives would not be furthered by recognition of the concept of mandatory jurisdiction and

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> difficulty of maintaining an accustomed standard of living on the federal salary the most acute. There is real danger that in such areas, once the prestige factor was removed, lawyers with successful practices, particularly young men, would not be willing to make the sacrifice.

*Id.* at 29-30 (footnote omitted). *See also* Leventhal, *Book Review—Federal Jurisdiction: A General View (Henry J. Friendly)*, 75 COLUM. L. REV. 1009 (1975) (expressing agreement with the views of Judge Friendly regarding the antinomy of prestige and large numbers).

137. Fischer, *Institutional Competence: Some Reflections on Judicial Activism in the Realm of Forum Allocation between State and Federal Courts*, 34 U. MIAMI L. REV. 175 (1980).

138. *Id.* at 202-03 (footnotes omitted).

when prejudice would be occasioned, the power to decline to exercise jurisdiction ought to be recognized, not as an inherent power of courts, but as a necessary incident of the initial jurisdictional grant.

Mandatory jurisdiction ought not to demand that courts tolerate concurrent adjudication in both state and federal courts in all instances. To accept that Congress has become tolerant of forum shopping between state and federal judiciaries does not support allowing a litigant to maintain multiple prosecutions of a single claim.[139] Once a litigant has consciously selected a forum, the congressional policy is satisfied and one should then focus upon a necessarily implicit part of any jurisdiction grant—the conservation of resources when that can be accomplished at no meaningful costs to society.[140]

Thus, when a litigant files an action in both state and federal courts in an attempt to take advantage of the earliest trial date, he can be legitimately compelled to elect between the two actions[141] unless it can be said that providing an early trial date is a congressional purpose behind the enactment of the jurisdiction statute.[142] Similarly, when analysis of the jurisdiction statute discloses a congressional purpose to allow judicial discretion to decline to exercise jurisdiction, access to a federal forum can be controlled.[143] These exceptions retain for the federal courts the practicable

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139. In the context of civil rights litigation, federal courts generally have held that a person who has initiated litigation in state court is barred from relitigating his claim in federal court. *See, e.g.*, Brown v. DeLayo, 498 F.2d 1173 (10th Cir. 1974); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973). When federal courts have allowed relitigation of civil rights issues, it has generally been justified by reliance upon the substantive policies which the Civil Rights Act is designed to promote. *See* Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975). When relitigation has been barred, the emphasis has been placed upon the claimants' *election* of trial in state court as manifested by instigation of litigation on the issues in a particular forum. *See* Loverly v. Laliberte, 498 F.2d 1261 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974).

140. It must be conceded that prohibitions on relitigation stand somewhat differently from bars upon simultaneous, multiple prosecutions because the former expressly comes under a general federal statute that adopts the doctrine of res judicata. 28 U.S.C. § 1738 (1970) prohibitions against multiple prosecution exist by way of ascribing to courts an inherent power to handle the repetitive and reactive litigation in a manner best designed to serve the interests of all concerned. 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[4]. Thus, to the extent the doctrine of mandatory jurisdiction is generic, it could be argued that federal courts have less leeway in staying multiple prosecutions than multiple relitigation because only the latter carries an express congressional sanction against the obligation of assuming jurisdiction. Focusing upon the congressional intent behind the formulation of jurisdictional and substantive legislation, however, avoids inconsistency between the proper treatment for multiple prosecution and repetitive relitigation. Thus, if the jurisdictional and substantive components of the legislative scheme evidence the intent to allow the claimant to choose where to litigate his federal claims, once the claimant has done so, judicial refusals to allow relitigation or multiple prosecution can be justified as not impeding either the claimant's right to a forum or the congressional policies behind the legislative scheme and its jurisdiction corollary.

141. Ystueta v. Parris, 486 F. Supp. 127 (N.D. Ga. 1980); Reines Distributors, Inc. v. Admiral Corp., 182 F. Supp. 226 (S.D.N.Y. 1960). *See* Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960).

142. Although unlikely, such a congressional policy cannot be rejected out-of-hand. *See* note 95 *supra*.

143. Lear Siegler, Inc. v. Adkins, 330 F.2d 595, 599 (9th Cir. 1964). The Federal Declaratory Judgments Act does not establish a new basis for jurisdiction in the federal courts; it merely establishes a new remedy, available in cases in which jurisdiction otherwise exists. Skelly Oil Co. v. Phillips Petroleum Co., 1950, 339 U.S. 667. . . . Moreover, the existence of jurisdiction in an action for declaratory

ability to function effectively and yet preserve for litigants the general right, in cases of concurrent jurisdiction, to decide for themselves whether they wish to adjudicate their federal claims in state or federal court.

## CONCLUSION

One cannot disparage the notion that myth is often as important as law, and certainly the myth that a polity, in the context of its legal system, is governed by law instead of men might be underscored were courts to refuse to decide what would often be perceived as hard or difficult cases. This point cannot be made light of. Acceptance of it produces in the end, however, an unenviable situation—if the federal courts cannot control their own dockets they run a real risk of becoming institutionally ineffective.[144] Certainly, this has happened to a great extent in nonconstitutional adjudications. The return of status principles, absolute liability, and expanding adjudicatory administrative agencies are at once a loud and persistent cry that traditional judicial institutions are, or appear, inadequate. The more courts want to do, the less they seem able to accomplish or accomplish well.[145]

This whole question but bespeaks of the problem of reconciling the irresistible force of constitutional theory with the immovable object of political reality. The movement by the Court of such article III doctrines as standing, ripeness, and mootness from positions of "legitimate" guardians of the federal courthouse door to general criteria that allow for nonconsideration of *cases* the Court does not wish to consider has been well noted. To take standing as an example, one is at a loss to reconcile suggestions in *Simon v. Eastern Kentucky Welfare Rights Organization*,[146] that prudential standing requirements constitute minimum article III demands, with the statement in *Trafficante v. Metropolitan Life Insurance Co.*[147] that Congress can abolish prudential standing requirements in appropriate situations. One would have thought *Marbury v. Madison* answered the

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relief does not require that the court exercise it. It has a judicial discretion to decline to grant such relief. This has been the consistent position of the Supreme Court, the latest decision being Public Affairs Associates, Inc. v. Rickover, 1960, 369 U.S. 111. . . . In that case in its per curiam opinion the Court said:

> "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so. . . . Of course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination. 'A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.' Eccles v. Peoples Bank, 333 U.S. 426, 431 [1948]. . . .

144. The issues of court congestion and calendar control are increasing and increasingly calling for meaningful resolution. Of course, the first reason for these problems is the explosion of federally recognized rights and correlative federal remedies that have arisen in the past two decades.

145. Hart, *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

146. 426 U.S. 26, 40-46 (1976).

147. 409 U.S. 205 (1972). The inconsistency between the two decisions is elaborated upon in Justice Brennan's dissent in *Simon*. 426 U.S. 26, 58-66 (1976) (Brennan, J., dissenting).

latter proposition in the negative long ago and for all time. This but demonstrates that the Court will find ways to avoid deciding cases it is not prepared to decide. It would seem to be much the preferable path that in such cases the Court be required to state why it is not prepared to take the case at the present time, rather than to continue to indulge in these circuitous ratiocinations that reach the only result the Court is institutionally prepared to make. In such cases, necessity demands that the Court be given the discretion to make a principled decision not to decide. Now if such a procedure casts doubt upon the supremacy of law, one must wonder how the contrary, yet existing practices of summary affirmances, standing, mootness, or such other devices, as presently understood and applied, establish the primacy of law.