

The Yale Law Journal

Volume 82, Number 7, June 1973

Constitutional Adjudication: The Who and When

Henry P. Monaghan*

When the newly appointed Justices of the Supreme Court assembled in the Royal Exchange Building in New York for their first session on February 2, 1790,¹ the most farsighted individual could not have foreseen what the future held for this tribunal. Now less than a generation short of its 200th anniversary, the Court is universally acknowledged to be the final and authoritative expositor of the Constitution.² Yet after almost two centuries, questions concerning this power of the Court to interpret the Constitution remain. The first set of questions centers on the substantive standards for constitutional adjudication.³ The second, with which this article deals, focuses on the conditions under

* Professor of Law, Boston University School of Law.

1. C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 46-47 (1928).

2. Indeed, the Court itself has gone so far as to advance the doubtful proposition that its interpretations of the Constitution are part of the Constitution itself. See *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958). Cf. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965). This is not to deny that Congress has an important role in constitutional determinations, but that role does not include definition of the substantive standards. See Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 199, 233-34 (1970). Cf. D. MORGAN, *CONGRESS AND THE CONSTITUTION* (1966).

3. Some would dismiss this issue entirely by arguing that judges are simply robed legislators who do and should "represent" either "values," e.g., speech, equality, or "interests," e.g., "minorities." See, e.g., Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769 (1971). "Those who accept this view," observes Professor Wechsler, "draw no distinction between politics and law, and urge the [C]ourt to function simply as a power organ." Wechsler, *supra* note 2, at 1009-10. There are numerous difficulties with this "political" view, not the least of which is that no justification is advanced why the other branches of government should feel bound by the Court's avowedly political judgments. See generally Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Politics*, 20 STAN. L. REV. 169 (1968); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972).

The Court itself has never overtly subscribed to such a view of its functions, apparently recognizing that public acceptance of judicial review depends in no small measure on a widely shared and deeply felt belief that the Justices themselves are lions under the throne. It is "of the essence of constitutionalism," writes Professor Kurland, "that all government—not excepting the courts—is to be contained by established principles." P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 8 (1970). Supported by the great weight of professional opinion, the members of the Court, with perhaps some rare exceptions, have viewed the judicial office as restricting them to a reasoned elaboration of fundamental principles. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 23-28 (1962); A. COX, *THE WARREN COURT* 222-23 (1968).

which constitutional determinations should be made: who may obtain constitutional declarations and when. Although often viewed as merely technical, legalistic wrangling which unnecessarily impedes the Court in its task of constitutional exegesis, these "who" and "when" questions embody fundamental assumptions as to the Court's appropriate role in our constitutional scheme.

The constitutional text is itself spare and unhelpful on these critical questions, providing only that "the judicial power of the United States" shall extend to certain enumerated "cases and controversies," including those "arising under the Constitution."⁴ Except for the creation of the Court and limited specifications as to its original jurisdiction, the remainder was left to Congress, which was expressly authorized to establish such inferior federal courts as it saw fit and to regulate the Supreme Court's appellate jurisdiction.⁵ At its first session Congress quickly enacted the Judiciary Act of 1789,⁶ which authorized, *inter alia*, Supreme Court review of certain constitutional determinations by the state courts. While the Act also established lower federal courts—a step which proved to have lasting significance—it gave those courts no direct "arising under" jurisdiction, and accordingly, until the great expansion of federal jurisdiction following the Civil War,⁷ their constitutional adjudications resulted only as by-products of the exercise of other jurisdiction.⁸

Neither the Constitution nor the Act set out the circumstances under which constitutional pronouncements were proper. Article III's "limitation" of the "judicial power" to "cases and controversies" has little necessary meaning; like most provisions of the Constitution, these words bear several interpretations. And while the Act established the federal judicial system, it said little about the occasions on which it was proper for any court to decide constitutional questions. Rather, like the substantive constitutional standards, the nature and form of judicial review were slowly shaped over time.⁹

4. U.S. CONST. art. III, §§ 1 & 2.

5. *Id.* See H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 12-13 n.46 (2d ed. 1972) [hereinafter cited as HART & WECHSLER], rejecting the view that Congress was under a duty to establish lower federal courts possessing full judicial power. The Court agrees. See *Palmore v. United States*, 93 S. Ct. 1670, 1678 (1973).

6. 1 STAT. 73. The classic account of the Act is contained in F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 15-25 (1928) [hereinafter cited as FRANKFURTER & LANDIS].

7. *Mitchum v. Foster*, 407 U.S. 225, 238-43 (1971); *Zwickler v. Koota*, 389 U.S. 241, 245-48 (1967).

8. See, e.g., *Palmore v. United States*, 93 S. Ct. 1670, 1678 (1973).

9. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 57 (1955). The fact that § 25 of the Act of 1789 authorized review of certain state court determinations plainly did not mean that it purported to consider all aspects of the "who" and "when" questions.

Constitutional Adjudication: The Who and When

I. Two Models of Judicial Competence

A. *The Private Rights Model*

*Marbury v. Madison*¹⁰ was the crucible for the development of both “who” and “when” principles. In important part, *Marbury* found the power of constitutional exposition to be an incident of the Court’s obligation to decide the particular “case or controversy” before it.¹¹ Thus, constitutional litigation was viewed as essentially no different from any other adjudication. That the Constitution was to be applied as “ordinary law” by the courts in resolving claims of litigants was a marked advance, squarely rejecting as it did the view that the document stated only political rules beyond the cognizance of judicial tribunals.¹² But even that step forward does not exhaust *Marbury*’s significance, for the case is now taken to have established that the Court’s constitutional interpretations are final and authoritative—that is, that they prevail over those of every other organ of government.¹³

The assertion of this power to annul congressional and state legislation was, of course, heady and frightening stuff for any tribunal, particularly where opposition to the exercise of that power was frequent, loud, and intense. Not unexpectedly, the Court over the course of time developed a flexible range of doctrines, *e.g.*, ripeness, mootness, standing, political question, abstention, exhaustion of remedies, which provided vehicles for avoiding constitutional questions.¹⁴ In part, these

10. 5 U.S. (1 Cranch) 137 (1803). See generally Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969).

11. 5 U.S. (1 Cranch) 137, 177-78 (1803). See also *Younger v. Harris*, 401 U.S. 37, 52 (1971).

12. See Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, in 1 SELECTED ESSAYS ON CONSTITUTION LAW 128, 146-47 (1938).

13. *Marbury* decided that the Court could decide constitutional issues in cases coming before it. It did not decide who, apart from the litigants, must yield to its interpretation. Rather, the Court’s authoritative role is the end-product of the struggle. See generally HART & WECHSLER, *supra* note 5, at 455.

Another, and often overlooked, factor served to retard development of the Court’s authoritative status: Until well into the twentieth century, the Court’s consideration of constitutional cases was essentially episodic. Not only was the bulk of the Court’s docket comprised of other matters, but the accidents of litigation also determined the range and character of the constitutional issues which reached it. By reducing the possibilities for the development of a systematic, coherent body of constitutional law, this state of affairs rendered less than self-evident any claim by the Court to authoritative status. See W. CROSSKEY, 2 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 978-80 (1953). So unpredictable were the occasions on which the Court would be called on to expound on the meaning of the Constitution that in 1893, Judge Thayer asserted that the Court could rightly make a declaration of invalidity only where the legislature had committed a “clear mistake.” Thayer, *The Origin and Scope of The American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-44 (1893).

14. See, *e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). See also *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). For a provocative analysis of the content and utility of these “ordinances of self-denial,” compare A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) with Gunther, *The Subtle Vices of the “Passive Vir-*

doctrines reflected a strong ambivalence about the propriety of judicial review in a democratic society, which, in turn, imported that judicial intervention should occur only when unavoidably necessary and under carefully structured circumstances designed to avoid "erroneous" holdings;¹⁵ in part, they also reflected an intuition that frequent judicial intervention in the political process would generate such widespread political reaction that the Court would be destroyed in its wake.¹⁶ Looking back over time, these judicially fashioned rules served still another very important function: They allowed the *current* dimensions of judicial review to become established at an acceptable political pace.

These limiting doctrines shared, by and large, a coherent view of the judicial process. In *Marbury*, Justice Marshall repeatedly emphasized the necessity for the judicial protection of "vested" or "legal" rights; and he declared that the "province of the Court is *solely* to decide on the rights of individuals, . . ."¹⁷ Moreover, *Marbury's* analogy of constitutional litigation to "ordinary" common law litigation strongly suggested that the occasions for judicial review were limited to the protection of identifiable and concrete personal rights, similar to those protected by the common law courts.¹⁸ This view of the judicial function took deep roots, particularly as the nineteenth century wore on.¹⁹ And the Court, while quick to protect private rights from "arbitrary" social legislation, repeatedly disclaimed any general commission to expound on the meaning of the Constitution.²⁰ Professor Wechsler re-

tues—*A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). On the question of whether the "case or controversy" and allied doctrines must be as principled in their content as the substantive constitutional doctrines themselves, I stand squarely with Professor Gunther.

15. This view of judicial review had its intellectual origins in Thayer, *supra* note 13.

16. See, e.g., Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261, 262-64 (1951).

17. 5 U.S. (1 Cranch) at 177. *Marbury* repeatedly refers to the need for judicial enforcement of "vested" or "legal rights." *Id.* at 162-64, 167. See also 78 FEDERALIST PAPERS 12-24 (Cooke ed. 1959) defending judicial enforcement of constitutional limitations because, "Without this, all the reservations of particular rights or privileges would amount to nothing." See also J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1574, 1641 (1858).

18. My own view is that, prior to their recent judicial expansion, the substantive constitutional guarantees could be viewed largely as securing against the government the same rights which the common law of tort and property secured against private individuals. Today, we have a somewhat reverse phenomenon: There is much concern with imposing on "private" groups the expanded conceptions of rights now possessed by the individual against the government. See, e.g., W. GELLHORN, AMERICAN RIGHTS 169-95 (1960).

19. Judicial concern for "vested rights" became a central part of the then-fashionable theology of property. For an excellent review of the relevant social and judicial history see W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE OLD LEGALITY 1889-1932 (1969).

20. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Muskrat v. United States*, 219 U.S. 346 (1911); *California v. San Pablo & Tulare R.R.*, 149 U.S. 308 (1893); *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Educ.*, 113 U.S. 33, 39 (1885).

Constitutional Adjudication: The Who and When

flected this tradition when, writing in 1966, he denied that the Court had any "special function" of "policing or advising Legislatures or Executives," and yet reasoned that where individual rights were at issue, the Court had the inescapable duty "to decide the litigated case and to decide it in accordance with the [Constitution]." ²¹

*Frothingham v. Mellon*²² represents the classic judicial expression of the "private rights" model. Mrs. Frothingham's interest *qua* taxpayer in the *expenditure* of general federal funds, it will be remembered, bore no resemblance to the kinds of concrete personal interests in liberty or property protected by the common law courts.²³ A unanimous Court expressly disclaimed any "power *per se* to review and annul acts of Congress on the ground that they are unconstitutional."²⁴ "That question," Mr. Justice Sutherland wrote, "may be considered only when the justification for some direct injury suffered or threatened is made to rest upon such an act."²⁵ *Frothingham* thus followed in apostolic succession from *Marbury*'s analogy of constitutional litigation to "ordinary" common law suits, and it reflected a premise which underlay much of the thinking about standing, ripeness, and sovereign immunity.

The requirement that the plaintiffs assert concrete "private rights" was nowhere more clearly demonstrated than in the Court's attitude toward suits brought by states. It now seems extraordinary that the question of whether an act of Congress exceeds the powers conferred on it and thereby invades the rights reserved to the states could be litigated in suits between private parties without appropriate federal or state officials being notified,²⁶ but such was the case until this century.²⁷ Still more extraordinary was the consistent rejection of federalism claims when raised by the states themselves. During the Reconstruction courts repeatedly rejected attempts by the Southern states to challenge the validity of congressional legislation, because they presented

21. H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 9 (1961).

22. 262 U.S. 447 (1923).

23. Not only did the suit not purport to determine Mrs. Frothingham's tax liabilities, there was no reason to believe that victory would have reduced her tax bill. See generally Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034 (1968) [hereinafter cited as Jaffe, *The Citizen as Litigant*].

24. 262 U.S. at 488.

25. *Id.* *Frothingham* rested squarely on the premise that a plaintiff must show that, apart from the official justification, the defendant would have been a common law tortfeasor. Obviously Mrs. Frothingham's complaint did not fit into such a framework. See *Associated Industries v. Ickes*, 134 F.2d 694, 700 (2d Cir.), *vacated and remanded*, 320 U.S. 707 (1943).

26. W. CROSSKEY, *supra* note 13, at 978-81. Cf. C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 531 (2d ed. 1932).

27. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 524 (1966). See also FED. R. APP. P. 44.

"no case of private rights or private property infringed, or in danger of actual or threatened infringement,"²⁸ although it seemed clear that this federalism issue could be raised by private litigants.²⁹

Surely the reasoning of these decisions is wholly unsatisfactory. The Reconstruction cases presented major questions concerning federalism and the separation of powers; the real contestants were Congress and the states.³⁰ Although the notion of what constitutes private rights has been judicially expanded in recent years to encompass whatever may be characterized as "injury in fact" to the plaintiff, the private rights model remains formally unimpaired: Constitutional adjudication is still viewed as the by-product of preventing unjustified injury to private interests.

B. *The Special Function Model*

That the Constitution needs authoritative interpretation is no longer open to rational dispute. The Court's monopoly on this prerogative is so firmly established that, as Professor Bickel observes, "[s]ettled expectations" of the body politic have come to depend on it in myriad ways.³¹ While one can readily agree that the Court rather than the political branches is uniquely suited for this task,³² it is by no means evident that it should be a function of ordinary litigation concerning private rights. Judicial review in other countries, particularly those not in the common law tradition, is not tied to such a limitation.³³

It is error to assume that, either as a matter of case or controversy or of substantive law, constitutional adjudication absent some specific

28. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1868). The same reasoning was applied in *Massachusetts v. Mellon*, 262 U.S. 447, 484-85 (1923).

29. The cases did suggest that dismissal of the states' suits was required because the issues were "political" questions. But the "political" character of the suits seems ultimately to have been simply a function of the character of the plaintiffs, not the issues, of the cases. No doubts about justiciability were raised when personal rights were at stake. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); *Ex parte Yergler*, 75 U.S. (8 Wall.) 85 (1869); *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

30. Professors Frankfurter, Landis, and Jaffe make the same point with respect to the "real" litigants in *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), and *Myers v. United States*, 272 U.S. 52 (1926). FRANKFURTER & LANDIS, *supra* note 6, at 315; Jaffe, *The Citizen as Litigant*, *supra* note 23, at 1041.

31. A. BICKEL, *supra* note 14, at 14.

32. See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 519, 523-24 (1970). Clifton McCleskey's nineteenth century examples to the contrary notwithstanding, see McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUSTON L. REV. 354, 360-61 (1966), Congress in the twentieth century is far too overwhelmed to give systematic and coherent development to constitutional principles.

33. Kauper, *The Supreme Court: Hybrid Organ of State*, 21 SW. L.J. 573, 590 (1967). This is all the more striking because the idea of judicial review is American in origin, despite its European antecedents. Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966). For descriptions of other models see M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* ch. 3 (1971); Rosenn, Book Review, 81 YALE L.J. 1411, 1417-20 (1972).

Constitutional Adjudication: The Who and When

complaint of injury in fact is beyond judicial competence. In his dissent in *Baker v. Carr*, Justice Frankfurter indicated that no "case or controversy" existed where the substantive assertion is simply that "the frame of government is askew."³⁴ But why not? Recent decisions in administrative law recognize that plaintiffs often assert broad and diffuse interests—such as those of consumers or users of the "environment"—which do not involve the litigants' individual status. The "public" action,³⁵ now recognized to have had deep roots in British legal history,³⁶ has fully surfaced. Both developments have radically altered assumptions about what constitutes a sufficient predicate for judicial action. In the words of Professor Jaffe:

Although it may seem anomalous to posit a right of the people which is not the right of any person in particular, we are becoming more and more familiar with the judicial enforcement of public or group interests at the suit of individuals and groups who may or may not be direct beneficiaries of the judgment.³⁷

It is quite plausible that a part of the constitutional guarantees of freedom of speech and religion, or more generally, of "liberty" and "property" as now understood, include a right to complain of the *existence* of unconstitutional legislation.³⁸ At bottom, Justice Frankfurter's denial that a citizen's interest in governmental regularity is "real" ignores the increasingly evident "public" nature of constitutional adjudication. It fails to recognize that many rights may be held *in gross* as well as *in personam*.

The underpinnings of the private rights model have been weakened further by the recognition that constitutional adjudication is, fundamentally, a "political-legal" undertaking only loosely analogous to "ordinary" judicial litigation. As Frankfurter and Landis observed long

34. 369 U.S. 186, 267, 298-300 (1962).

35. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 459-500 (1965).

36. Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816 (1969).

37. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 *HARV. L. REV.* 768, 774 (1972). See also Duggan, *Standing to Sue: A Commentary on Injury in Fact*, 22 *CASE W. RES. L. REV.* 256, 273-74 (1971); Viner, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 *MICH. L. REV.* 1443, 1471-75 (1971).

38. One basis for such an argument might run as follows. One of the rights a citizen has is that legislative bodies consider only constitutionally permissible factors in formulating rules designed for the common good. See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 *SUP. CT. REV.* 1, 95, 116, 118. This means that a citizen has an interest in the process, as well as the product, of legislation:

In a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed.

Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972).

ago in their classic study of federal jurisdiction, the task of judges in constitutional cases differs from that of common law judges in "the context of the materials, the nature of the interests, and the technique of adjudication."³⁹ It calls for judgments dealing with the distribution of political power in which the Court, on the basis of "broad and undefined clauses,"⁴⁰ is asked to reject the choices made by the otherwise concededly supreme law-making institutions of our society.⁴¹ The analogy to ordinary litigation is largely formal: Constitutional determinations merely occur in the context of the traditional lawsuit familiar to all lawyers.

Today there is virtually unanimous agreement that the Court has a "special function" with regard to the Constitution because it is the final authoritative interpreter of constitutional text. "Whatever the rationale to support the theory and practice," observes Professor Kauper, "Americans take it for granted that the Supreme Court will exercise [the] power [of judicial review]. We accept the Court as an organ necessary to the constitutional order."⁴² It is, accordingly, today simply unacceptable for the Court to dismiss as *beyond judicial competence* challenges by Congress to the practice of the pocket veto or to presidential attempts to impound funds solely because traditional "private" interests are not at stake;⁴³ it is unacceptable to dismiss state challenges to federal authority or a case of far-reaching national importance, simply because the particular litigants no longer have a "personal interest" in the outcome.⁴⁴

Once the Court's "special function" and the "unique" character of constitutional adjudications are stressed, "the old notion that the power to decide constitutional questions is simply incident to the power to dispose of a concrete case loses much of its substance."⁴⁵ *Marbury* itself provides the basis for a different model of judicial competence. In its repeated emphasis that a written constitution imposes limits on every organ of the state,⁴⁶ *Marbury* welded judicial review to the political axiom of limited government. However frequently limited government

39. FRANKFURTER & LANDIS, *supra* note 6, at 307.

40. *Id.* at 308.

41. A. BICKEL, *supra* note 14, at 16-23. See also R. JACKSON, *supra* note 7, at 55-57 (1955); Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 572-73 (1948).

42. Kauper, *supra* note 33, at 590.

43. Perhaps the Court could strain these cases into established authority through reliance on its 5-4 decision in *Coleman v. Miller*, 307 U.S. 433, 438-42 (1939) (granting standing to state senators challenging right of lieutenant governor to cast tie-breaking vote on proposed constitutional amendment).

44. Cf. Brennan, J., dissenting in *Richardson v. Wright*, 405 U.S. 208, 212 (1972).

45. Kauper, *supra* note 33, at 577.

46. 5 U.S. (1 Cranch) at 176-77 (1803).

and private rights were joined, eighteenth century thinkers did *not* believe that protection of private rights exhausted the justification for the enforcement of constitutional limits.⁴⁷ Accordingly, in substantially recasting our thinking about the appropriate occasions for judicial review, we need not face the impact of a specific and restrictive historical intention.⁴⁸ This is a situation where, in Holmes' phrase, "the present has a right to govern itself as far as it can."⁴⁹

Because the Court has the "special function" in our frame of government to declare authoritatively the meaning of the Constitution, at least when Congress so authorizes the Court may properly render such pronouncements whether or not recognizable private interests are involved. A "special function" model of judicial competence⁵⁰ would perceive constitutional litigation as "public actions," which may or may not involve private rights.⁵¹ To a significant extent, the "special function" model, in fact, has already been adopted, although its contours are vague. If it is to be an acceptable guide for the appropriateness of judicial review, however, its form must be made explicit.

II. The Contours of a Special Function Model

A "special function" model for constitutional adjudication would require, at the very least, that issues be sharply defined and capable of judicial solution. Beyond that, it also would require that the rate at which constitutional issues arise in the courts be controlled so as to insure that judicial intervention not overwhelm the political branches.

A. *Issues Sharply Defined*

The first limitation might suggest that the form in which the issue is presented be that of a traditional lawsuit invoking traditional remedies. *Flast v. Cohen*, for example, states that standing is "related" to the question of "whether the dispute sought to be adjudicated will be

47. "Limited government" was the common bond uniting political discussion about the meaning of such diverse concepts as a written constitution, fundamental law, social contract, separation of powers, and federalism. See C. HAINES, *supra* note 26, at 204-31. See generally the note and materials contained in H. HART & W. WECHSLER, *supra* note 5, at 9 n.34; 3 J. STORY, *supra* note 17, at 373-97. Cf. Nelson, *Changing Conceptions Of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1170-71 (1972).

48. See C. MILLER, *THE SUPREME COURT AND THE USES OF THE HISTORY* 161-69 (1969).

49. O. HOLMES, *COLLECTED LEGAL PAPERS* 121 (1921).

50. Cf. Kauper, *supra* note 33, at 587; D. CURRIE, *FEDERAL COURTS, CASES AND MATERIALS* 5, 31-33 (1968).

51. The traditional theory, of course, has been nearly the opposite, the "public" aspects of constitutional adjudication being viewed a happy by-product of the assertion of private rights. See, e.g., *Bursley v. United States*, 466 F.2d 1039, 1084 (9th Cir. 1972).

presented in an adversary context and in a form historically viewed as capable of judicial resolution."⁵² But in a document intended "to endure for ages to come,"⁵³ this language cannot mean that we are frozen to the judicial forms and proceedings understood by the judges at Westminster.⁵⁴ Nor can it mean that remedial considerations are decisive as to the existence of a case or controversy. While a court might conclude, for example, that settled principles of the separation of powers preclude coercive relief against the President, a declaratory judgment might still be appropriate.⁵⁵

It is necessary only that the constitutional question be presented in a manner sufficiently concrete for resolution of the problem. This requires adequate factual information if the Court is to avoid "dialectics . . . [and] sterile conclusions unrelated to actualities."⁵⁶ Although there are, to be sure, constitutional cases where, in Frankfurter's words, "facts, and facts again, are decisive"⁵⁷—for example, questions of substantive due process, the reach of federal power under the Commerce Clause, and the nature of the "compelling state interest" standard—in other cases specific factual variations have little bearing on the proper resolution of the constitutional question.⁵⁸ Here, to borrow a metaphor, the issues can be addressed at wholesale, rather than at retail. The danger, of course, is the tendency to believe that this second category is much larger than it actually is, particularly where the "adjudicative" facts of the controversy seem clear, but where the constitutional ques-

52. 392 U.S. 83, 101 (1968).

53. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819).

54. "[T]he Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies It did not crystallize into changeless form the procedure of 1789" *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 264 (1933).

55. Because of the relative novelty of the declaratory judgment procedure, our traditions are just beginning to shake their preoccupation with problems of enforcement. Cf. *Powell v. McCormack*, 395 U.S. 486, 517-18 (1969) where the Court expressly recognized that declaratory relief might be awarded even if there were constitutional problems with coercive relief. It is, accordingly, evident that one could succeed in suing a presidential subordinate as in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). However, the separation of powers would prevent calling the President to testify since that would materially interfere with the discharge of his duties. To the extent that Chief Justice Marshall's opinion in *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14, 692d) (C.C.D. Va. 1803) suggests the contrary, it must be restricted to situations where the Due Process Clause or the Sixth Amendment requires the testimony—as, for example, where the President could provide an alibi in a murder case.

56. Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

57. *Id.* at 1013.

58. HART & WECHSLER, *supra* note 5, at 66, 67. The "overbreadth" decisions also apparently represent a judgment that facts are relatively unimportant. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611 (1970); Comment, *First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 863 (1970). In the "newspaperman's privilege" case, *Branzburg v. Hayes*, 408 U.S. 665 (1972), there were sharply different assumptions about the critical facts. Compare the opinion of the court, *id.* at 693-94, with the dissent of Stewart, J., *id.* at 735-36.

Constitutional Adjudication: The Who and When

tion turns on certain legislative facts—for example, facts bearing on matters of economic or social organization.⁵⁹

Where resolution of the constitutional question turns on a careful factual assessment, the Court might properly decline to adjudicate the issue absent an appropriate record.⁶⁰ Even here, however, there are occasions when the Court might (indeed perhaps must) express its view on the substantive issues, although that expression must be understood to be of a relatively abstract, tentative nature.⁶¹ The *Georgia Blow Post* cases illustrate the latter situation. In the first of the two cases, the Court in reviewing a criminal conviction, rejected a Commerce Clause challenge to a state statute requiring that trains stop at railroad crossings, saying that the pleadings “set forth no facts which would make the operation of the statute unconstitutional.”⁶² Seven years later, however, the Court reached a contrary result because the evidence showed that compliance would have extended a scheduled four and one-half hour run by six hours.⁶³

Flast's requirement of an “adversary context”⁶⁴ also suggests that the constitutional requirement of a “case” might preclude advisory opinions because at least two adversaries are needed. Thus, for example, even assuming sufficient statutory authorization, the Court rightly refused Washington's request for legal advice on a long list of issues concerning American neutrality in the war between England and France.⁶⁵ Concededly, the lack of an adversary presentation increases the risk that the Court's constitutional pronouncements will not be sufficiently considered.⁶⁶ But that hazard hardly seems to be one of constitutional dimension. In principle, it is difficult to assert that “real” adversaries are necessary to the existence of a case or controversy; witness, for example, default judgments, guilty pleas, consent decrees, confessions of error by the solicitor general, naturalization and bankruptcy proceedings—situations where the parties have something to gain or lose, but

59. See *Adams v. Turner*, 244 U.S. 590, 597, 600 (1916) (Brandeis, J., dissenting). See also *Burns Baking Co. v. Bryan*, 264 U.S. 504, 517, 520 (1924); *Lochner v. New York*, 198 U.S. 45 (1904). Cf. *Frankfurter & Landis*, *supra* note 6, at 310.

60. See *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); HART & WECHSLER, *supra* note 5, at 657-59; Scharpf, *supra* note 27, at 519.

61. See, e.g., *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541, 549-50 (1947).

62. *Southern Ry. Co. v. King*, 217 U.S. 524, 536 (1909).

63. *Seaboard Airline Ry. Co. v. Blackwell*, 244 U.S. 310 (1916).

64. 392 U.S. at 101 (1968). This requirement is frequently stated in the Court's opinions. See, e.g., *Goosby v. Osser*, 93 S. Ct. 754 (1973); *Roe v. Wade*, 93 S. Ct. 705 (1973).

65. HART & WECHSLER, *supra* note 5, at 64. But, even here, would not the difficulty of lack of adversary parties have been met if the Court gave notice to England and France to brief and argue the issues raised? If they defaulted on the opportunity, that could hardly be said to deprive the Court of “jurisdiction.”

66. P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 17 (1961); Comment, *First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 863 (1970).

where they agree on the facts and/or the law.⁶⁷ At least where the crucial facts are relatively undisputed, all that seems constitutionally necessary is for a petitioner to present relevant facts in sufficiently concrete form.⁶⁸ In "public" actions I doubt that Article III can be read to require the presentation of argument on any question of law or fact.⁶⁹ Where private rights are affected, Article III or the guarantees of the First, Fifth, or Sixth Amendments might arguably require more,⁷⁰ but that seems doubtful so long as any affected private party could subsequently challenge the rules announced by the Court and relitigate any adjudicative facts.⁷¹

B. Amenable to Judicial Resolution

The second limitation arguably derivable from Article III is that the issue be amenable to judicial resolution, *i.e.*, that there be some judicially manageable standards for deciding the case. Presently, this requirement is largely subsumed under the "political question" umbrella.⁷² Not surprisingly, as the Court comes more and more to see itself as the authoritative expositor of the Constitution, the range of nonjusticiable political questions has shrunk.⁷³ But there are still instances where the Court simply cannot fashion applicable rules, normally because of a lack of relevant factual information. Where the facts on which the decision must rest are complicated, uncertain, and

67. K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE 118-19 (1958).

68. *Cf.* *Tutun v. United States*, 270 U.S. 568 (1925), where the Court recognized an uncontested naturalization petition as a case or controversy. To be sure, the Court said that the government "is always a possible adverse party," *id.* at 597, but that seems merely a makeweight. Of course, in *Tutun*, as in guilty pleas and default judgment cases, one party seeks to enforce or deprive another of a valuable and traditionally recognized personal or property interest. But as argued above, the nature of the interest is *not* a limitation on the Court's power which stems from Article III. Moreover, it is surely no guarantee that there will be adversary presentation of either the law or the facts.

69. "The Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law . . ." *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1924); *cf.* K. DAVIS, 1 ADM. LAW TREATISE 407-512 (1958); 300-69 (Supp. 1970).

70. *See, e.g.,* *Crowell v. Benson*, 252 U.S. 22 (1932). *See also* Monaghan, *supra* note 32, at 520-21 n.13.

71. I recognize that this reasoning entails a reformulation of the relationship of res judicata to case or controversy doctrine. *Compare* *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693 (1926), *with* *Hoover Co. v. Coc*, 325 U.S. 79 (1944), and *Glidden Co. v. Zdanok*, 370 U.S. 530, 576 (1961).

72. For a collection of other materials on the political question doctrine see P. KAUFER, CONSTITUTIONAL LAW, CASES AND MATERIALS 49 (1972). *See also* Tigar, *Judicial Power, The "Political Question Doctrine" and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970).

73. *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962). Though the primary concern of the political question doctrine is judicially manageable standards, even where they exist, the Court may conclude that there has been a clear textual commitment of the issue to the political branches. *Cf.* *Powell v. McCormack*, 395 U.S. 486 (1969). So far as this is a separate category, it seems to me now arguable only with respect to the impeachment power (U.S. CONST. art. I, §§ 2 & 3), and the power of Congress to determine whether a representative or senator satisfies the constitutional requirement of age, etc. *Id.*

Constitutional Adjudication: The Who and When

unverifiable in traditional judicial terms, or disguise what are really matters of judgment, it becomes exceedingly difficult to formulate any constitutional rules, except those of the most absolute character.⁷⁴ In such instances, the relationship between ripeness and political question is readily apparent, as both commentators⁷⁵ and the Court⁷⁶ have recognized: They are connected on a continuum, with the political question bar at that point where factual difficulties become relatively intractable.

The unresolved question is whether there are cases where the political question difficulty is not factual. It is questionable, for example, whether the Court could ever formulate standards for resolving issues under the Guarantee Clause no matter how concrete the factual pattern.⁷⁷ The Court could, of course, formulate standards so loose that, in effect, it had no real role in reviewing the actions of the political organs.⁷⁸ But on the whole, I prefer the alternative course suggested by Professor Jaffe—the frank recognition that these may be areas where we prefer to operate wholly or substantially without any rules at all.⁷⁹

III. Congress and the Special Function Model

The central question in the “special function” model is what quality of the litigant’s interest will suffice to justify the exercise of judicial review. While it is no longer possible to conclude that injury is in fact a constitutional prerequisite, it does not necessarily follow that a special function model makes constitutional adjudications available on demand. The special function model still requires some appropriate boundary.

Primarily, the special function model must account for a crucial feature of the American system of judicial review: its decentralized

74. Professor Cox is of the view that the Vietnam War constitutes a political question because the only rules that could be formulated and administered would be impractically rigid. Compare Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 197, 201-06 (1972) with Tigar, *supra* note 72. See also *Atlee v. Laird*, 347 F. Supp. 689, 693 *et seq.* (E.D. Pa. 1972) (three-judge court), *aff’d per curiam*, 93 S. Ct. 1545 (1973) (three justices dissenting).

75. Scharpf, *supra* note 27, at 527-33. See also HART & WECHSLER, *supra* note 5, at 241.

76. *Coleman v. Miller*, 307 U.S. 433 (1939). See also the discussion in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), particularly the opinion of Brennan, J., *id.* at 790, on the relationship of the act of state doctrine to the principles which underlie the political questions doctrine; *cf.* *Da Costa v. Laird*, 471 F.2d 1146, 1148 (2d Cir. 1973); *Mitchell v. Laird*, 41 U.S.L.W. 2526 (D.C. Cir. Mar. 20, 1973).

77. *But see* Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study In Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962). See also *O’Brien v. Brown*, 409 U.S. 1, 4 (1972), intimating that the operation of national nominating conventions raised serious problems of nonjusticiability; *Da Costa v. Laird*, 471 F.2d 1146, 1152-56 (2d Cir. 1973).

78. This seems to be Professor Scharpf’s preference, *supra* note 27, at 561.

79. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 491 (1965).

character. Every court, high or low, state or federal, passes on the constitutional questions in cases properly before it. This follows not only from Article VI, but more importantly, from *Marbury's* fundamental premise that the Constitution is to be applied as ordinary law. The decentralized character of our system of judicial review stands in marked contrast to many other systems in which a single or limited number of tribunals pass on constitutional questions, and then only in certain contexts.⁸⁰ Given the abundance of "ideological" plaintiffs and the ready availability of class actions, dispensing entirely with any requirement of a personal interest would raise the level and quality of judicial intervention at all levels of the political order. Further, any significant increase in the number of constitutional adjudications emanating from the lower courts might critically impair the ability of a Supreme Court, already hard pressed, to give coherent direction to our corpus of constitutional law.⁸¹

My own view is that expressed by Justice Harlan, dissenting in *Flast*.⁸² After rejecting the Court's effort at characterizing a taxpayer's interest in Establishment Clause questions as a "personal" one, Justice Harlan argued that the doors of the federal courts should not be thrown open to "ideological" or "nonHohfeldian" plaintiffs *without congressional authorization*.⁸³ That position rests on the premise that the judicial prerogative to render constitutional expositions cannot be asserted independently of the will of the political branches of government. Any expansion of judicial jurisdiction should come only with the *explicit* concurrence of Congress,⁸⁴ a political assumption inherent in the constitutional grant of power to Congress over the jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court.⁸⁵ This may be a difficult proposition for those who base the

80. See M. CAPPELLETTI, *supra* note 33, at 45-66; Rosenn, *supra* note 33, at 1413 (1972).

81. The seriousness of this problem is attested to not only by recent decisions narrowing the exercise of original jurisdiction, e.g., *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); *Washington v. General Motors Corp.*, 406 U.S. 109, 113 (1972), but also by the recommendations of a special panel of experts, supported by Chief Justice Burger, for a "national court of appeals." REPORT ON THE CASE LOAD OF THE SUPREME COURT, STUDY GROUP OF THE FEDERAL JUDICIAL CENTER (1972). Incredibly, Mr. Justice Douglas has suggested that the members of the Court are "vastly underworked" and have "vast leisure," *Tidewater Oil Co. v. United States and Phillips Petroleum Co.*, 93 S. Ct. 408, 423 (1972) (dissenting opinion).

82. 392 U.S. 83 (1968).

83. *Id.* at 107 (dissenting opinion).

84. I do not agree with Professor Jaffe that the Court should develop, without congressional guidance, a series of rules as to which public actions should and which should not be entertained. Jaffe, *The Citizen as Litigant*, *supra* note 23, at 1038.

85. Congressional authority to "ordain and establish" the lower federal courts, U.S. CONST. art. III, § 1, has long been held to include the power to limit the jurisdiction of these courts over enumerated controversies. See, e.g., *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Sheldon v. Sill*, 49

Constitutional Adjudication: The Who and When

Court's prerogatives in a separation of powers model. They would argue that congressional power over the jurisdiction of the inferior federal courts⁸⁶ is different from the congressional power to control the Court's appellate jurisdiction: Even if there were no lower federal courts, the Supreme Court could assert its prerogative on appeals from the state courts by narrowly construing the scope of congressional power over its appellate jurisdiction.⁸⁷

Nevertheless, our separation of powers tradition leaves considerable room for shifting accommodations among the three branches.⁸⁸ Nothing in that tradition gives the Supreme Court or any other court a right to insist that it give opinions, although *where private rights are involved* Article III or other provisions of the Constitution might guarantee private parties access to some court on constitutional questions.⁸⁹ Accordingly, I see nothing anomalous in the "untidy proposition" that the Supreme Court is the final expositor of the Constitution only so long as it "has the assent and the cooperation first of the political institutions, and ultimately of the people"⁹⁰—at least where "traditional" personal rights are not at stake. To this extent I agree with Professor Wechsler that a contrary view is "antithetical to the plan of the constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institutions would be used within the limits of the federal judicial power."⁹¹

Not only does a special function model presuppose constitutional pronouncements only by way of an acquiescent Congress; it also leaves considerable room for congressional participation in the form and mode of constitutional adjudications not involving substantial personal rights.⁹²

U.S. (8 How.) 441 (1850). The appellate jurisdiction of the Supreme Court is expressly made subject to "such Exceptions . . . as the Congress shall make." U.S. CONST. art. III, § 2; See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868).

86. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). For a more recent discussion, see Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542, 1547-53 (1972).

87. Professor Hart, for example, suggests the vague—and wholly inadmissible—idea that "the exceptions [to the Supreme Court's appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." 66 HARV. L. REV. 1362, 1365 (1953). For other suggestions see HART & WECHSLER, *supra* note 5, at 362-65.

88. Monaghan, *Presidential War Making*, 50 B.U. L. REV. 19, 24-25 (1970) (special issue).

89. Exploration of this issue is of course far beyond the compass of this paper. See HART & WECHSLER, *supra* note 5, at 1539-1629; Monaghan, *supra* note 32, at 518.

90. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 90 (1970).

91. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1005 (1965).

92. "Legislation concerning judicial organization throughout our history has been a very empiric response to very definite needs." FRANKFURTER & LANDIS, *supra* note 6, at 13. Of course, in view of Article III, § 2, original jurisdiction could not be given to the

First, Congress might restrict the occasions in which "public actions" could be maintained. It might tighten standing and mootness requirements in constitutional cases; alternatively, it might differentiate among different classes of public actions, by, for example, refusing standing to those challenging the validity of federal expenditures. Or Congress might make wholly ad hoc responses to the issues of standing and mootness—perhaps according standing only in cases where some specific action by it or the executive raised severe constitutional questions. Finally, Congress might limit the right to bring public actions to organizations that had first satisfied the Court of their "capacity" to develop concrete and manageable constitutional issues.

Second, Congress might reject altogether the decentralized system of judicial review for "public action" suits. It might, for example, confine such litigation to special constitutional courts with further review to the Supreme Court only by certiorari. And it might condition access to these special courts on preliminary findings of, in Judge Hand's phrase, "how importunately the situation demands an answer"⁹³—thus weeding out wholly "academic" cases. Alternatively, the Freund Committee's proposed "national court of appeals" might be used to screen public actions, eliminating unimportant or insubstantial cases from Supreme Court consideration.⁹⁴

Third, Congress might simply restrict the remedies available to plaintiffs in public actions, perhaps denying coercive relief and permitting only declaratory judgments. Or, less drastically, Congress might withdraw the judicial power to grant interlocutory injunctions in public actions save on the showing of the most exigent circumstances.

Leaving to Congress the shaping of the special function model might, of course, be viewed as an assault on federalism. If sound, the special function model apparently means that Congress might authorize every citizen of every state to challenge the validity of any statute anywhere; the federal character of the government, with what is embodied in the vague concept of "state sovereignty," seems inconsistent with citizens spanning the width and breadth of the land cleaning up state statute books.⁹⁵ Three responses can be made to such a vision: First, Congress may lack the affirmative power to authorize such actions under any of

Supreme Court. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). That the time has come for a thoroughgoing congressional reexamination of the jurisdiction of the lower federal courts is demonstrated brilliantly by Judge Friendly in *H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

93. L. HAND, *THE BILL OF RIGHTS* 15 (1958).

94. See note 81 *supra*.

95. Such a suggestion was received with evident hostility in *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972).

its granted powers, broad as they are.⁹⁶ That question is beyond the scope of this article. But it might only be noted that the objection, if it be one, does not flow from the private rights model; and it surely provides no barrier to congressionally-authorized suits against federal officials. Second, even if Congress seemed to possess the power to authorize such actions, "Our Federalism"—as Justice Black termed it in *Younger v. Harris*⁹⁷—might be seen as imposing inherent limitations on congressional power to determine the "who" and "when" of constitutional adjudication. This argument, of course, is simply the old wine of "dual federalism" in a new bottle.⁹⁸ The question is whether congressional action could be rationally related to one of the great heads of congressional power. If it can, that automatically disposes of any "Our Federalism" objection.⁹⁹ Finally, the whole federalism problem may, after all, be little more than an academic exercise:¹⁰⁰ If Congress felt impelled to enact on a wholesale basis legislation of the character considered here, the political consequences would be so serious that constitutional doctrine would be of little moment. And yet, a congressional authorization of certain specific suits by citizens against their own state officials, contrary to that state's law on standing, mootness, or the separation of powers, seems a rational exercise of the powers granted Congress under Article I, § 8 and/or the enforcement provisions¹⁰¹ of the Civil War Amendments. Hence the state, as well as the federal, courts would be compelled to vindicate congressional policy.¹⁰²

IV. The Present Status of the Special Function Model

To a significant extent the Court has already discarded the view that the existence of a private right is not only sufficient but also necessary for judicial review. Standing, mootness, ripeness, and sovereign immunity—the principal repositories of the private rights model—have

96. *Oregon v. Mitchell*, 400 U.S. 112 (1971), contains the most recent discussion of the range of congressional power under U.S. CONST. amend. XIV, § 5. See also *Linda R. S. v. Richard D. and Texas*, 93 S. Ct. 1146 (1973); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring).

97. 401 U.S. 37 (1971).

98. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). Even today, however, this doctrine occasionally surfaces. See *United States v. Oregon*, 366 U.S. 643 (1961) (Douglas, J., dissenting).

99. *United States v. Darby*, 312 U.S. 100 (1941). Cf. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring).

100. Far more realistic is the felt need to withdraw certain types of civil rights litigation from southern federal trial courts. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

101. U.S. CONST. amend. XIV, § 5; amend. XV, § 6.

102. *Linda R. S. v. Richard D. and Texas*, 93 S. Ct. 1146 (1973); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

been substantially recast in recent decades; they now foreclose judicial review only infrequently and erratically. Moreover, the present underpinnings of these doctrines are fully consistent with a special function model of judicial competence.

A. *Standing*

Erosion of standing as an embodiment of the private rights model is largely a by-product of the rise of the administrative agencies.¹⁰³ "The availability of judicial review," observes Professor Jaffe, "is the necessary condition psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."¹⁰⁴ Irresistible pressure was thus generated to accord judicial review to anyone substantially affected by administrative action, whether or not he asserted interests comparable to those protected by the common law judges.¹⁰⁵ In part, of course, the "new standing" could be shoehorned somewhat uncomfortably into the traditional private rights model: Welfare payments and other governmental entitlements constituted if not "vested property rights"¹⁰⁶ at least a "new property"¹⁰⁷ entitled to some measure of judicial protection. Accordingly, judicial review of administrative actions affecting such interests still presented "a question concerning [the litigant's] own legal status."¹⁰⁸ But the occasions for judicial review have now spread beyond this category to persons asserting broad and diffuse interests, for example, consumers or users of the environment.¹⁰⁹ We have, in short, been living with the public action for some time.

To be sure, standing is still denied on occasion, but the criteria have become confused and trivialized. In *Sierra Club v. Morton*,¹¹⁰ for example, the Court, by a vote of four to three, held that a conservation group lacked standing to challenge governmental environmental policy absent at least an allegation that the organization's members used the

103. For recent discussion see HART & WECHSLER, *supra* note 5, at 150-214; Scott, *Standing to Sue in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

104. L. JAFFE, *supra* note 35, at 320.

105. Professor Davis has been a powerful and convincing advocate of this view. K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE 208-94 (1958).

106. *Flemming v. Nestor*, 363 U.S. 603 (1960). See also *United States v. Jim*, 409 U.S. 80 (1972).

107. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

108. Jaffe, *The Citizen as Litigant*, *supra* note 23, at 1033.

109. See *Sierra Club v. Morton*, 405 U.S. 727, 734 n.7, 738-39 & nn.13-14 (1972). See also Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 503-11 (1972). On no basis could one conclude that, once stripped of their official capacity, the official defendants were acting like common law tortfeasors toward the plaintiffs. Cf. *Linda R. S. v. Richard D. and Texas*, 93 S. Ct. 1146 (1973); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

110. 405 U.S. 727 (1972).

affected area. But *Sierra Club* recognized that nothing in the "case or controversy" clause required such a result. The majority apparently assumed that the previously developed standing rules were wholly subject to congressional alteration: "[A] personal interest in the outcome of the litigation" is necessary, said Justice Stewart, *only* "where a person does not rely on any specific statute authorizing invocation of the judicial process."¹¹¹ Despite the fact that *Sierra Club's* predecessors did not indicate that Congress could wholly dispense with an "injury in fact" requirement,¹¹² this view was reaffirmed in *Linda R. S. v. Richard D. and Texas*.¹¹³ There, in an unfortunate example of intellectual confusion, the Court said that "injury in fact" was a constitutional requirement but that congressional statutes conferring standing automatically satisfy it.¹¹⁴

*Roe v. Wade*¹¹⁵ further illustrates such confusion. There the Court held that an abortion controversy was not moot with respect to an unmarried woman who was pregnant at the time of the suit but not, so far as the record showed, at time of oral argument: The issue, said the Court, might occur again. But the Court then held that a married couple regularly having intercourse lacked any "standing." The attempted distinction between the two situations on Article III grounds seems without rationality. Perhaps the Court might have properly dismissed the married couple petition for want of ripeness, but certainly not for lack of standing.¹¹⁶

However much their confused character attracts the attention of commentators, such cases are of increasingly marginal significance.¹¹⁷ Standing as a constitutional limitation on the exercise of judicial power simply could not survive the onset of the administrative agencies once the courts assumed the task of limiting the agencies' power. And, of course, the standing developments in administrative law carried over

111. *Id.* at 732.

112. See *Data Processing Service v. Camp*, 397 U.S. 150 (1970). See also comment on *Sierra Club* in Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 236, 238 (1972).

113. 93 S. Ct. 1146 (1973).

114. *Id.* at 1148 n.3.

115. 93 S. Ct. 705 (1973).

116. The confusion between ripeness and standing becomes even more pronounced once the Court's discussion of the "standing" of clergy, nurses and social workers to challenge abortion statutes is examined. See *Doc v. Bolton*, 93 S. Ct. 739, 756 (1973). See also *Cheaney v. Indiana*, 285 N.E.2d 265 (Ind. 1972), *cert. denied*, 93 S. Ct. 1516 (1973) (denial of standing of non-doctor performing abortion).

117. In addition to the cases previously discussed see also Chief Justice Burger's denial of a stay in *Aberdeen & Rockfish Co. v. SCRAP*, 409 U.S. 1207 (1972). *Cf.* *Ragland v. Volpe*, 455 F.2d 922 (5th Cir. 1972), *cert. denied*, 409 U.S. 889 (1972) (denying standing to Florida citizens and highway users challenging apportionment of federal highway funds); *Galliot v. HEW*, 464 F.2d 598 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 559 (1972) (citizens lack standing to challenge HEW policy of denying funds to state hospitals which classify blood of donors by race).

into constitutional adjudication. While judicial opinions still abound with talk about the necessity for a "personal interest," that concept bears very little resemblance to its ancestor in the earlier private rights model.¹¹⁸ To be sure, *Sierra Club* makes clear the Court's present unwillingness to announce that all citizens have standing to attack governmental action; some showing of "injury in fact," however loosely defined, is still required.¹¹⁹ But the concept has been so diluted that even the most trivial interest will suffice.¹²⁰ The implications of this development are, of course, far reaching: If no part of standing is of Article III dimensions, the character of the interests asserted by the plaintiff has no constitutional significance.

One could, of course, retain a "personal interest" requirement in constitutional cases even if a more relaxed standard were applied elsewhere. The justification for such a differentiation could be based in the "special" nature of constitutional litigation;¹²¹ the source of the differentiation would be located, not in Article III, but in the discretion inherent in the granting of injunctions and declaratory judgments.¹²² But, as yet, there has been no coherent judicial development of such a differentiation. Moreover, other developments confirm the demise of traditional standing limitations, even in constitutional cases. Recent decisions apparently now sanction the right of the states to raise federalism claims.¹²³ Since no pretense can be made that these cases involve "private" rights, Professor Bickel is clearly correct in concluding that they stand in open contradiction to the Reconstruction cases and *Massachusetts v. Mellon*.¹²⁴

The explosion of class actions in constitutional cases further illustrates the point. Given the breadth of the relief given in these cases, they in fact serve as "public" actions vindicating broad public interests not protected under the traditional private rights model. As Professor Cappelletti observes:

118. See *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968); *Richardson v. Reservists Comm. to Stop the War*, No. 71-1535 (D.C. Cir. Oct. 31, 1972), *cert. granted*, 41 U.S.L.W. 3569 (U.S. Apr. 23, 1973); *McGlotten v. Connally*, 338 F. Supp. 448, 452 (D.D.C. 1972) (three-judge court).

119. 405 U.S. at 439-40 (1972).

120. See Note, *Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 238-39 (1972); DAVIS, ADMINISTRATIVE LAW TEXT 428-29 (1972).

121. Compare Scharpf, *supra* note 27, at 528-29, with Fortas, J., concurring and dissenting in *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 181 (1967).

122. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967); *Finley v. Hampton*, 473 F.2d 180, 184 (D.C. Cir. 1973).

123. *Oregon v. Mitchell*, 400 U.S. 112 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

124. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 84-90. Wholly apart from the states' standing, it is doubtful the Court should have accepted original jurisdiction (U.S. CONST. art. III, § 2) over these suits, since the "citizenship" of the federal defendants was wholly immaterial to the suit.

Constitutional Adjudication: The Who and When

By its nature the class action asks for more than *inter partes* relief; it takes away the cushioning effects provided by the fact that the significance of traditional constitutional cases was felt only gradually as successive individual litigants sought to vindicate their newly defined rights.¹²⁵

Perhaps more than any other single development, the mushrooming of class actions has rendered the private rights model largely unintelligible. When coupled with the judicial freedom inherent in making prospective constitutional pronouncements,¹²⁶ widespread use of the class action may alter both the frequency and scope of judicial interference with the political process. Similarly, suits by "the government"¹²⁷ to vindicate "individual" constitutional rights—with or without express statutory authority¹²⁸—are class actions that involve the same substantial shift from the "cushioning" presuppositions of the private rights model.¹²⁹

B. Mootness

Recent mootness cases further confirm the emergence of the special function model.¹³⁰ The various justifications traditionally offered for dismissing cases which have become moot on appeal suggest radically different conceptions of the nature of federal judicial power. One rationale justifies dismissal in terms of judicial economy: It is argued that courts are far too busy to "waste" time on disputes where "nothing" is at stake. Clearly, insofar as it assumes that nothing is at stake if individual rights are not involved, this explanation assumes precisely that which is in issue.¹³¹ Moreover, it fails to explain dismissals in cases where, although the decision can no longer affect the personal interests of the litigants, the issue seems certain to recur.¹³² Alterna-

125. M. CAPPELLETTI, *supra* note 33, at 88.

126. See Mishkin, *Forward: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 70-71 (1965); cf. GARVEY, CONSTITUTIONAL BRICOLAGE 61-65 (1971) (emphasizing the critical importance of the prospective-retrospective distinction in the development of American separation of powers theory).

127. By "government" one means the "Executive" suing in the name of the United States. This identification of the government with the Executive shows the continued influence of the prerogative powers in English legal history.

128. Comment, *Nonstatutory Executive Authority to Bring Suit*, 85 HARV. L. REV. 1566 (1972).

129. Finally, one should make mention of the recent developments which apparently recognize standing in officials charged with administration of statutes to challenge their constitutionality. See HART & WECHSLER, *supra* note 5, at 182-83.

130. For a survey and collection of the recent Supreme Court cases on mootness, see *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); HART & WECHSLER, *supra* note 5, at 107-22.

131. Comment, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1675 (1970).

132. See *Richardson v. Wright*, 405 U.S. 208, 212 (1972) (Brennan, J., dissenting); *Alton & S. Ry. Co. v. International Ass'n of Machinists*, 463 F.2d 872, 878-79 (3d Cir. 1972).

tively, it has been argued that dismissal of moot cases is required because the federal courts are not empowered to give advisory opinions.¹³³ But this explanation simply restates the subtle problem of just what it is that makes advisory opinions obnoxious to Article III,¹³⁴ and it fails to account for those cases which become moot on appeal in which the Court is nevertheless presented with a concrete record illuminated by the adversary process.¹³⁵

The explanation most frequently offered is that dismissal is required because there is no "case or controversy" once the private rights of the litigants are no longer at stake.¹³⁶ Mootness is, therefore, the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).¹³⁷ Since these two doctrines share the same root,¹³⁸ the decline of standing as a barrier to judicial review has been accompanied by a corresponding decline in the mootness doctrine. To be sure, mootness, like standing, remains formally intact: Some moot cases are still dismissed.¹³⁹ But while the Court continues to assert that moot cases are beyond its power,¹⁴⁰ that position cannot be derived from case or controversy principles once standing is seen to be not of Article III dimensions.¹⁴¹ The mootness cases serve

133. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

134. See H. HART & H. WECHSLER, *supra* note 5, at 77, 81.

135. Cf. *Sibron v. New York*, 392 U.S. 40, 57 (1968). Also Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772, 774 (1955):

[M]oot cases do not present all the dangers of advisory opinions. The "impact of actuality" may well be lacking if the . . . decree cannot affect the rights of the parties. But there is a record to which the court may look for facts; there is probably as much experience under the statute as might be had in a case which is not moot; and there are advocates before the court who are prepared to argue the issues.

136. See, e.g., *North Carolina v. Rice*, 404 U.S. 244 (1971).

137. *Roe v. Wade*, 93 S. Ct. 705, 713 (1973).

138. *California v. San Pablo & Turlare R.R.*, 149 U.S. 308, 314 (1893) provides a particularly good illustration. Over the objection that the suit had significant precedential value, dismissal for mootness was ordered because:

The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.

Id. at 314.

139. See, e.g., *SEC v. Medical Committee*, 404 U.S. 403, 407 (1972).

140. E.g., *North Carolina v. Rice*, 404 U.S. 244 (1971); *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969).

141. But mootness is a convenient tool for avoiding "hard" cases. See *Johnson v. New York State Educ. Dep't*, 93 S. Ct. 259 (1972) (alleged discrimination between rich and poor). See Scharpf, *supra* note 27, at 529, commenting on the related problem in ripeness cases. See generally Singer, *Justiciability and Recent Supreme Court Decisions*, 21 ALA. L. REV. 258-68 (1969).

Constitutional Adjudication: The Who and When

to confirm the demise of the personal interest requirement. Thus the Court seems on the verge of holding that a case is not moot "where it involves short-term orders, capable of repetition yet evading review," even though the parties before it are no longer concerned.¹⁴² It also seems almost certain that the class action has become an established vehicle for circumventing mootness; the suit may continue even though the class representative is no longer directly involved in the outcome.¹⁴³

If one accepts the special function model, the standing and mootness doctrines must be recast. The Court, aware of its changing role, has in fact attempted to restate the personal interest requirement. That interest is necessary, the Court now says, in order "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues."¹⁴⁴ Perhaps in the past a personal interest helped assure this objective but, if so, it cannot account for dismissing cases which become moot only after appeal to the Court. Moreover, there is no reason to believe that litigants with a "personal interest" will present constitutional issues any more sharply or ably than the Sierra Club or the ACLU.¹⁴⁵ Finally, and most importantly, there is no necessary connection between a personal interest and the sharp presentation of issues; the latter is readily satisfied by the "ripeness" doctrine without any reference to the character of the parties involved in the lawsuit.¹⁴⁶ While the Court's attempt to reformulate standing doctrine confuses standing with ripeness, the effort is nevertheless significant: It marks

142. See, e.g., *Brown v. Chots*, 41 U.S.L.W. 4548, 4549 n.5 (U.S. May 7, 1973); *Rosario v. Rockefeller*, 93 S. Ct. 1245, 1249 n.5 (1973); *Roe v. Wade*, 93 S. Ct. 705 (1973). The cases are still somewhat uncertain on this point, however. Compare *Moore v. Ogilvie*, 394 U.S. 814 (1969) with *Halls v. Beals*, 396 U.S. 45 (1969). Cases such as *Carrol v. Commissioners of Princess Anne County*, 393 U.S. 175 (1968), are distinguishable because the issue might arise in litigation between the parties. But I think Judge Leventhal is in error in believing that this is a constitutional requirement. See *Alton & S. Ry. Co. v. International Ass'n of Machinists*, 463 F.2d 872, 879-80 (D.C. Cir. 1972).

143. *Goosby v. Osser*, 93 S. Ct. 854, 856 n.2 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972). But see the suggestion to the contrary in *Laird v. Tatum*, 408 U.S. 1, 13-14 n.7 (1972). And see the remand in *Indiana Employment Security Division v. Burney*, 93 S. Ct. 883 (1973). There plaintiff brought a class action challenging the pre-termination procedures of the Indiana unemployment compensation system. Plaintiff received compensation, and a remand on mootness was ordered: "Though the appellee purports to represent a class of all present and future recipients, there are no named representatives of the class except (plaintiff), who has been paid." *Id.* at 884. The dissent of Justices Marshall and Brennan argued that, even as to plaintiff, the case was not moot. Both the Court and the dissent failed to discuss *Dunn* and *Goosby*, even though the latter case was decided on the same day. Even if the case was moot as to the named plaintiff, it does not follow that it is moot in its class action aspects. Even under *Dunn*, however, plaintiffs "cannot represent a class to which they do not belong" at the start of the litigation. *Rosario v. Rockefeller*, 93 S. Ct. 1245, 1250 n.9 (1973).

144. *Baker v. Carr*, 369 U.S. 186, 204 (1961). But see K. DAVIS, ADMINISTRATIVE LAW TEXT 427 (1972).

145. Jaffe, *The Citizen as Litigant*, *supra* note 23, at 1037.

146. *Cj. Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).

an ever-increasing awareness of the public nature of constitutional adjudication. The status of the parties is relevant not in its own right, but only insofar as it insures a proper presentation of the constitutional issues.¹⁴⁷ Constitutional exegesis, not the vindication of private rights, is the core of the Court's task.

C. *Sovereign Immunity*

The major barrier to embracing the special function model stems not from case or controversy but rather from the doctrine of sovereign immunity. There has been some confusion over the precise reach of the immunity, particularly where the suit, though cast in the form of an action against government officials rather than a state or its agency, seeks in substance to restrain or command governmental activity. Whatever the areas of uncertainty, however, since *Ex parte Young*¹⁴⁸ it has been understood that sovereign immunity does not prohibit enjoining official action which threatens individual rights in violation of the Constitution.¹⁴⁹ This is, of course, a critical limitation on the scope of the sovereign immunity doctrine and one which, in the twentieth century, is indispensable to our understanding of "the rule of law."¹⁵⁰ But the rationale for this limitation is a shaky one. The theory is that the Court "enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."¹⁵¹ This is appropriate because an official acting unconstitutionally is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."¹⁵² In short, once stripped of his

147. See *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968).

148. 209 U.S. 123 (1908).

149. See also *Larson v. Domestic & Foreign Corporation*, 337 U.S. 682 (1948). See generally HART & WECHSLER, *supra* note 5, at 1339-77. For a thorough discussion of American cases and their English antecedents, see L. JAFFE, *supra* note 35, at 197-231.

150. P. FREUND, ON LAW AND JUSTICE 156 (1968). Damage actions against officials in their "personal capacities" were, of course, the classic mode of holding the governors as well as the governed subject to legal rules. See L. JAFFE, *supra* note 35, at 237-39. But, in our time, we have come to recognize the inadequacy of this remedy, and accordingly, the necessity for preventive relief. To put the same matter differently, while originally it may have been thought that constitutional rights could be raised only as a defense to official proceedings, see Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1533 n.8 (1972), it is clear that constitutional guarantees would become meaningless unless appropriate preventive relief is available. See, e.g., Monaghan, *supra* note 32, at 543.

151. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

152. *Ex parte Young*, 209 U.S. at 159-60 (1908). See *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738, 843-44 (1824). This explanation raises the obvious difficulty of how a substantive violation of the Fourteenth Amendment—which requires state action—can occur if the defendants are "stripped" of their official mantle. See Note, *Sovereign Immunity in Suits to Enjoin the Enforcement of Unconstitutional Legislation*, 50 HARV. L. REV. 956 (1937).

Constitutional Adjudication: The Who and When

statutory justification, the official is simply a common tortfeasor.¹⁵³ The underlying unity of *Ex parte Young* and *Frothingham v. Mellon*, of sovereign immunity and case or controversy doctrine, is apparent,¹⁵⁴ and it finds additional expression in several "ripeness" cases. In *United Public Workers v. Mitchell*,¹⁵⁵ for example, a suit was dismissed because the Court found, "[no] threat of interference . . . with the rights of these appellants appears beyond that implied by the existence of the law and the regulations."¹⁵⁶ Taken together, these decisions stand for the proposition, in Hart's words, that "the quarrel must be with the official and not the statute,"¹⁵⁷ and this is not altered by judicial determinations that a statute is "void on its face."¹⁵⁸

The present doctrine of sovereign immunity displays the unfortunate impact of remedial conceptions on substantive doctrines. Sovereign immunity doctrine was shaped prior to the development of declaratory judgments; like "case or controversy doctrine"¹⁵⁹ it drew heavily

153. *In re Ayers*, 123 U.S. 443 (1887), contains an early description of the private tort model. In upholding a defense of sovereign immunity, the Court distinguished several cases on the ground that "considered apart from the official authority alleged as a justification, and as a personal act of the individual defendant, [that conduct] constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character." *Id.* at 502. *See also* *Terrace v. Thompson*, 263 U.S. 197, 212-16 (1923). Conversely, it seems to be assumed that unless the official threatens identifiable harm, sovereign immunity bars the suit. Drawing heavily on *Ex parte Young*, *Ex parte La Prade*, 289 U.S. 444 (1933), authorized dismissal of a suit against a successor Attorney General absent an allegation that the successor intended to prosecute. However, where the successor took the same position as his predecessor, substitution was allowed. *Allen v. Regents of University System of Georgia*, 304 U.S. 439 (1938). *See also* *Atchison, T. & S.F. Ry. v. La Prade*, 2 F. Supp. 855 (1933), *aff'd sub nom. Ex parte La Prade*, 289 U.S. 444 (1933). Present Rule 25(d) of the Federal Rules of Civil Procedure would apparently overrule *Ex parte La Prade*.

154. *But see* HART & WECHSLER, *supra* note 5, at 935. *Cf. Scott, Standing in the Supreme Court—A Functional Analysis*, 86 HARV L. REV. 645, 651 (1973). The argument that "peaceful" use of the state courts to enforce a state policy is not analogous to any common law tort ignores the fact that the state court order is backed by force if necessary. Moreover, any unjustified third-party interference with a commercial relationship is clearly a tort, whether or not a trespass.

155. 330 U.S. 75 (1947).

156. *Id.* at 91.

157. HART & WECHSLER, *supra* note 5, at 148.

158. The judgment still runs against the public official, not the statute books. Moreover, a judgment that a statute is void on its face simply means that a person challenging the statute is not limited to consideration of the statute as applied to him. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (1972). Despite the First Circuit's view to the contrary, *Goguen v. Smith*, 471 F.2d 88, 96 & n.14 (1st Cir. 1972), *prob. juris. noted*, 41 U.S.L.W. 3616 (U.S. May 21, 1973), the question seems to me to be a standing one. A statute ostensibly void on its face may nevertheless be subsequently applied to conduct clearly and foreseeably within its ambit if an acceptable narrowing structure can be given. *California v. LaRue*, 409 U.S. 109 (1972); *United States v. Thirty Seven Photographs*, 402 U.S. 363, 375 n.3 (1971) (plurality opinion); *Younger v. Harris*, 401 U.S. 37, 50 (1971). *Cf. Colten v. Kentucky*, 407 U.S. 104, 110-11 (1972), unless, of course, the facial ruling turns on incurable vagueness or overbreadth. P. FREUND, *supra* note 66, at 68-69.

159. Professor Davis has noted the impact of injunction principles on the development of the law of case or controversy. K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 23.05, at 310 (1958).

on the assumptions surrounding the availability of injunctions.¹⁰⁰ Efforts to limit the reach of the doctrine were typically heard in the context of suits for injunctive relief, where concern for private rights was central. Nevertheless, the remedial and sovereign immunity questions are distinct. Equitable relief may be inappropriate absent a clear threat of harm, but whether the Court should inquire into the statutory justification for official conduct is a different matter.

Recasting our thinking about sovereign immunity is long overdue.¹⁰¹ Its historical function was to bar unauthorized raids on the public treasury¹⁰² and very little more. The doctrine therefore should be viewed as limiting only the remedies available to the federal court.¹⁰³ It is difficult in principle to understand why it should bar a declaratory judgment concerning the constitutionality of a statute, particularly if the declaratory judgment would not affect title to funds or property in the hands of the government. This is the view of Professors Hart and Wechsler.¹⁰⁴ I would, however, narrow the doctrine still further. To

160. See *Terrace v. Thompson*, 263 U.S. 197, 216 (1923); *Ex parte Young*, 209 U.S. 123, 129 (1908).

161. See generally C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972). The most recent Supreme Court discussion appears in the concurring and dissenting opinions in *Employees of the Dep't of Public Health & Welfare v. Missouri*, 93 S. Ct. 1614 (1973).

162. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Court construed Article III as permitting a suit by a citizen of South Carolina against the state of Georgia to enforce a debt obligation. "The decision," said Professor Warren, "fell upon the country with a profound shock." C. WARREN, *1 THE SUPREME COURT IN UNITED STATES HISTORY* 96 (1928). While there was much talk of states' rights, the real fear was for the state treasury, *id.* at 99-100, and the Eleventh Amendment was thus adopted. The Supreme Court has recognized that the Amendment is not, however, to be given a literal interpretation. The Court has applied the Amendment to bar an action by a citizen against his own state, *Hans v. Louisiana*, 134 U.S. 1 (1890); a suit by a federal corporation against a state, *Smith v. Reeves*, 178 U.S. 436 (1899), and suits in admiralty, *Ex parte New York*, 256 U.S. 490, 498-503 (1920), even though none of these actions is within the Amendment's literal prohibition. The Court reached these results because it had recognized that, contrary to *Chisholm*, the doctrine of sovereign immunity was intended to operate as an implicit limitation upon the jurisdiction of the Article III courts. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934); *Employees of the Dep't of Public Health & Welfare v. Missouri*, 93 S. Ct. 1614, 1625 (Brennan, J., dissenting); HART & WECHSLER, *supra* note 5, at 258. On the power of Congress to displace state immunity see *Employees of the Dep't of Public Health & Welfare v. Missouri*, *supra*, at 1616-17.

163. That the doctrine operates only as a procedural bar was recognized in *The Siren*, 74 U.S. (7 Wall.) 152, 155-56, 159 (1868) and in *The Davis*, 77 U.S. (10 Wall.) 15, 21-22 (1869). *But see* *The Western Maid*, 257 U.S. 419, 433-34 (1922), *The Thekla*, 266 U.S. 328, 339-40 (1924), and Justice Marshall's confused concurrence in *Employees of the Dep't of Public Health & Welfare v. Missouri*, 93 S. Ct. 1614, 1619 (1973).

164. In discussing the problem of suits against the United States they observe:

Would not clarity and justice be promoted if the Court were to return to Marshall's position . . . that the only actions against the United States are actions in which the United States is named as a party defendant or in which the court is asked to enter a judgment affecting the title to property admitted or found to belong to the United States and in its possession, or compelling the expenditure of public funds, while recognizing that there may be other instances in which the interests of the United States are so intimately involved that the action cannot in justice proceed in its absence?

HART & WECHSLER, *supra* note 5, at 1370. Of course, Congress can consent to suits to compel the payment of money or the delivery of property. See *id.* at 1326-38, 1351-56.

Constitutional Adjudication: The Who and When

my mind, sovereign immunity should bar only coercive relief. Where no such relief is sought, I see no reason why it should bar a declaratory judgment on the legality of any governmental action. Should the public official ignore the declaration, that is his business; but the court is under no obligation to avoid declaring what the duty is.¹⁶⁵ Nor is the *conduct* of the official decisive as to whether a suit may be maintained. Although we are accustomed to filing actions against some named officials seeking a determination with respect to their conduct, it is the official's authority, not his conduct, that is really at issue. Our thinking need not be imprisoned by the hoary forms of judicial proceeding. One can readily imagine a declaratory suit styled "In Re—A Criminal Libel Statute." Certain individuals would be given notice and permitted to defend the statute in much the same way that individuals now defend in rem actions in maritime libel suits.

D. *Primary Conduct*

Although the injury need not come from the *conduct* of an official charged with enforcing the statute or regulation—as some of the standing, mootness, and ripeness decisions seem to assume—it might still be argued that at least the challenged rule itself—apart from any threat of enforcement—must have an appreciable impact on primary conduct. This seems to be the major premise of the "chilling effect" cases. In entertaining those suits, the Court focused not on the defendant's conduct, but rather on the impact of the challenged laws on plaintiff's primary conduct.¹⁶⁶

The argument that there must be such a clear impact can, of course, be framed in terms of the substantive constitutional guarantees themselves. It might be argued that absent the minimum complaint of "injury in fact" no statute could, as a matter of substantive constitutional law, be said to "deprive" any person of liberty or property, or

165. Compare *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1948), where both equitable and declaratory relief were requested, with *Ex parte Merryman*, 17 F. Cas. 144, 153 (No. 9,487) (C.C.D. Md. 1861):

I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to "take care that the laws be faithfully executed" to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

166. Compare Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853-58 (1970), with Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

"abridge" his freedom of speech.¹⁶⁷ Thus, a municipality does not deprive anyone of the right of free speech by enacting a seditious libel ordinance where, wholly apart from the ordinance, none of its residents would dream of criticizing the government; similarly, no one is denied property without due process by a tax to which he has no objection. So long as the statute sits on the books unenforced or so long as it does not inhibit primary conduct, it is not "unconstitutional." This argument has substantial roots in our legal tradition.¹⁶⁸ *Laird v. Tatum*¹⁶⁹ lends it support: There the Court sustained dismissal of plaintiffs' constitutional claims because of their inability to show harm caused by the challenged governmental conduct. The Court's opinion reveals the close connection between thinking about "case or controversy" and substantive constitutional doctrine:¹⁷⁰ *Laird* concluded that unless plaintiffs were "presently or prospectively subject to the regulations, proscriptions or compulsions" of the challenged statutes,¹⁷¹ there was no case or controversy. Allegations of a subjective "chill" were not an adequate substitute for "a claim of specific present objective harm or threat of specific future harm."¹⁷²

Laird is by no means clear, however, and can be read to stand for several very different propositions: (1) that there was no case or controversy because there were, in fact, no sufficient allegations of a real "chill"; (2) that any "chill" must have an objective and reasonable basis; (3) that the "chill" must come from official conduct threatening harm and not be merely "implied by the existence of the law and regulations"; or (4) that the threat of official harm must be reasonably "immediate." *Laird* is, of course, a return to the traditions of *Mitchell* and the private tortfeasor model of *Ex parte Young* and *Frothingham*. But it has serious theoretical difficulties if it is taken as holding that, as a matter of Article III, there must be harm to the complainant which is linked to "objectively" verifiable official conduct. Even under the private rights model, all that is necessary is that plaintiffs suffer injury

167. In view of the decisions under the Establishment Clause, it might be conceded that a state could violate the Establishment Clause even though no one complained of that fact, and accordingly, the "liberty" and "property" secured by the Due Process Clause would not be implicated. *But see Abington School Dist. v. Schempp*, 374 U.S. 203, 256 (1963) (Brennan, J., concurring).

168. Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968).

169. 408 U.S. 1 (1972).

170. Professor Lewis has noted that decisions on standing are often based on the substantive reach of the constitutional guarantees themselves. Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433, 438-39 (1962). *Cf. Finley v. Hampton*, 473 F.2d 180 (D.C. Cir. 1973).

171. 408 U.S. at 11-13 (1972).

172. *Id.* at 13-14.

Constitutional Adjudication: The Who and When

in fact, and that may be caused by the deterrent effect of the statute itself.¹⁷³

Moreover, it is incorrect to assume that, either as a matter of case or controversy or of substantive law, there can be no "unconstitutionality" without some specific injury in fact. To argue, as does Professor Davis, that some injury must exist, but that "a trifling interest is enough,"¹⁷⁴ is more than merely exalting form over substance; it ignores the essentially public character of constitutional litigation. Its foundation is the same as that of the old standing and sovereign immunity doctrines—the denial that a citizen's interest in governmental regularity is a "real" one. It is simply far too late for such an argument. The Court's decisions can be viewed as a progression steadily expanding the nature of an acceptable interest—from traditional private rights of liberty and property to the "new property," and finally, to the far more diffuse interests of consumers or users of the environment.

It is thus unsound to contend that there must be an impact on primary conduct before there is a substantive violation of the Constitution. Such an argument confuses remedial with substantive questions. Absent personal impact, injunctive relief may be inappropriate. But, so far as Article III and the Fourteenth Amendment are concerned, a state seditious libel statute can be declared invalid even if there are *no* objectors asserting what under the present decisions would be characterized as "injury in fact." The real question is the quality of the litigant's interest which will be sufficient to justify judicial review.¹⁷⁵ Similarly, appropriate declaratory relief could be framed for even a

173. Compare *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-54 (1967), and *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171-72 (1967), with *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967). Some of these cases can be reasonably rationalized as cases of coerced compliance, *i.e.*, primary conduct is coerced by the reasonable fear that, at some point, there may be a prosecution. *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 506-08 (1972). See also *Laird v. Tatum*, 408 U.S. 1, 11-13 (1972). But there are numerous cases in which jurisdiction was entertained and which were not and probably could not be so reasoned. See, *e.g.*, *Roe v. Wade*, 93 S. Ct. 705 (1973) (no allegation that plaintiff was deterred from abortion by threat of enforcement of criminal statute); *Doe v. Bolton*, 93 S. Ct. 739, 745 (1973) (no present threat of enforcement); *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952); *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948); *Carter v. Carter Coal Co.*, 298 U.S. 238, 287-88 (1936) (no present threat of enforcement). See also cases and discussion in Comment, *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 COLUM. L. REV. 106, 114-16 (1962).

174. K. DAVIS, ADMINISTRATIVE LAW TEXT 428-30 (1972).

175. In *Abbott Laboratories*, Justice Harlan recognized the well-established principle that "the injunctive and declaratory judgment remedies are discretionary . . ." 387 U.S. 136, 148 (1967). Accordingly, it may very well be that *as a matter of discretion inherent in the law of remedies*, the Court in constitutional cases will ordinarily refuse to consider the validity of a criminal statute absent an immediate threat of enforcement or some other visible injury in fact. See, *e.g.*, *Boyle v. Landry*, 401 U.S. 77 (1971); *Poe v. Ullman*, 367 U.S. 497 (1961) (plurality opinion). See also *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972); *Lake Carriers Ass'n v. MacMullen*, 406 U.S. 498, 506-08 (1972); *Finley v. Hampton*, 473 F.2d 180, 184 (D.C. Cir. 1972).

valid statute when in a particular instance its effect is unconstitutional. A statute requiring a flag salute by soldiers might, for example, be invalid only in the limited circumstances where a religious objector complains and where the needs for discipline are not substantial. But there is no reason why such a declaration could not be obtained by a citizen rather than by an objecting soldier. The real difficulty would be the same in either case: the impact on the adjudicative process of factual gaps in the record.

V. The Special Function Model and Private Rights

The fact that the traditional private rights model is not adequate to describe the limits of judicial competence in constitutional cases does not mean that those rights are unimportant.¹⁷⁶ And the special function model in no way precludes fully effective private remedies. The crucial problem in current constitutional litigation is the extent to which the federal courts should grant constitutional determinations in private suits seeking *prospective* (injunctive and/or declaratory) relief. By and large, the present law is unsatisfactory. The Court has entertained suits where substantial private interests were not at stake, and denied relief where they were. Recent developments indicate a sharp halt in the former situation. In *Boyle v. Landry*,¹⁷⁷ for example, prospective relief was denied where the plaintiffs indiscriminately challenged a number of unlawful assembly statutes without showing that they had any impact on anyone's primary conduct, let alone that there was any immediate threat of enforcement. A substantially similar analysis applies to *Golden v. Zwickler*,¹⁷⁸ and *Socialist Labor Party v. Gilligan*,¹⁷⁹ although in each, plaintiff's challenge was to a single statute,

176. Professor Jaffe is surely correct in stating that the "central function of the courts is the determination of the individual's claim to 'just' treatment when the citizen is demanding his legally prescribed due" with regard to his liberty or property. Jaffe, *The Citizen as Litigant*, *supra* note 23, at 1034.

177. 401 U.S. 77 (1971).

178. 394 U.S. 103 (1969). There, a distributor of anonymous handbills criticizing a Congressman's voting record sought a declaratory judgment respecting the constitutionality of a state statute which penalized the distribution of anonymous literature in connection with an election campaign. While the case was pending the Congressman received an appointment to the state judiciary. The Supreme Court concluded that the appeal had become moot because there was no longer "a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 108. This was so, said the Court, because "it was wholly conjectural that another occasion might arise when [plaintiff] might be prosecuted . . ." *Id.* at 109. *Zwickler* is, therefore, a case where there was both an absence of a threat of enforcement and an absence of any basis for belief that plaintiff again intended to engage in the conduct described in the complaint. In these circumstances, the Court concluded that there was no case or controversy.

179. 406 U.S. 538 (1972).

Constitutional Adjudication: The Who and When

and to *Laird v. Tatum*,¹⁸⁰ where the challenge was to a governmental practice. Absent a congressional determination that suits in which the plaintiff does not allege any injury should be entertained by the federal courts, these decisions are consistent with the special function model. The basis for refusing relief is merely the discretion inherent in the law of remedies.

To the extent that the special function model requires the explicit concurrence of the political organs of government, it is arguable that the time has come, as Justice Rehnquist recently suggested,¹⁸¹ for the Court to consider narrowing the occasions in which prospective relief will be granted. That result could be achieved, in the main, by following the lead of *Laird v. Tatum*, not out of constitutional compulsion, but rather as a matter of sound equity practice. Prospective relief in constitutional cases might be denied unless plaintiff satisfied a tightened requirement of injury in fact.¹⁸² Moreover, limitations of the "on its face" approach could be developed.¹⁸³ For example, it makes little sense to me to permit, as would the dissents in *California v. LaRue*,¹⁸⁴ a First Amendment overbreadth attack on regulations governing nudity in barrooms where plaintiff's conduct fell squarely within the concededly valid applications of the regulations. Finally, some consideration might be given to restricting the use of the ever-increasing class actions in constitutional cases. Retrenchment along some or all of these lines would, of course, reduce the level of judicial contact with the political process.¹⁸⁵

At the same time, there should be no invariable requirement of an immediate threat of enforcement before the court can grant prospective relief.¹⁸⁶ Such relief should be available whenever a substantial

180. 408 U.S. 1, 3, 6 (1972). See also *Finley v. Hampton*, 473 F.2d 180 (D.C. Cir. 1973).

181. *California v. LaRue*, 409 U.S. 109, 112-13 n.3 (1972).

182. The "trivialized" interests sufficient to justify judicial review in administrative law have not yet become firmly embedded in the area of constitutional law. Tightening of standing could be accomplished by requiring a clear and substantial nexus between plaintiff's interest and the substantive constitutional claim. See, e.g., *Linda R. S. v. Richard D. and Texas*, 93 S. Ct. 1146 (1973).

183. In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972), the Court suggested that there would be no further expansion of the "on the face" approach beyond free speech and race cases. But *Roe v. Wade*, 93 S. Ct. 705 (1973) and *Doc v. Bolton*, 93 S. Ct. 739, 745 (1973) are inconsistent with this result as Justice Rehnquist, the author of *Irvis*, observes. 93 S. Ct. at 745.

184. 409 U.S. 109 (1972).

185. Professor Scott has recently examined standing doctrine in terms of its use both to ration judicial resources and to limit judicial policy-making. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 669-92 (1973). Professor Viner has provided a similar effort in reviewing "ripeness" in functional terms. Viner, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971).

186. But see cases cited in HART & WECHSLER, *supra* note 5, at 133, particularly, *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954); *United States v. Mitchell*, 330 U.S. 75 (1947).

showing can be made that the statute or regulation has an appreciable impact on the plaintiff's primary conduct, wholly apart from whether the law would in fact be enforced against him.¹⁸⁷

Prospective relief should also be available with respect to criminal statutes: A rational system of justice should not deny a law-abiding citizen the option of being a plaintiff in a civil suit rather than a defendant in a criminal proceeding.¹⁸⁸ Prospective relief is particularly desirable when the criminal statute is said to violate some fundamental constitutional guarantee such as freedom of speech.¹⁸⁹ If, for example, a statute forbidding a certain form of expression is invalid on its face, a prospective declaration to that effect is a more adequate remedy than an acquittal in one or more criminal prosecutions brought long after the occasion for the expression has passed.¹⁹⁰

If, however, the prospective criminal defendant seeks to test a statute valid on its face but possibly unconstitutional as applied to him, the danger of a frivolous suit increases. Under such circumstances the district courts should be required to entertain prospective suits on a showing that the criminal process is not *in fact* likely to afford an adequate vehicle by which to vindicate the asserted constitutional rights, and that the "as applied" issue can be presented concretely prior to its actual occurrence.¹⁹¹

187. *But see* *Poe v. Ullman*, 367 U.S. 497 (1961). In *Poe* there does not seem to have been an allegation that the doctor was in fact deterred by the statute. The most difficult case is whether a good faith allegation that the doctor, although not being in fact deterred, felt acute moral and psychological distress from violating a state statute would support a case or controversy. That view is, however, inconsistent with the reasoning of *Laird v. Tatum*, although in fact plaintiffs made no such showing in *Laird*, and it was rejected once again, *Roe v. Wade*, 93 S. Ct. 705 (1973). *See also* *Finley v. Hampton*, 473 F.2d 180, 185 (D.C. Cir. 1972). *But see* *Doe v. Bolton*, 93 S. Ct. 739, 745 (1973).

188. The practice of giving declaratory judgments is, in fact, quite widespread, and it fosters the goal of a rational system of criminal justice. *See Note, Declaratory Relief in Criminal Cases*, 80 HARV. L. REV. 1490, 1505-07 (1967).

189. Decisions of the Supreme Court have, until recently, uniformly permitted declaratory relief with respect to penal statutes which threatened First Amendment interests. *See* *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Dombrowski v. Pfister*, 380 U.S. 479 (1964); *Baggett v. Bullitt*, 377 U.S. 360 (1964). *But see* *Laird v. Tatum*, 408 U.S. 1 (1972); *Boyle v. Landry*, 401 U.S. 77 (1971), and companion cases.

190. This issue arose in several contexts involving the musical *Hair*. In each instance prospective relief on the issue of facial invalidity was granted. *Southeastern Promotions, Ltd. v. Oklahoma City*, 459 F.2d 282 (10th Cir. 1972); *Southeastern Promotions, Ltd. v. West Palm Beach*, 457 F.2d 1016 (5th Cir. 1972); *P.B.I.C. Inc. v. Byrne*, 313 F. Supp. 757 (D. Mass. 1970), *appeal pending*, No. 71-304, U.S., Oct. Term, 1972. Even more than movies, plays are "wasting assets." If they are interrupted by arrests or threats of multiple criminal prosecutions, they will in fact close or not open. Accordingly, producers will steer wide of controversial issues, and self-censorship will be the inevitable result. *See* *Doe v. Bolton*, 93 S. Ct. 739, 745 (1973) (physician's defense of a criminal proceeding not adequate to raise constitutional issue).

191. Assume, for example, a facially valid municipal obscenity statute, but the play's producer, *i.e.*, a prospective defendant, claims that his play is not obscene. Here the statutory and constitutional questions are identical: If the ordinance is erroneously

The Court's reluctance to grant prospective relief in such cases almost invariably arises in the context of suits to enjoin pending or threatened state criminal prosecutions. It might be suggested, as did Justice Black in *Younger v. Harris*,¹⁹² that "Our Federalism" precludes anticipatory relief in such cases.¹⁹³ But really the federalist principles proclaimed in *Younger* are not constitutionally required or beyond the power of Congress to alter. Justice Black's federalism simply fails to account for the radical transformation worked in the federal character of our government by the Civil War Amendments and the subsequent expansive grants of jurisdiction to the federal courts.¹⁹⁴ Our Federalism, circa 1972, means that we have come to recognize that the federal courts are and should be "the primary and powerful reliance for vindicating every right given by the Constitution."¹⁹⁵ Similarly, if the Constitution is viewed as conferring national rights on all citizens, national courts should be open to vindicate those rights in a uniform, coherent manner.¹⁹⁶ Federalism considerations cannot be rationalized in terms of facile distinctions between pending and non-pending pro-

held to reach a non-obscene play, it is unconstitutional as applied. Once again, it is simply false to assume generally that the criminal proceeding provides an adequate remedy for vindication of the constitutional claim. To my mind, therefore, the district courts should be required to entertain prospective suits upon a showing that *in fact* the criminal process is not likely to afford an adequate vehicle in which to vindicate the constitutional right. Where a defendant is engaging in a "one-shot" transaction, criminal prosecution after the fact is probably acceptable, at least where the danger of arrest during the assertedly protected act is unlikely. *Younger v. Harris*, 401 U.S. 37, 45-46, 49, 54 (1971). But, surely, the realities are far different when a play or other course of continuous conduct is involved. HART & WECHSLER, *supra* note 5, at 1010-11; Monaghan, *supra* note 32, at 547-49.

192. 401 U.S. 37 (1971). *Younger* and its companion cases dealt with *pending* state prosecutions. *Younger* was extended uncritically in *Roe v. Wade*, 93 S. Ct. 705, 713-14 & n.7, where a physician-defendant in a criminal proceeding was denied intervention in an otherwise properly maintainable suit for a declaratory judgment, at least where he was not suing on behalf of a class comprised of all physicians. *But see Doe v. Bolton*, 93 S. Ct. 739, 745 (1973) (standing of physicians).

193. Note should also be taken of the generally unsuccessful attempts to use removal, *Greenwood v. Peacock*, 384 U.S. 808 (1966), *Georgia v. Rachel*, 384 U.S. 780 (1966), and preconviction habeas corpus, *see* discussion in majority and dissenting opinions in *Braden v. 30th Judicial Court of Kentucky*, 93 S. Ct. 1123 (1973), as vehicles for bypassing state criminal proceedings.

194. *See* Note, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007 (1966). There is also some dispute whether Justice Black correctly described the 1789 federalism model. HART & WECHSLER, *supra* note 5, at 1237 n.1.

195. *Zwickler v. Koota*, 389 U.S. 241, 247 (1967), quoting FRANKFURTER & LANDIS, *supra* note 6, at 10. *See also* *Mitchum v. Foster*, 407 U.S. 225, 238-42 (1972). *Cf.* *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), expanding the category of suits maintainable under 28 U.S.C. § 1343(3) (1970).

196. The history of diversity jurisdiction, 28 U.S.C. § 1332 (1970), provides an interesting analogue. Chief Justice Taft justified its retention in terms of the national interests it promoted: the confidence it gave the corporations creating a national market that they would have access to impartial forums, and often to a special body of substantive law. C. WRIGHT, *FEDERAL COURT* 79 (2d ed. 1972). Much constitutional litigation, is, of course, really an effort to enforce minimum national rights throughout the country. *See generally* Jaffe, *The Citizen as Litigant*, *supra* note 23.

ceedings,¹⁹⁷ criminal and civil statutes,¹⁹⁸ or declaratory and injunctive prayers.¹⁹⁹ The principle must be that the federal courts are the primary vindicators of federal rights, absent some congressional determination to the contrary. If this principle be correct, the abstention doctrine must be thoroughly rethought.²⁰⁰ If the federal courts interpret "difficult" state law where, as in diversity cases, the federal interest is marginal at best, it is difficult to see why they should decline that task where appreciable federal interests hang in the balance.²⁰¹ At the very least, abstention cases should be rethought in terms of interim relief. Before it abstains, the federal court should consider whether interim

197. *Younger v. Harris*, 401 U.S. 37 (1971) modified *Dombrowski v. Pfister*, 380 U.S. 479 (1965), by holding that a "chilling effect" on First Amendment rights is, by itself, insufficient to support federal equitable relief, 401 U.S. at 47-54. *Younger* would, moreover, apparently require more than the traditional showing of irreparable injury: "[e]ven irreparable injury is insufficient unless it is both great and immediate," *id.* at 43. It is, as has been noted, not altogether clear that *Younger's* reasoning can fairly be confined to pending prosecutions, although arguably special problems are presented where prosecutions are pending. But Justice Black's opinion in *Younger* purported not to deal with the issue of nonpending prosecutions, *id.* at 41, and its negative inferences on that issue probably did not represent the view of a majority of the Court, as an examination of all the opinions in *Younger* and its companion cases will show. In *Lake Carriers Ass'n v. MacMullen*, 406 U.S. 490, 509 (1972), the Court described *Younger* as "having little force in the absence of a pending state proceeding." Despite the sweeping rhetoric, the holding of *Younger, et al.* may, therefore, simply be to limit lower court excesses in applying *Dombrowski's* "chilling effect" doctrine. See generally Note, *Implication of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 COLUM. L. REV. 874 (1972).

198. The Court regularly entertains suits where "civil" statutes are involved. *Younger v. Harris*, 401 U.S. at 43-44, recognized that the basis of the criminal-civil distinction had not been spelled out in the Court's decisions, and the explanation it proffered is, to say the least, unilluminating. It is, however, difficult to justify the distinction in federalism terms, and there are signs that the distinction is coming apart at the seams. Justice White's dissenting opinion in *Fuentes v. Shevin*, 407 U.S. 67, 98 (1972) suggests the applicability of *Younger* to civil cases. See also *Mitchum v. Foster*, 407 U.S. 225, 244 (1972) (White, J., concurring); *Lynch v. Snapp*, 472 F.2d 769 (4th Cir.), *petition for cert. filed*, 41 U.S.L.W. 3586 (U.S. Apr. 23, 1973) (suit to enjoin pending state civil proceedings must satisfy *Younger v. Harris*). See the confused opinion in *Gibson v. Berryhill*, 41 U.S.L.W. 4576, 4580 (U.S. May 7, 1973), and the cryptic order in *Joiner v. Dallas*, 41 U.S.L.W. 3616 (U.S. May 21, 1973), a case remanding for reconsideration in light, *inter alia*, of *Younger*, a federal court injunction suit against a pending state condemnation proceeding.

199. It is interesting to note that there is nothing in the language in *Samuels v. Mackell*, 401 U.S. 66 (1971), also an opinion by Justice Black, which even remotely suggests that declaratory as opposed to injunctive relief should not be awarded where there is no pending state prosecution, but only the threat of one. *Roe v. Wade*, 93 S. Ct. 705 (1973), and *Doe v. Bolton*, 93 S. Ct. 739, 745 (1973), would seem to establish beyond doubt that *Younger* has no applicability to federal declaratory relief against threatened state criminal proceedings. Further clarification, however, may be forthcoming from *Becker v. Thompson*, 459 F.2d 919 (5th Cir. 1972), *cert. granted sub nom. Steffel v. Thompson*, 41 U.S.L.W. 3562 (U.S. Feb. 26, 1973). See also *Thoms v. Heffernan*, 473 F.2d 478, 482-83 (2d Cir. 1973).

200. For a collection of the cases see HART & WECHSLER, *supra* note 5, at 985-97. See also discussion in H. FRIENDLY, *supra* note 92, at 75-107.

201. See *Lake Carriers Ass'n v. MacMullen*, 406 U.S. 498, 509 (1972), emphasizing that abstention is appropriate "only in narrowly limited 'special circumstances' . . . justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise'" (footnotes omitted); *Gibson v. Berryhill*, 41 U.S.L.W. 4576, 4581 (U.S. May 7, 1973); *Thoms v. Heffernan*, 473 F.2d 478, 485-86 (2d Cir. 1973).

Constitutional Adjudication: The Who and When

relief could be granted to the plaintiff so that remitting him to the state court would not substantially eliminate his federal right.

Accordingly, the special function model affords no problem to private interests seeking specific declaratory or injunctive relief. The point here is that the special function of constitutional adjudication should not be made to *depend* on ordinary litigation concerning private rights.

VI. Conclusion

There is nothing in the “case or controversy” concept, or that of sovereign immunity, which precludes restructuring our thinking about the conditions under which constitutional determinations occur. The discrete doctrines which make up the law of case or controversy are, with the possible exception of certain aspects of the ripeness and political question doctrines, entirely judiciary-fashioned ordinances of self-denial rather than constitutionally compelled limitations inhering in “judicial power.” Sovereign immunity places a limitation on the remedies available to the Court, not the Court’s competence to pass judgment. What is required is a record sufficiently concrete to give specific and practical effect to the Court’s pronouncements.

To recognize a citizen’s stake in a constitutional principle and allow him access to the Court absent some specific complaint of injury in fact or effect on primary conduct need not open floodgates to frivolous constitutional litigation. But it is up to Congress to fashion the boundaries of a model of judicial competence better suited to the Court’s special function.