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Untying the Gordian Knot: An Orderly Approach to Federal Jurisdiction Issues in a Basic Course in United States Constitutional Law

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UNTYING THE GORDIAN KNOT: AN ORDERLY APPROACH TO FEDERAL JURISDICTION ISSUES IN A BASIC COURSE IN UNITED STATES CONSTITUTIONAL LAW

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I. INTRODUCTION

Not surprisingly, it is common practice to begin a basic constitutional law course with *Marbury v. Madison*.[1] Many casebooks either reflect or cause this practice.[2] *Marbury's* concept of judicial review is then generally expanded through the introduction of the early formative cases.[3] At this point the questions of limitations on

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1. 5. U.S. (1 Cranch) 137 (1803). This case is generally credited with having established the concept of judicial review within the federal court system.

Marbury was described by Professors Robert E. Cushman and Robert F. Cushman as having "a certain strategic significance." R.E. & R.F. CUSHMAN, CASES IN CONSTITUTIONAL LAW 17 (3d ed. 1968). Although *Marbury* was the first Supreme Court decision to declare an act of government unconstitutional it was not the first in which the power of judicial review was exercised by the Court.

> There is evidence that public opinion tended to look upon the power of judicial review as one of the normal incidents of judicial power. The Court considered the constitutionality of the carriage tax in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), and its refusal to declare it unconstitutional, as well as the lower federal courts to hold unconstitutional the Alien and Sedition Acts and the United States Bank Charter, was bitterly condemned by the Republicans, who seemed to feel that the courts were neglecting their duty in not sustaining the Constitution against legislative usurpation of power. That Congress itself recognized the power is perhaps evidenced by their alteration of the term of the Supreme Court to prevent the Repeal Act of 1802 from coming to the Court for review for more than a year after its enactment.

Id.

2. Consider, for example the following well known works: J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY (2d ed. 1982); G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985); W. LOCKHART, Y. JAMISAR, J. CHOPER AND S. SHIFFRIN, CONSTITUTIONAL LAW, CASES - COMMENTS - QS - QUESTIONS (6th ed. 1986); R. ROTUNDA, MODERN CONSTITUTIONAL LAW (3d ed. 1989). That *Marbury* as genesis is not universally the case is illustrated by R.E. & R.F. CUSHMAN, CASES IN CONSTITUTIONAL LAW (3d ed. 1968).

3. These are usually thought to include Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813), and its generally more well known sequel, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816). The former extended *Marbury's* doctrine of judicial review to acts of state governments while the latter established the Supreme Court's appellate review power over state courts in matters involving questions of federal law. At times one finds Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), which was actually the first case in which judicial review was applied against the states. Also, sometimes included is Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), which extended the *Martin* rule to criminal as well as civil matters. *See generally supra* note 2.

the power of judicial review arise and with them the difficulty of organization[4] to which this article will address itself.[5] As a firm believer in diagrams,[6] I have organized the basic limitations on judicial review suitable to an introductory law school federal constitutional law course into a series of barriers through which a litigant who seeks judicial review must travel before he achieves his goal of actually having the Court exercise the power it has had since at least 1803, the year of *Marbury*.

II. OVERVIEW

The barrier diagram that is the subject of this paper, and in reproduced below, divides the limitations on judicial review commonly found in a law school introductory federal constitutional law course into four barriers within which are grouped similar limitations. The diagram also illustrates that a litigant seeking the Court's exercise of judicial review would be perceived at the left of the first barrier with his goal being to pierce all four so that he would end up to the right of the forth barrier with the Court actually deciding his constitutional question by exercising judicial review. It should, of course, be emphasized that merely because the Court chooses to decide the question that it will not necessarily decide it his way.

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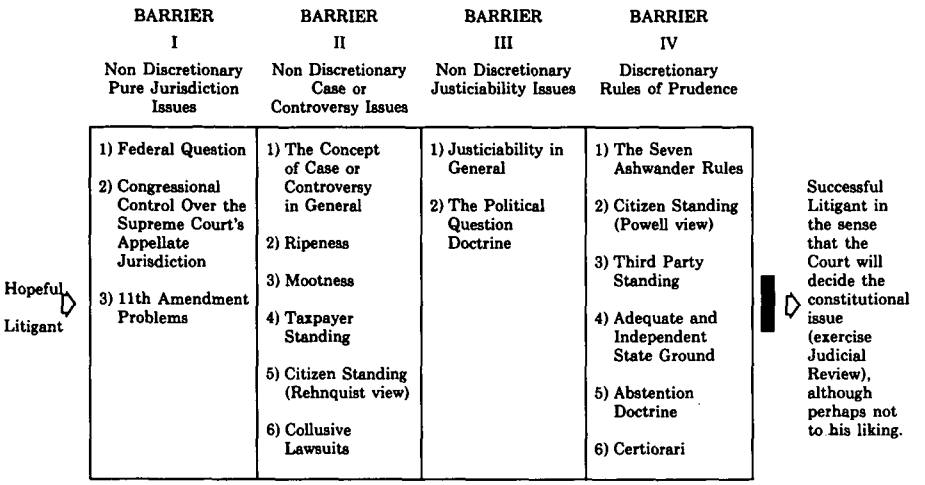
4. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). The Supreme Court recognized that there is no organizational pattern in this area that is commonly recognized by the federal courts. It spoke of "[t]he lack of a fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability." *Id.* at 215, note 5. By "justiciability," the Court apparently meant constitutional limitations on the exercise of judicial power by federal courts. Those are the limitations set out in the first three barriers in the diagram found *infra* in the text at page 386.

5. *See generally supra* note 2 and the different tracks they take. Having said this, the author wishes to point out that no criticism of these works is intended or is to be implied. Each teacher has his or her way of organizing things. Mine seems to have worked well over the years and it is my desire to share it with my colleagues who teach introductory United States Constitutional Law.

6. A Chinese Proverb has it that "one picture is worth more than ten thousand words." R. BARTLETT, FAMILIAR QUOTATIONS, at 1213 (12th ed. 1951). In more modern times, Ivan Sergeyevich Turgeniev, a nineteenth century Russian author, has stated, "A picture may instantly present what a book could set forth only in a hundred pages." *Id.* at 1187.

Diagram



In using this diagram, it must be heavily emphasized to the students that the "hopeful litigant" in his quest to become the "successful litigant" will not necessarily, and in all likelihood will never, have to deal with every limitation in every barrier. Usually he will have to contend with no more than one or two in total. The barrier scheme illustrates all the potential limitations on judicial review that should concern the student in an introductory federal constitutional law course. A more "in depth" look at these as well as other limitations should probably await an advanced course in federal courts.

III. ANALYSIS

A. Barrier I, Part 1. Federal Question

Of all the elements in the barriers, this one should be the easiest for the student to understand and the litigant to pierce. In fact, it's a "gimmie".[7] "The judicial power of the United States shall extend to all Cases, in Law and Equity, *arising under* this Constitution, . . ."[8] Therefore, since judicial review is by its very nature one "arising under" the United States Constitution it clearly presents a federal question.[9]

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7. "A short putt that is conceded or given to an opponent." T. CONSIDINE, THE LANGUAGE OF SPORT 190 (1982).

8. U.S. CONST. art. III, § 2(1) (emphasis added).

9. "It has long been held that a suit 'arises under' the Constitution if a peti-

B. Barrier I, Part 2. Congressional Control Over the Supreme Court's Appellate Jurisdiction

> In all the [cases within federal judicial power except those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party"] the Supreme Court shall have appellate jurisdiction, . . . *with such Exceptions, and under such Regulations as the Congress shall make.*[10]

It is here that the specter of *Ex Parte* McCardle[11] arises. There, in the aftermath of the War Between the States, Congress had *expanded* the appellate jurisdiction of the Supreme Court[12] to include a broad variety of appeals from habeas corpus decisions of federal circuit courts.[13] Then McCardle, a rabble rousing[14] Mississippi newspaper editor, was arrested by federal military authorities because articles in his newspaper were deemed to be "incendiary and libelous."[15] After McCardle's appeal from a denial of habeas corpus relief by the federal circuit court in Mississippi had been lodged in the Supreme Court under the 1867 act, and after oral

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tioner's claim 'will be sustained if the Constitution . . . [is] given one construction and will be defeated if it is given another.' " Powell v. McCormack, 395 U.S. 486, 514 (1969) (citations omitted).

10. U.S. CONST. art. III, § 2(2) (emphasis added).

11. 74 U.S. (7 Wall.) 506 (1868).

12. The Court took the view that taken together all affirmative federal legislation regarding appellate jurisdiction of the Court would be considered to negate any other possible appellate jurisdiction. "The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been . . . established, it was an almost necessary consequence that Acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as Acts granting jurisdiction and not as Acts making exceptions to the constitutional grant of it." *McCardle*, 74 U.S. (7 Wall) at 513.

13. Act of February 5, 1867. *See McCardle*, 74 U.S. (7 Wall) at 508.

14. Some years after the Confederacy lost the War Between the States, a heated dispute broke out between the adherents of P.T.G. Beauregard and Jefferson Davis over whose errors cost the South the War. *See, e.g.*, A. ROMAN, THE MILITARY OPERATIONS OF GENERAL BEAUREGARD IN THE WAR BETWEEN THE STATES (2 vols. 1885). An excerpt from a letter McCardle wrote to Davis is illustrative of the type of journalistic venom of which McCardle was capable.

> I suppose, however, General Beauregard will continue his work of vilification, and, as long as he can command the pen of his friend Roman, and the ability of that lying cur, Tom Jordan, to manufacture orders and evidence, the stream of slander will flow in a bold and unimpeded current.

JEFFERSON DAVIS, CONSTITUTIONALIST, HIS LETTERS, PAPERS AND SPEECHES IX, 560 (Roland ed. 10 vols. 1923).

15. *McCardle*, 74 U.S. (7 Wall) at 508.

argument, but before a conference vote on how the Court should rule, Congress repealed that part of the 1867 act upon which McCardle's appeal was based.[16] The Court considered itself bound by this exercise of Congress' power to make exceptions to its appellate jurisdiction and dismissed the appeal "for want of jurisdiction."[17] There is little doubt that this repeal of the Court's appellate jurisdiction was to prevent the Court from holding the Reconstruction Act which had authorized military detention of civilians in the territory of the former Confederacy unconstitutional.[18] It was widely believed that this is what the Court would have done.[19]

McCardle has never been overruled. There has, however, been no lack of scholarly debate about its continuing validity. In a survey course it is probably best to avoid most of it, although two differing views of eminent Supreme Court justices that tend to bring the issue into focus are useful.[20] Justice Douglas in his dissent in *Glidden v. Zdanok*[21] declared that "there is a serious question whether the *McCardle* case could command a majority view today."[22] Justice Frankfurter, on the other hand, commented in dissent in *National Mutual Insurance Co. v. Tidewater Transfer Company*[23] that "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*."[24]

After some discussion of the potential impact of *McCardle* on judicial review, I emphasize the probable intent of the "regulations and exceptions" clause by discussing 28 U.S.C. Sections 1254 and 1257 as "housekeeping" arrangements for the orderly operation of the Supreme Court in the exercise of its appellate jurisdiction. These, of course, are in stark contrast to the substantive change in the law the Congress' exercise of its power in *McCardle* probably prevented. Thus the discussion ultimately comes down to this

16. Act of March 27, 1868. *See McCardle*, 74 U.S. (7 Wall) at 508. The repealer reached appeals which "have been . . . taken" thus including McCardle's. *Id.*

17. *McCardle*, 74 U.S. (7 Wall) at 515.

18. *See generally* C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, II, 465-88 (2 vols. rev. ed. 1926).

19. *Id.*

20. J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY (2d ed. 1982) at 28. No doubt they are also found elsewhere.

21. 370 U.S. 530 (1962).

22. *Id.* at 605 n. 11 (Douglas, J., dissenting).

23. 337 U.S. 582 (1948).

24. *Id.* at 655 (Frankfurter, J., dissenting).

question. Is Congress' power limited to "housekeeping" or does it include "substance" also?

C. *Barrier I, Part 3. Eleventh Amendment Problems*

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.[25]

First, the "boiler plate" material consistently found in most, if not all, casebooks must be pointed out. *Chisholm v. Georgia*[26] caused the amendment to be enacted. The amendment has been broadened to include suits in federal court against a state by its own residents.[27] The amendment does not apply to a State's political subdivisions such as municipalities and counties.[28]

Second, in an introductory course it is then necessary to focus on only four cases and those only briefly. Not surprisingly, the first is *Ex Parte Young*.[29] There, the Court refused to follow the logic that to the extent that the Fourteenth Amendment was inconsistent with the Eleventh, the latter should be considered superceded.[30] Instead, it found that while the state itself could not be sued in federal court, one of its officers might.

> [There is] ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil

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25. U.S. CONST. amend. XI.

26. 2 U.S. (2 Dall) 419 (1793).

27. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

28. *See, e.g.*, Mount Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

29. 209 U.S. 123 (1908) (case involving a suit in federal court against a state attorney general and others to enjoin enforcement of railroad tariffs alleged to violate the Due Process Clause of the Fourteenth Amendment).

30.

> [A] decision of this case does not require an examination or decision of the question whether [the adoption of the Fourteenth Amendment] in any way altered or limited the effect of the [Eleventh] Amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.

Id. at 150.

> or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.[31]

The second case is *Edelman v. Jordan*.[32] This case, as quite adequately described in the third and subsequent case of *Milliken v. Bradley*,[33]

> involved a suit for money damages against the State, as well as for prospective injunctive relief. The suit was brought by an individual who claimed that Illinois officials had improperly withheld disability benefit payments from him and from the members of his class. Applying traditional Eleventh Amendment principles, we held that the suit was barred to the extent the suit sought "the award of an accrued monetary liability. . ." which represented "retroactive payments." [Citation omitted.] Conversely, the court held that the suit was proper to the extent it sought "payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination. . . [Citation omitted.][34]

The fourth case is *Fitzpatrick v. Bitzer*,[35] which holds that the Eleventh Amendment is no bar to "accrued monetary liability" in the form of "retroactive payments" if such an award is authorized by Congress under its "authority to enforce 'by appropriate Legislation' the substantive provisions of the Fourteenth

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31. *Id.* at 155-56. The rationale for this remarkable proposition is set forth by the Court as follows and totally ignores the fact that the Fourteenth Amendment Due Process Clause is predicated by the words "No state shall."

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

209 U.S. at 159-60.

32. 415 U.S. 651 (1974).

33. 433 U.S. 267 (1977).

34. *Id.* at 289. (The emphasis is the *Milliken* Court's.)

35. 427 U.S. 445 (1976).

Amendment."[36]

Thus, in summary, the Eleventh Amendment, while it precludes a suit in federal court directly against a State, allows a suit against a state official who is enforcing a state law that is alleged to violate the federal Constitution. The suit can enjoin future unconstitutional conduct even if compliance with the injunction will cost the State money. Retroactive relief which will cost money is not allowable unless authorized by Congress in the exercise of a power that provides for such authorization.

D. Barrier II, Part 1. Case or Controversy In General

The Constitution describes federal judicial power in terms of cases and controversies.[37] The meaning of these terms is discussed in *Muskrat v. United States*.[38] This is all the mention that *Muskrat* deserves apart from a brief reference to it as a possibly still valid[39] example of an unsuccessful attempt by Congress to obtain an advisory opinion as to the constitutionality of one piece of legislation. In this regard it should be brigaded with a brief reference to Chief Justice John Jay's refusal, on separation of power grounds, to provide the executive branch with an advisory opinion.[40]

At this point, the discussion should shift to the modern view of what constitutes a case or controversy and the question of whether the outcome of *Muskrat* would be the same under that

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36. U.S. CONST. amend. XIV, § 5; *Fitzpatrick*, 427 U.S. at 456.

37. U.S. CONST. art. III, § 2(1).

38. 219 U.S. 346 (1911). The case involved an act of Congress conferring jurisdiction upon the Court of Claims and, upon appeal from that court, to the United States Supreme Court, to hear suits against the United States testing the validity of an act of Congress that had diluted the interests of certain persons to property awarded to them by Congress by increasing the number of persons allowed to share in the particular property. Congress also provided that, should the plaintiffs win, the federal government would pay their attorney fees. The Supreme Court held that suits brought under the act did not amount to a case or controversy.

> This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true that the United States is made a defendant to this action, but it has no interest adverse to the claimants. The whole purpose of the law is to determine the constitutional validity of this class of legislation. . . .

Id. at 361.

39. It has never been explicitly overruled.

40. *See, e.g.*, G. GUNTHER, CONSTITUTIONAL LAW, 1535-36 (11th ed. 1985).

view.[41] For this, the pertinent part of Chief Justice Burger's opinion in *Duke Power Company v. Carolina Environmental Study Group*[42] is excellent. It, in essence, structures case or controversy into two elements "injury" and "likelihood of redress."[43] Since the rest of Barrier II focuses virtually entirely on the injury aspect of case or controversy, taking the existence of likelihood of redress as a given, I supplement *Duke Power* with a discussion of *Simon v. Eastern Kentucky Welfare Rights Organization*[44] in order to emphasize the likelihood of redress problems.[45]

At this point it is helpful to make it clear to the students that the rest of the elements in Barrier II, Ripeness, Mootness, Taxpayer Standing, Citizen Standing (Rehnquist view) and Collusive lawsuits are but examinations of the existence or non-existence of the injury component of case or controversy in different factual settings. The five are merely different ways of asking, does an injury exist in this case?[46]

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41. Given the scope of "injury" and "likelihood redress" discussed below, it is certainly arguable that while today the Court might still refuse to hear a case like *Muskrat*, it would do so as a matter of Barrier Four prudence and not for lack of a case or controversy. *See infra* text accompanying notes 142-43 and 165-67.

42. 438 U.S. 59 (1978).

43. *Id.* at 72-78.

44. 426 U.S. 26 (1976).

45. *Simon* held that decisions by hospitals in Kentucky regarding treatment of indigent patients was not related to a federal revenue ruling that benefited the hospitals. "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the federal government's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." 426 U.S. at 42-43. Thus, "the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire." 426 U.S. at 45-46. In *Duke Power*, on the other hand, the Court, relying in large part on *Simon*, upheld a lower court ruling that there was a "substantial likelihood" that were it not for the liability cap found in the constitutionally challenged Price-Anderson Act, the nuclear power plants which would have caused the alleged injury would never operate. 438 U.S. at 75.

46. *See supra* text accompanying note 43. As the Supreme Court has pointed out, "standing 'serves, on occasion, as a shorthand expression for all the various elements of justiciability.'" Flast v. Cohen, 392 U.S. 83, 99 (1968) (citing Lewis, *Constitutional Rights and the "Misuse of Standing"*, 14 STAN. L. REV. 433, 453 (1962)). Conversely, standing, looked at as "shorthand" for case or controversy, is frequently broken down into various diverse issues involving whether or not one of the two crucial elements of case or controversy, injury, exists.

E. Barrier II, Part 2. Ripeness

A case may not be ripe because there is no injury in the case or controversy sense or because even though there is adequate injury, the Court, as a matter of its Barrier IV discretion, decides that it is unnecessary to decide it.[47] The Court has yet, in its ripeness cases, to adequately distinguish between the two. This problem was perhaps best summed up by Professor Gunther when he proposed the idea that:

> a case may have had so many contingencies on both sides that [the case or controversy limitation barred judicial resolution.] However, a dispute may be sufficiently concrete to meet the minimum requirements of [case or controversy], but nevertheless be sufficiently contingent to warrant dismissal on ripeness grounds in the exercise of judicial discretion as to the federal declaratory judgments remedy. Arguably [United Public Workers v.] Mitchell was such a case.[48]

It is *Mitchell*[49] that provides the most convenient framework for discussing the case or controversy aspect of ripeness. There, various federal employees subject to the Hatch Act[50] sued alleging that they "desire[d] to engage in acts of political management and in political campaigns"[51] but were dissuaded from doing so because of the Act, the constitutionality of which they thus sought to challenge. One federal employee had already violated the Act.[52] The Court decided that the case was only ripe as to this one employee.[53] It was not ripe as to the others.[54] The case contains con-

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47. The Court [over time] developed, for its own governance in . . . cases confessedly within its jurisdiction [i.e. where there is the requisite injury to create case or controversy and thus standing], a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

. . . .

2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. [Citations omitted.] . . . .

Ashwander v. Tennessee Valley Auth., 297 U.S. 288 at 346-47 (1936) (Brandeis, J., joined by Stone, Roberts and Cardozo, JJ., concurring).

48. G. GUNTHER, CONSTITUTIONAL LAW, 1585 (11th ed. 1985).

49. United Pub. Workers v. Mitchell, 330 U.S. 74 (1947).

50. The Hatch Act was a federal law that proscribed various types of partisan political activity on the part of employees of the federal government. *See Mitchell*, 330 U.S. at 78, n. 1.

51. *Id.* at 82.

52. *Id.* at 83.

53. *Id.* at 91.

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flicting signals regarding the Court's view of ripeness. At one point, it spoke in terms of a justiciable case or controversy,[55] but later used terms that are clearly associated with the Barrier IV rules of prudence.[56] Nevertheless, using *Mitchell*, especially if one subscribes, as seems reasonable, to Professor Gunther's view[57] that it is really a Barrier IV case, a hypothetical can be constructed to illustrate Barrier II ripeness and contrast it to Barrier IV ripeness. It requires three categories of plaintiffs, the two from the actual case and a third fictional one. The fictional category is taken first. It consists of persons who allege that at some point they might wish to become federal employees who would then be subject to the Hatch Act and if they did become so employed they, someday, might wish to engage in activities prohibited by it and thus they wish a court to declare it unconstitutional. Any infringement by the Hatch Act on these plaintiffs is so remote that the Hatch Act causes them no injury. Thus as to them there is no case or controversy. They are stopped by Barrier II.

The second category are the actual plaintiffs in *Mitchell* who "desire[d] to engage in acts of political management and political campaigns."[58] The chill that the Hatch Act placed on their alleged First Amendment rights should be considered sufficient injury to get them past the case or controversy barrier, but they still have to negotiate the ripeness aspects of Barrier IV. That problem will be discussed at the appropriate time.[59]

The third category, the one federal employee who had already violated the Hatch Act[60] is obviously injured by it but he too must still negotiate the ripeness aspects of Barrier IV.[61]

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54. *Id.*

55. *Id.* at 89. The Court also spoke of "constitutionally imposed boundaries." *Id.* at 90.

56. "It has long been this Court's 'considered practice not to decide . . . any constitutional question in advance of the necessity for its decision." 330 U.S. at 90, n. 1 (citations omitted). The similarity of this statement to one of the rules of prudence set out in Justice Brandeis' concurring opinion in Ashwander v. Tennessee Valley Auth. is obvious. *See supra* note 47.

57. *See supra* text accompanying note 48.

58. *See supra* text accompanying notes 50-51.

59. *See infra* text accompanying notes 168-77.

60. *See supra* text accompanying note 52.

61. *See infra* text accompanying notes 168-77.

F. Barrier II, Part 3. Mootness

"The present rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed."[62] The case frequently used to illustrate this proposition is *Defunis v. Odegaard*.[63] Marco Defunis' dispute with the University of Washington over his denial of admission caused by the school's affirmative action policy resulted in his judicially ordered admission to the law school.[64] By the time the Supreme Court of the United States was ready to decide the case, Defunis was in his final quarter of law school[65] and was guaranteed the right to complete that quarter.[66] Should more time be required for him to complete the requirements for graduation, however, no further guarantees were made.[67] The Court held that since this was the case, "[t]he controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relation of parties having adverse legal interests.' "[68] In other words, Defunis' injury had ceased to exist because of (1) the passage of time (2) his progress in law school and (3) the "professional representation" to the Court by counsel for the University that no matter what decision the Court might make, Defunis would be allowed to complete the present quarter of law school,[69] which barring unforeseen circumstances would allow him to complete the requirements for graduation. Thus, absent injury, there was no case or controversy.[70]

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62. Honig v. Doe, 108 S.Ct. 592, 607 (1988) (Rehnquist, C.J., concurring). "That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires." *Honig*, 108 S. Ct. at 601 (Case citations omitted).

63. 416 U.S. 312 (1974).

64. *Id.* at 314-15.

65. *Id.* at 315-16.

66. *Id.* at 316.

67. *Id.* at 348 (Brennan, J., joined by Douglas, White and Marshall, JJ., dissenting).

68. *Id.* at 317 (Case citation omitted).

69. *Id.*

70. Because [Defunis] will complete his law school studies at the end of the term for which he is now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Article III of the Constitution consider the substantive constitutional issues tendered by the parties.

The Court has, however, carved out four exceptions to this mootness rule which, since they cannot legally rest on some policy basis such as great public importance[71] must logically be based on a theory of continuing injury in spite of apparent mootness. The first of these is "capable of repetition yet evading review."[72] Undoubtedly, the leading case to apply this exception is *Roe v. Wade*.[73] Given the nine month human gestation period, there is virtually no way a pregnancy would not have terminated before a case could reach the Supreme Court. Based on *Roe* and earlier cases,[74] a sufficient threat of future injury apparently continues to meet that prong of the case or controversy requirement.[75] "Pregnancy often comes more than once to the same woman. . . ."[76]

A second exception is the voluntary cessation by the defendant of the alleged unconstitutional activity.[77] It should be noted that the Court in *Defunis* clearly distinguished the university counsel's representation to the Court[78] from "a voluntary cessation

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Id. at 319.

The Court brushed off suggestions by the dissenting justices that some event might preclude Defunis from completing the final quarter as "speculative contingencies" and thus not, presumably, a sufficient injury for the minimum requirements of case or controversy. *Id.* at 320, n. 5.

71. For example, in *Defunis*, the Court pointed out this difference in the exercise of federal judicial power under its case or controversy limitation and that of the courts of Washington.

> Although as a matter of Washington state law it appears that this case would be saved from mootness by 'the great public interest in the continuing issues raised by this appeal,' . . . the fact remains that under Art. III, '[e]ven in cases arising in state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction.'

Defunis, 416 U.S. at 316 (Case citations omitted).

72. *See, e.g.*, Super Tire Eng'g. Co. v. McCorkle, 416 U.S. 115 (1974) (decided one week before *Defunis*).

73. 410 U.S. 113 (1973).

74. Some of these cases are collected in the *Roe* opinion, 410 U.S. at 125.

75. *See supra* text accompanying note 42.

76. *Roe*, 410 U.S. at 125.

77. "There is a line of decisions in this Court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" *Defunis*, 416 U.S. at 318 (citations omitted).

78. "The [law school through its counsel has] professionally represented that in no event will the status of *Defunis* now be affected by any view this Court might express on the merits of this controversy." 416 U.S. at 318.

of the admission practices complained of"[79] without some considerable degree of certainty that the activity would not be recommenced.[80] Here again, although the Court did not directly touch upon it, the only constitutional basis for this mootness exception is the threat of continuing injury.[81]

The third exception is the case of the class action where although moot as to the class representative, the controversy remains alive because of the continuing injury to the members of the class.[82]

The fourth exception involves continuing consequences such as those involved in a felony conviction. In *Caraffas v. LaVallee*,[83] the Supreme Court held that review of a denial of a prisoner's habeas corpus petition was not mooted by his subsequent release from custody, both actual imprisonment and the quasi custody of parole. His continuing loss of such things as civil liberties and difficulty finding employment constituted a continuing injury.[84]

The potential flaw in all but the fourth of the mootness excep-

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79. *Id.*

80. *Id.*

81. There must be "no reasonable expectation that the wrong will be repeated," because if there is no such expectation "the defendant is free to return to his old ways." *Defunis*, 416 U.S. at 318 (citation omitted). Of course, if the defendant did "return to his old ways," the original injury would be renewed. It must here be conceded that the Court gave a disturbing rationale for this exception. "This fact [freedom of the defendant to "return to his old ways"] would be enough to prevent mootness because of the 'public interest in having the legality of the practices settled." *Id.* That cannot be a valid reason for this exception to mootness in federal courts. Otherwise, the Court would be basing the exception on nothing more than the importance of the question presented, which it conceded it could not do earlier in the opinion. *See supra* note 71. It must be noted, however, that this "public policy" factor in exceptions to the mootness doctrine simply will not go away. Justice Scalia in his dissent in Honig v. Doe, 108 S. Ct. 592 (1988) seemed to accept in some limited situations the constitutional validity of substituting for the requisite degree of certainty of continuing injury, "dispensing with the same-party requirement entirely [while] focusing instead upon the great likelihood that the issue will recur *between the same defendant and the other members of the public at large* without ever reaching us." 108 S.Ct. at 611-12. (Scalia, J., joined by O'Connor, J., dissenting) (emphasis added). He found that "[a]rguably, those cases have been limited to their facts or to the narrow areas of abortion and election rights. . . ." 108 S.Ct. at 611.

82. "Although the controversy is no longer alive [i.e., it is moot] as to appellant. . . it remains very much alive for the class of persons she has been certified to represent." Sosna v. Iowa, 419 U.S. 393, 401 (1975).

83. 391 U.S. 234 (1968).

84. *Id.* at 239.

tions is the *speculative nature*[85] of the supposed continuing injury. In other words, are the mootness exceptions ripe? For example, in the *Roe v. Wade*[86] "capable of repetition" exception, does the fact that "pregnancy often comes more than once to the same woman"[87] actually provide the basis for finding a continuing injury? Would such an injury not be *speculative* unless a woman such as Roe could prove a reasonable likelihood that she was capable of sustaining an unwanted pregnancy and could or would not take steps to prevent it, before the threat of a state anti-abortion statute would represent a continuing injury such as a chill on sexual intercourse?

Is it not *speculative* to say that a voluntary cessation of alleged unconstitutional activity[88] leaves intact a viable injury when resumption of the activity is only a possibility? Or, does the potential of resumption create enough chill for injury?

As to class actions,[89] are not injuries to certified members of a class *speculative* as well? Who would have been the members of the class if, for example, Marco Defunis[90] had tried to create one? How could a court be sure, for example, that such class members would maintain their applications to the University of Washington Law School rather than go elsewhere?

Only the fourth exception[91] is the one that truly has no ripeness difficulty. Continuing ramifications of a felony conviction are injury in the purest sense of the word.

In summary, the argument is that to the extent that the mootness exceptions depend on *speculative* future injury they are simply not ripe. In *Honig v. Doe*,[92] this concept was flirted with by the majority, a concurring opinion and the dissent.

The majority opinion found that the case was not moot because it was "capable of repetition yet evades review"[93] because

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85. *See supra* note 70.

86. 410 U.S. 113 (1973).

87. *Id.* at 125.

88. *See supra* text accompanying notes 76-80.

89. *See supra* text accompanying note 80.

90. *See supra* text accompanying notes 62-69.

91. *See supra* text accompanying note 82.

92. 108 S.Ct. 592 (1988). This case involved an alleged deprivation of federal rights under the Education of the Handicapped Act. Since the person entitled to the benefits under E.H.A. was, at the time the case was heard by the Supreme Court, not being deprived of any benefits although he allegedly had been when the litigation began, it was possible that the case had become moot. *Id.* at 601.

93. *Id.*

there was "a sufficient likelihood that [the plaintiff] will again be wronged in a similar way."[94] The inherent ripeness problem of speculation regarding future potential injury was dealt with simply in terms of how great the likelihood has to be.[95] The word ripeness was not mentioned.

Chief Justice Rehnquist in "writing separately" on the mootness issue argued that even though modern Supreme Court precedent has predicated the mootness doctrine on the lack of the injury component of case or controversy[96] the doctrine is really no more than a Barrier IV rule of prudence to which the Court can make any exceptions it wishes.[97]

Justice Scalia, joined by Justice O'Connor in dissent on the mootness issue, differed with both the majority and Chief Justice

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94. *Id.* at 604. Also, the Court felt that it was reasonable to assume that the beneficiary of the rights conferred by the E.H.A. would again seek to exercise them even though at present he was not doing so. 108 S.Ct. at 602, n. 6.

95. The Court conceded that: "for purposes of assessing the likelihood that state authorities will re-inflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *See* Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or other offense, or would resist arrest if stopped); Murphy v. Hunt, 455 U.S. 478, 484 (1982) (no reason to believe that party challenging denial of pre-trial bail "will once again be in a position to demand bail"); O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing and jury-fee practices would again violate valid criminal laws). *Honig*, 108 S. Ct. at 602.

However, in *Honig*, the Court was willing to find that an emotionally handicapped child did run a sufficient risk of engaging in the type of disruptive behavior that had lead to his alleged loss of federally guaranteed rights in the first place. *Id.* at 602.

96. "The Court implies in its opinion, and the dissent expressly states, that the mootness doctrine is based upon Art. III of the Constitution. There is no doubt that our recent cases have taken that position." *Honig*, 108 S.Ct. at 607 (Rehnquist, C.J., concurring).

97. But it seems very doubtful that the earliest case I have found discussing mootness, Mills v. Green, 159 U.S. 651 (1895), was premised on constitutional restraint; Justice Gray's opinion in that case nowhere mentions Art. III.

. . . .

The logical connection to be drawn [from various mootness cases and from the "historical development"] of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden when there are strong reasons to override it.

108 S.Ct. at 607-08 (Rehnquist, C.J., concurring).

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Rehnquist. Their difficulty with the majority was that its standard for deciding "capable of repetition" was too speculative[98] while they differed with the Chief Justice on his view that mootness should not be a function of case or controversy.[99]

The ripeness issue could be met head-on by the simple recognition by the Court that the degree of speculation as to future injury inherent in (1) "capable of repetition yet evading review,"[100] (2) "voluntary cessation,"[101] and perhaps "class actions" as well,[102] should be governed by the ripeness principles described above.[103] A very high degree of necessary speculation about future injury should indicate that there is no injury in the case or controversy sense and thus there could be no exception to the mootness doctrine as a matter of constitutional requirement.[104] A moderate degree of necessary speculation would indicate that the Court could find a mootness exception because the injury requirement of case or controversy would be met but would not do so because of Barrier IV ripeness considerations.[105] Little or no necessary speculation would suggest that the Court should apply the mootness exception because even the Barrier IV ripeness considerations could be considered satisfied.[106]

G. Barrier II, Parts 4 and 5. Taxpayer Standing and Citizen Standing: A Confusing Dichotomy

In *Frothingham v. Mellon*,[107] the Supreme Court held that a federal taxpayer did not have a sufficient interest in federal expen-

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98. "I am surprised by the Court's contention fraught with potential for future mischief that 'reasonable expectation' is satisfied by something less than 'demonstrated probability.' 108 S. Ct. at 609 (Scalia, J., joined by O'Connor, J., dissenting).

99. "There is no more reason to intuit that mootness is merely a prudential doctrine than to intuit that initial standing is." 108 S. Ct. at 612 (Scalia, J., joined by O'Connor, J., dissenting).

100. *See supra* text accompanying notes 72-75.

101. *See supra* text accompanying notes 77-81.

102. *See supra* text accompanying note 82.

103. *See supra* text accompanying notes 57-61.

104. *See supra* text accompanying note 57.

105. *See supra* text accompanying notes 58-59.

106. *See supra* text accompanying notes 60-61.

107. 262 U.S. 447 (1922) (taxpayer claiming that the expenditure of federal funds to reduce maternal and infant mortality was beyond the scope of federal power and thus was a deprivation of her due process rights under the Fifth Amendment).

diture of tax monies to challenge such an expenditure as violating the Constitution.[108] Fifty-one years later the Court held in *Schlesinger v. Reservists Committee to Stop the War*[109] that alleged violations of the Constitution by the federal government which had virtually the same effect on every citizen did not provide citizens an interest sufficient to challenge such alleged violations.[110] The two cases together stand for the proposition that an injury suffered by all or a large percentage of the citizenry of the United States is not the type of injury that federal courts will normally consider, whether the plaintiff sues as taxpayer or citizen or in both capacities. The constitutional rationale behind this refusal to consider this class of case is far from clear. Neither opinion firmly sets out the basis for the Court's holdings. They could either be predicated on lack of sufficient injury to create a case or controversy[111] or on prudential discretionary limits created by the Court itself.[112]

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108. "[The taxpayer's] interest in monies of the treasury . . . is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." 262 U.S. at 487.

109. 418 U.S. 208 (1974). The Committee and certain of its members sued in their capacity as both citizens and taxpayers to bar members of Congress from holding commissions in the armed forces reserves of the United States because, it was claimed, such dual office holding violated the Incompatibility Clause (U.S. CONST. art. I, § 6, cl. 2). The clause provides that "no Person holding any office under the United States, shall be a member of either House [of Congress] during his Continuance in Office." Since, as will be seen, by 1974 the issue of taxpayer standing had been resolved in Flast v. Cohen, 398 U.S. 83 (1968). *Schlesinger* is principally important for its discussion of citizen standing, although it did discuss the status of the Committee members as taxpayers also. *Flast* was found to be controlling. 418 U.S. at 227-28.

110. "[I]t can only be a matter of speculation whether the claimed violation has caused a concrete injury to the particular complainant." 418 U.S. at 223.

111. *See supra* text accompanying note 43.

112. The opinion delivered in *Frothingham* can be read to support either position. The concluding sentence of the opinion states that, to take jurisdiction of a taxpayer's suit, "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority we plainly do not possess." *Frothingham*, 262 U.S. at 489. Yet, the concrete reasons for denying standing to a federal taxpayer suggest that the Court's holding rests on something less than a constitutional foundation.

The Court's opinion in *Schlesinger*, like that in *Frothingham*, spoke partially in terms of insufficient injury for case or controversy, finding that "whatever else the 'case or controversy' requirement embodied, its essence is a requirement of 'injury in fact.' . . . And in defining the nature of that injury, we have only re-

The rationale for the taxpayer standing rule now appears to be settled[113] although in a less than satisfactory manner.[114] The same cannot be said for citizen standing. To the extent that the basis for citizen standing differs from that for taxpayer standing, severe explanatory problems exist because both standing rules are predicated on the diffuse nature of the injury.

The case principally responsible for finally deciding that federal taxpayers normally have no standing because they suffer no injury in the case or controversy sense is *Flast v. Cohen*.[115] After deciding that a fresh examination of the issue originally decided in

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cently stated flatly: 'Abstract injury is not enough.' [citation omitted]." 418 U.S. at 218-19. In spite of this seemingly clear statement that a generalized grievance is not an injury within the meaning of case or controversy, the *Schlesinger* opinion also proceeded to justify its holding on what are essentially prudential grounds. "[T]he requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily." 418 U.S. at 221. "[T]he discrete factual context within which the concrete injury occurred on is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied." 418 U.S. at 222. As early as 1936, the *necessity* of deciding a particular constitutional question and the *breadth of the issue decided* were clearly recognized as Court-created rules of prudence and not limitations imposed by the case or controversy requirements of the Constitution.

The Court developed, for its own governance in . . . cases confessedly within its jurisdiction [i.e. where there *is* a case or controversy], a series of rules under which it has avoided passing upon a large part of the constitutional questions pressed upon it for decision. Included among them are:

. . . .

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it [citations omitted] . . . ."

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. [citations omitted]."

Ashwander v. Tennessee Valley Auth., 297 U.S. 288 at 346-47 (1936) (Brandeis, J., joined by Stone, Roberts and Cardozo, JJ., concurring).

Some of the case authority cited in the "Ashwander Rules" has been criticized as actually "articulat[ing] purely constitutional grounds for decision." Flast v. Cohen, 392 U.S. 83, 97 (1968). Nevertheless, the Court in *Flast* clearly recognized that Justice Brandeis was speaking of rules of prudence and not commands of the Constitution. *Id.*

113. *See infra* text accompanying notes 114-25.

114. *See infra* text accompanying notes 130-39.

115. 392 U.S. 83 (1968). A federal taxpayer sued, in that capacity, to challenge a federal expenditure as allegedly in violation of the Establishment Clause of the First Amendment. The challenged federal funds were being used to provide certain assistance to private schools affiliated with particular religious faiths.

Frothingham[116] was appropriate,[117] the court opted for the view that, as a general rule, a taxpayer suffered no injury sufficient to create a case or controversy.[118] Thus, in order to meet the injury component of case or controversy,[119] the Court created a two-part test for taxpayer litigants to meet. It is commonly known as the "dual nexus test." The first nexus required that the federal activity challenged as unconstitutional by the taxpayer be based on the federal power to tax and spend[120] and on no other federal power.[121] The relevancy of this nexus to the injury required for Case or Controversy is that taxpayers suffer an injury linked to that status when the alleged violation is based on the power to tax and spend.[122]

The second nexus required that "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[123] The explanation given for the relevancy of this nexus is the perceived peculiar status of the Establishment Clause in relation to the power

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116. *See supra* text accompanying note 107.

117. *Flast*, 392 U.S. at 94.

118. The Court spoke in terms of the "circumstances" necessary "so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III." 392 U.S. at 101.

119. The *Flast* Court found that " '[t]he gist of the question of standing' is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to insure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " 392 U.S. at 99 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). The Court in *Baker* recognized that the crux of "personal stake in the outcome of controversy" is that the plaintiff has suffered "a legally cognizable injury." 369 U.S. at 208. This connection between "personal stake in the outcome of the controversy" and "injury" is firmly established by the Court in Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978). The Court there recognized that "this requirement of a 'personal stake' has come to be understood to require . . . 'a distinct and palpable injury' to the plaintiff." 438 U.S. at 72, (citing Warth v. Seldin, 422 U.S. 490, 501 (1975)).

120. 392 U.S. at 102.

121. "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.* Thus, federal expenditures in support of the exercise of its regulatory powers under, for example, the Commerce Clause would not satisfy this first nexus.

122. The Court spoke of the "logical link between [the litigant's status as taxpayer] and the type of legislative enactment attacked." *Id.*

123. *Id.* at 102-03.

to tax and spend.[124] A far more obvious, but of course unstated, reason is to distinguish *Flast* from *Frothingham*[125] and thus continue intact the constitutional bar to taxpayer suits in all cases except those that involve an alleged violation of the Establishment Clause by Congress in the exercise of its power to tax and spend.[126]

The Court has reiterated this view of the basis for its taxpayer standing rule in *Valley Forge Christian College v. Americans United for Separation of Church and State*,[127] thus reinforcing the view that the general lack of taxpayer standing is a function of case or controversy rather than a rule of prudence and that only when a taxpayer satisfies both halves of the dual nexus test will he be deemed to have suffered the requisite injury.

The status of citizen standing is less well settled. The current

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124. "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103.

125.

> [Ms. Frothingham] lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing and spending power. The taxpayer in *Frothingham* alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Art. I, Sec. 8, and that Congress had thereby invaded the legislative province reserved to the states by the Tenth Amendment. To be sure, Mrs. Frothingham made the additional allegation that her tax liability would be increased as a result of the allegedly unconstitutional enactment, and she framed that allegation in terms of a deprivation of property without due process of law. However, the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability, and the taxpayer in *Frothingham* failed to make any additional claim that the harm she alleged resulted from a breach by Congress of specific constitutional limitations on the taxing and spending power.

Id. at 105.

126. The narrowness of this opinion is emphasized, perhaps in a way the *Flast* Court would have found distasteful, in Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). There the Court held that a gift of land from the federal government to a college with a religious affiliation did not meet the dual nexus test since the federal power to dispose of the land was not based on the power to tax and spend, but on the power to dispose of federal property. *Id.* at 479-80.

127. 454 U.S. 464 (1982). "Any doubt that once might have existed concerning the rigor with which the *Flast* exception to the *Frothingham* principle ought to have been erased by this Court's recent decisions in United States v. Richardson, 418 U.S. 166 (1974) and Schlesinger v. Reservists Comm. to Stop the War, [418 U.S. 208 (1974)]." *Id.* at 481.

major proponent of the view that an injury suffered by all or a large part of the citizenry of the United States will not create injury in the case or controversy sense is Chief Justice Rehnquist. His principal vehicle for expression of this view was also *Valley Forge Christian College v. American United for Separation of Church and State*.[128] After disposing of the taxpayer standing issue in that case[129] he handled the citizen standing issue on the same general theory — a generalized grievance is not sufficient injury to create a case or controversy.[130] Thus, it is easily possible to conclude and probably correctly conclude, that *Flast* and *Valley Forge* together are dispositive of both the taxpayer and citizen standing issues: in both situations a generalized taxpayer or citizen grievance does not create sufficient injury to satisfy case or controversy with the single exception being satisfaction of the dual nexus test in the taxpayer standing cases.

This view has not gone unchallenged. Most recently, Justice Powell has been critical of the Court's stance in the taxpayer standing cases. His views also represent weighty (but probably no longer controlling) authority that the generalized grievance issue in citizen standing cases is a rule of prudence and not an issue involving case or controversy.

For Justice Powell, the quintessential devil[131] in the whole spectrum of generalized grievance issues was the Court's opinion in *Flast v. Cohen*.[132] He believed, and not without cause,[133] that, prior

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128. *Id.* at 464.

129. *See supra* notes 125-26 and accompanying test.

130.

> Although [Americans United for Separation of Church and State] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms.

Id. at 485-86 (the emphasis is the court's).

131. These words are, of course, borrowed from *Star Trek IV* where they were used by the Klingon Ambassador to the Federation to describe Admiral James T. Kirk.

132. 392 U.S. 83 (1968).

133. Consider, for example, three pre-*Flast* cases cited by the Court in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 219-20 and n.8 (1974); *Ex parte* Levitt, 302 U.S. 633 (1937); Fairchild v. Hughes, 258 U.S. 126 (1922); and Tiler v. Judges of Court of Registration, 179 U.S. 405 (1900). All of these cases hold that a generalized grievance will not support the exercise of fed-

to *Flast*, this problem was treated by the Court as a discretionary, prudential rule.[134] He further believed that not only was the *Flast* opinion absurd,[135] it had, by 1974, infected citizen as well as taxpayer standing.[136] He went so far the next year, in writing the opinion for the Court in *Warth v. Seldin*,[137] as to characterize, arguably in dicta, citizen standing as a rule of prudence,[138] while re-

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eral judicial power but none of them remotely suggest that the reason is case or controversy. And then there is *Frothingham* itself, also cited by the Court in *Schlesinger* which even the Court in *Flast* conceded could have been based on prudence rather than the Constitution. *See supra* note 112. Thus, the outcome of the "fresh look" taken at the generalized grievance issue in *Flast* was the seminal error.

134. He spoke of "pre-*Flast* prudential limitations on federal and citizen taxpayer standing." United States v. Richardson, 418 U.S. 166, 184 (1974) (Powell, J., concurring). What he probably meant to say was "federal *taxpayer* and citizen standing" but unfortunately he cited no cases as examples of such pre-*Flast* cases (emphasis supplied).

135. Relying heavily on Justice Harlan's dissent in *Flast*, Justice Powell commented:

> In my opinion, Mr. Justice Harlan's critique of the *Flast* "nexus" test is unanswerable. As he pointed out, "the Court's standard for the determination of standing [i.e. sufficiently concrete adverseness] and its criteria for the satisfaction of that standard are entirely unrelated" [392 U.S.] at 122. Assuming that the relevant constitutional inquiry is the intensity of the plaintiff's concern, as the Court initially posited [392 U.S.] at 99, the *Flast* criteria "are not in any sense a measure of any plaintiff's interest in the outcome of any suit." [392 U.S.] at 121 (Harlan, J., dissenting). A plaintiff's incentive to challenge an expenditure does not turn on the "unconnected fact" that it relates to a regulatory rather than a spending program, [392 U.S.] at 122, or on whether the constitutional provision on which he relies is a "specific limitation" upon Congress' spending powers [392 U.S.] at 123.

United States v. Richardson, 418 U.S. 166, 183 (1974) (Powell, J., concurring).

136. *See supra* note 133.

137. 422 U.S. 490 (1975).

138.

> Apart from this minimum constitutional mandate [injury sufficient for Case or Controversy], this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. *E.g.*, Schlesinger v. Reservists to Stop the War [418 U.S. 208 (1974)]; United States v. Richardson, [418 U.S. 166 (1974)]; *Ex Parte* Levitt, 302 U.S. 633, 634 (1937). [Here Justice Powell included third party standing which even Chief Justice Rehnquist has conceded is essentially a rule of prudence. *See infra* note 184.] Without such limita-

luctantly, as he almost had to, conceding that taxpayer standing was a constitutional issue.[139] The Rehnquist opinion for the Court in *Valley Forge*[140] has, however, probably made this thought regarding citizen standing obsolete.[141]

H. Barrier II, Part 6. Collusive Lawsuits

Although *Muskrat v. United States*[142] may be thought of as collusive to some extent,[143] what is probably the prototype and perhaps the only reasonably well-known example of the true collusive lawsuit is *Hylton v. United States.*[144] The federal government wished to know whether a recently enacted tax on carriages was constitutional. It made a deal with Daniel Hylton that if he would agree to be the defendant in a suit by the government for nonpayment of the tax, the government would pay for his counsel both before the federal trial court and Supreme Court. In order to meet the monetary jurisdiction of the trial court, the government stipulated that Hylton owned 125 carriages rather than the one he actually owned. It further agreed that if the tax was found to be constitutional, Hylton would only be liable for the $16 tax on one carriage, rather than for $2000, the figure for 125 carriages. The $16 tax represented no real injury to Hylton because he conceded that his goal was not to avoid the tax, but merely to test its constitutionality.[145]

> tions — closely related to Art. III concerns but essentially matters of judicial self-governance — the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

Id. at 499-500.

139. The taxpayer standing case, *Flast* is notably lacking from Justice Powell's list of prudential generalized grievance cases. *See supra* note 138.

140. 454 U.S. 464 (1982).

141. *See supra* text accompanying note 129.

142. 219 U.S. 346 (1911). *See supra* note 38 and accompanying text.

143. The government had agreed to pay Muskrat's attorney's fees if he lost and it had no real adverse interest. *See supra* note 38. Nevertheless, Muskrat did suffer a real injury in that if the Act of Congress was upheld, his property interests would be reduced.

144. 3 U.S. (Dall.) 171 (1796). The Supreme Court ignored its collusive nature.

145. The narrative description of this case is taken from C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, I, 147-48 (2 vols. rev. ed. 1926).

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I. Barrier III, Part 1. Justiciability In General

In distinguishing federal jurisdiction, Barriers I and II from Barrier III, the Supreme Court has acknowledged that "[i]n the instance of nonjusticiability, . . . the Court's inquiry necessarily proceeds [in effect through Barriers I and II] to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."[146] Beyond the political question doctrine which is discussed below,[147] very little is known about the boundaries of those issues which are considered to be non-justiciable.[148] The Court's description in *Powell v. McCormack*[149] adds little to our knowledge of those boundaries and, indeed, arguably makes them even more vague in that it tends to suggest that rather than be merely an example of nonjusticiability as indicated by the Court's opinion in Baker,[150] the political question doctrine is a totally distinct step in the justiciability inquiry.[151]

Returning to the Court's discussion in *Baker* of those things that destroy justiciability,[152] Justice Frankfurter's dissent in *Baker*, although not an accurate prediction of the impact of the

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146. Baker v. Carr, 369 U.S. 186, 198 (1962). (Court finding that an Equal Protection challenge to a malapportioned state legislature was justiciable in that sense).

147. *See infra* text accompanying notes 155-61.

148. As far as the author can determine, *Baker*'s discussion of non-justiciability is limited to cases that involve in one way or another the political question doctrine. For example, the Court warned that "it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render the Guaranty Clause claims nonjusticiable as actually to present a political question itself." 369 U.S. at 227. Nevertheless, the Court made it quite clear that the political question doctrine was one example of a nonjusticiable question when it spoke of the "nonjusticiability of a political question." 369 U.S. at 210.

149. 395 U.S. 486 (1969).

150. *See supra* note 147.

151. Two determinations must be made [in determining justiciability]. First, we must decide whether the claims presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a "political question" — that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution.

395 U.S. at 516-17.

152. *See supra* text accompanying note 146.

Court's decision in *Baker*,[153] set out some of those elements that should concern a court when it considers whether or not a claim under the Constitution is justiciable.

> The Court's authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction. Such feelings must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.
>
> . . . .
>
> [The majority opinion] conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary.
>
> . . . .
>
> [For the Court to believe that state legislatures would reapportion based on the mere pronouncement by the Court that such an issue is justiciable under the Equal Protection Clause] implies a sorry confession of judicial impotence in place of a frank acknowledgement that there is not under our Constitution a judicial remedy for every undesirable exercise of legislative power. . . . [A]ppeal for relief does not belong here.[154]

J. Barrier III, Part 2. The Political Question Doctrine

The doctrine, as distilled by the Court from varying applications of it, was succinctly stated in *Baker v. Carr*:[155]

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

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153. *See* Reynolds v. Simms, 377 U.S. 533 (1964).

154. *Baker*, 369 U.S. at 267-70. (Frankfurter, J., joined by Harlan, J., dissenting). "Ducks and drakes" is "[t]he ricocheting or rebounding of a stone to skim along the surface of a pond." I. EVANS, BREWER'S DICTIONARY OF PHRASE AND FABLE, 348 (Centenary ed. 1970).

155. 369 U.S. 186 (1962).

> without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[156]

Examples given by the Court of actual political questions include the foreign relations of the United States,[157] dates of duration of hostilities,[158] and the Guaranty Clause.[159] To the extent that the Court believes that the considerations it described above[160] apply to those issues, they represent nonjusticiable political questions. That the political question doctrine is but one example of the larger issue of nonjusticiability, although perhaps the only identifiable one, is illustrated by inclusion among those things that make a question political, the lack of competence to decide such a question.[161]

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156. *Id.* at 217.

157. *Id.* at 211-13. The Court conceded that "[n]ot only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the government's views." *Id.* at 211. Nevertheless, not all cases involving foreign relations are political questions. "Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law." *Id.* at 212.

158. *Id.* at 213-14. "Dominant [in this area] is the need for finality in the political determination, for emergency's nature demands "a prompt and unhesitating obedience." *Id.* at 213 (citation omitted). "But deference rests on reason, not habit." *Id.*

159. Art. IV, § 4 of the United States Constitution provides that "the United States shall guarantee to every State in this Union a Republication Form of Government." U.S. Const. art. IV § 4. Ever since Luther v. Borden, 48 U.S. (7 How.) 1 (1848) it has been consistently held that this provision is nonjusticiable in that its scope is a political question. 369 U.S. at 223. The Guaranty Clause presents a political question for several reasons, including "the commitment to the other branches of" the federal government the application of that clause and "the lack of criteria by which a court could determine which form of government was republican." 369 U.S. at 222.

160. *See supra* text accompanying note 156.

161. "[T]he Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful conduct." Baker v. Carr, 369 U.S. 186, 223 (1962). *See also supra* note 157.

K. Barrier IV, Part 1. The Seven Ashwander Rules

As has already been alluded to three times,[162] Justice Brandeis in 1936 identified seven instances in which the Court, even though it had jurisdiction,[163] would normally, as a matter of discretion, decline to exercise judicial review.[164] The first *Ashwander* Rule[165]

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162. *See supra* notes 47, 56 and 112.

163. In the language of the diagram, all of the limitations of the first three barriers had been passed.

164. In addition to the two rules found *supra* in note 112, the additional five rules stated by Justice Brandeis in Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., joined by Stone, Roberts and Cardozo, JJ., concurring), are set out below.

> 1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry into the constitutionality of a legislative act."

Ashwander, 297 U.S. at 346 (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)) (other case citations omitted).

It should be noted at this point that the statement by the Court in Flast v. Cohen, 392 U.S. 83, 97 that *Wellman* "articulated purely constitutional grounds for decision" is simply incorrect regarding the context in which it was used by Justice Brandeis.

> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. [Examples and citations to case authority omitted.]
>
> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

Ashwander, 297 U.S. at 347.

Among other cases cited by Justice Brandeis is Fairchild v. Hughes, 258 U.S. 126 (1922). The other examples and citations to case authority are omitted. Here the criticism by the *Flast* court, 392 U.S. at 97, is correct. *Hughes* can be fairly read to say that the citizen standing rule is predicated on the constitutional limitations of case or controversy and not on some prudential rule. This would seem to strengthen the case of Chief Justice Rehnquist's view that citizen standing belongs in *Barrier II*. *See supra*, text at notes 128-30. It also creates substantial doubts whether the fifth *Ashwander* rule is correctly considered a rule of prudence. Nevertheless, this rule was cited with approval, along with the others, in Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947).

> 6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. [Citations to case authority omitted.]

Ashwander, 297 U.S. at 348.

> 7. When the validity of an act of Congress is drawn in question, and even

which pertains to "friendly, non-adversary proceedings" could be used to explain the continuing vitality of *Muskrat v. United States*.[166] As suggested above,[167] "[I]t is certainly arguable that while today the Court might refuse to hear a case like *Muskrat*, it would do so as a matter of Barrier IV prudence and not for lack of a case or controversy.

As was also suggested above,[168] the ripeness problem is best resolved as being in part a rule of prudence. The second *Ashwander* Rule[169] regarding not deciding constitutional questions before they absolutely have to be decided is the most obvious explanation for the Court's refusal to decide, on ripeness grounds, a case where the plaintiff suffers sufficient injury to meet the requirements of case or controversy.[170] Thus, in *United Public Workers v. Mitchell*,[171] the Court refused to adjudicate the constitutional claims of the federal employees who had not actually violated the Hatch Act but, in effect, desired to.[172] There is language in the *Mitchell* opinion that suggests that the decision was based on absence of case or controversy, but also wording that suggests the application of a prudential rule.[173] Given the rather amorphous nature of the *Ashwander* ripeness rule, "in advance of the necessity of,"[174] the soundness of Professor Gunther's view of the two-pronged nature of ripeness[175] and the evolution of the Court's views on ripeness,[176]

> if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Ashwander, 297 U.S. at 348-49 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1982)).

165. *See supra* note 164.

166. 219 U.S. 346 (1911).

167. *See supra* note 41.

168. *See supra* text accompanying notes 59 & 61.

169. *See supra* note 47.

170. *See supra* text accompanying note 43.

171. 330 U.S. 74 (1947).

172. *See supra* text accompanying note 58.

173. *See supra* text accompanying notes 55 & 56.

174. *See supra* note 56.

175. *See supra* text accompanying note 48.

176. Two of the ripeness cases used by Professor Rotunda illustrate the point. R. ROTUNDA, MODERN CONSTITUTIONAL LAW (3d ed. 1989) pages 1026-29. In International Longshoremen's and Warehousemen's Union v. Boyd, 347 U.S. 222 (1954), the Court found that a threatened interpretation of federal law that would have "treat[ed] aliens domiciled in the continental United States returning from temporary work in Alaska as if they were aliens entering the United States for the

it seems reasonable to conclude that *Mitchell* actually represents an application of *Ashwander*. It was unnecessary to decide the constitutionality of the Hatch Act until it was actually violated. Thus, the case was only ripe in the *Ashwander* sense as to the one

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first time," 347 U.S. at 222-23, was not sufficiently ripe for judicial review. This lack of ripeness was based on, in the Court's view, an absence of a case or controversy. *Id.* at 223. The suit was, "an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable." 347 U.S. at 224. And yet, in spite of the incantation of the phrase case or controversy, the Court also used language similar to the *Ashwander* ripeness rule. "Determination of the scope and constitutionality of legislation involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Id.* Not surprisingly, the Court cited United Pub. Works v. Mitchell, 330 U.S. 75 (1947). *See supra* text accompanying notes 47 & 48.

As the *Boyd* dissent points out, at the time the suit was filed, none of the domiciled aliens had left for Alaska to work there for the summer, but the government had announced that it intended to interpret the law such that upon seeking to return from Alaska the domiciled aliens would be treated like aliens seeking initial entry in the 48 states. 347 U.S. at 225 (Black, J., joined by Douglas, J., dissenting). And, by the time the case reached the Supreme Court,

> [a]ll 1953 alien cannery workers have actually been subjected to the wearisome routine of immigration procedure as though they had never lived here. And some of the union members are evidently about to be denied the right even to return to their homes on grounds that could not have legally been applied to them had they stayed in California or Washington instead of going to Alaska to work for an important American industry.

347 U.S. at 226 (Black, J., joined by Douglas, J., dissenting).

Even if it wasn't "necessary to decide" the constitutionality of the statute as interpreted by the responsible government officials, there was certainly sufficient injury to warrant treating the majority opinion as an exercise of the *Ashwander* ripeness rule. And, one wonders at even the lack of necessity in deciding, given the facts as recited by Justice Black. Perhaps necessity would only occur in the case of those workers who were actually denied re-entry into the 48 states.

The second case used by Professor Rotunda strengthens this view. In Steffel v. Thompson, 415 U.S. 452 (1974), the Court found that a government threat to prosecute Steffel if he again engaged in distributing handbills protesting the United States involvement in Vietnam (an activity he claimed to be protected by the First Amendment) presented a real danger of arrest and was thus injury sufficient to create a "case or controversy." 415 U.S. at 458-59. And since the Court remanded the case for a determination if it had become moot because of "the recent developments reducing the Nation's involvement in [Vietnam]", 415 U.S. at 460, it must have found it necessary to decide that the case was ripe in the *Ashwander* sense. It is difficult to see how since *Steffel* apparently presented a situation that was ripe not only as to Barrier II, but to Barrier IV as well, that *Boyd*, if decided today, would not pierce Barrier II even if it was ultimately stopped at Barrier IV.

government employee who had actually violated it.[177]

L. *Barrier IV, Part 2. Citizen Standing, The Powell View*

The considered opinion of Justice Powell was that citizen standing based on nothing more than an alleged violation of the Constitution that had generally the same effect on all, or at least a large percentage of citizens, was a rule of prudence because even a widespread injury was still an injury in terms of the irreducible minimum[178] for case or controversy.[179] While his opinion for the Court to that effect, *Warth v. Seldin*[180] has not been overruled, the Rehnquist view to the contrary probably represents the view that the Court holds today.[181]

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177. Today, the Court is apparently much more willing to find an injury that will make a case ripe in the case or controversy sense, and also create a necessity to decide the constitutional issue it involves. In addition to the stark contrast between the outcome in *Boyd* and *Steffel*, *supra*, note 176, separated by thirty years, consider another case closer to the *Boyd* era, Poe v. Ullman, 367 U.S. 497 (1961). There, the Court refused to consider the constitutionality of a Connecticut statute that "prohibit[ed] the use of contraceptive devices and the giving of medical advice in the use of such devices," 367 U.S. at 498 (plurality opinion), that had, for all intents and purposes, never been enforced since it became law in 1879. *Id.* at 501 (plurality opinion). The Court, although case or controversy entered into its thinking, 367 U.S. at 502, apparently based its decision primarily on the *Ashwander* ripeness rule. 367 U.S. at 502-09 (plurality opinion). The discretionary nature of the plurality opinion is reinforced by the concurrence in the judgment by Justice Brennan who cast the necessary fifth vote for the outcome. It is clearly based on prudence and not on case or controversy. 367 U.S. at 509 (Brennan, J., concurring).

178. *See supra* text accompanying note 43.

179. His view has been discussed in some detail *supra* in the text accompanying notes 131-38.

180. 422 U.S. 490 (1975).

181. *See supra* text accompanying notes 128-30 & 140-41. It is interesting to note that Chief Justice Rehnquist would apparently concede that there, at least in theory, might be a case where a generalized grievance reached the injury requirement for case or controversy. "[W]hen the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III [Case or Controversy], the Court has refrained from adjudicating 'abstract questions of wide public significance' pervasively shared and most appropriately addressed by the representative branches." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474-75 (1982) (citing Warth v. Seldin, 422 U.S. at 499).

However, the minimal lip service paid by Chief Justice Rehnquist to the possibility that a generalized grievance would amount to an inquiry that would satisfy the case or controversy requirement is substantially negated by him later in

M. Barrier IV, Part 3. Third Party Standing

Unlike taxpayer standing[182] and citizen standing,[183] there appears to be general agreement that third party standing really is, and ought to be, a rule of prudence.[184] The reason for this is perhaps best explained by Justice Brennan.

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the *Valley Forge* opinion. "The Court of Appeals was surely correct in recognizing that the Art. III requirements of standing are not satisfied by 'the abstract injury in nonobservance of the Constitution asserted by . . . citizens.' Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. at 223, n.13, . . ." *Valley Forge*, 454 U.S. at 482.

The only case that the author has been able to discover that might allow some harmonization between Chief Justice Rehnquist and Justice Powell on this issue is United States v. SCRAP, 412 U.S. 669 (1973). There the Court found that SCRAP (Students Challenging Regulatory Agency Procedure) had standing under the federal Administrative Procedures Act even though "all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here." 412 U.S. at 687. (Railroad rate increases would, through a rather long chain of causation, ultimately cause harm to the environment.) "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody." 412 U.S. at 688. That this case involved standing under the Administrative Procedures Act is of no direct relevance because Congress in the APA could not provide a party standing in federal court unless there existed a case or controversy. SCRAP can thus be harmonized with the Rehnquist view only if the generalized environmental harm at issue there can be considered a more real injury than a violation by the federal government of some constitutional limitation.

Any such attempt at harmonization is weakened because Justice Powell cited Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) and United States v. Richardson, 418 U.S. 166 (1974) as authority for citizen standing being a rule of prudence. Warth v. Seldin, 422 U.S. 490, 499-500 (1975). Chief Justice Rehnquist, on the other hand, cited these same two cases for the proposition that a generalized citizen complaint about violations of the constitution does not create a case or controversy. *Valley Forge*, 454 U.S. at 485.

182. *See supra* text accompanying notes 107-08 & 113-27.

183. *See supra* text accompanying notes 128-41 & 178-81.

184. Essentially tracking the language of Justice Powell, Chief Justice Rehnquist has conceded that:

> [b]eyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties. *Warth v. Seldin*, 472 U.S., at 499."

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474 (1982). *See also infra* note 199.

> Of course, we generally permit persons to press federal suits even when the injury complained of is not obviously within the realm of injuries that a particular . . . constitutional provision was designed to guard against. We term that circumstance one of "third party standing." In such situations, the Constitution requires us to determine whether the injury alleged is sufficiently "palpable" to fall within the contemplation of Article III. If plaintiff *has* suffered injury in fact within the contemplation of Art. III, but is *not* obviously within the reach of the particular . . . constitutional provision upon which the plaintiff founds his claim, we then bring prudential considerations to bear to determine whether the plaintiff should be allowed to maintain his action.[185]

Perhaps the case must frequently used in law school to illustrate this is *Singleton v. Wulff*.[186] There the Court identified two elements, the coming together of which would overcome prudence and allow the Court to hear the case.

> [T]he Court has looked primarily at two elements to determine whether the rule should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. . . .
>
> The other factual element to which the Court has looked is the ability of the third party to assert his own right. . . . If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent. . . .[187]

Applying these two elements, the Court found that the doctor-patient relationship had already been found to meet the first one.[188] The second element was also easily met.[189]

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185. 454 U.S. at 492, note 4 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting) (the emphasis is Justice Brennan's).

186. 428 U.S. 106 (1976).

187. *Singleton*, 428 U.S. at 114-16. (plurality opinion.)

188. The closeness of the relationship is patent, as it was in *Griswold* [v.

The general willingness of the Court to find the existence of the requisite two elements is uncertain. Justice Brennan has claimed that "we have only rarely interposed a bar to 'third-party standing,' particularly when constitutional violations are alleged."[190] However, Justice Blackmun denied in *Singleton* that decision opened the door to " 'any provider of services . . . to assert his client's or customer's constitutional rights, if any, in an attack on a welfare statute that excludes from coverage his particular transaction.' "[191]

Even though Justice Powell complained in *Singleton* that "this case may well set a precedent that will prove difficult to cabin" in that it appeared to allow standing to any provider of services injured by an act of government that violated not their constitutional rights, but those of others,[192] he went along with exactly that extension of *Singleton* in *Craig v. Boren*.[193] Only Chief Justice

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Connecticut, 381 U.S. 479 (1965)] and *Doe* [v. Bolton, 410 U.S. 179 (1973)]. A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. . . . Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against that decision.

Singleton, 428 U.S. at 117 (plurality opinion).

189. As to the woman's assertion of her own rights, there are several obstacles. For one thing, she may be chilled from such assertion by a desire to protect the very privacy of her decision by the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim.

Singleton, 428 U.S. at 117 (plurality opinion).

190. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 462, 492, n. 4. (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting).

191. Singleton v. Wulff, 428 U.S. at 118, n. 7 (plurality opinion). The plurality was responding to criticism of the dissent, 428 U.S. at 129-30. (Powell, J., joined by Burger, C.J. and Stewart and Rehnquist, JJ., concurring in part and dissenting in part).

192. *Singleton*, 428 U.S. at 129-30 (Powell, J., joined by Burger, C.J. and Stewart and Rehnquist, J.J., concurring in part and dissenting in part).

193. 429 U.S. 190 (1976). The court allowed a "licensed vendor of 3.2% beer" to sue to vindicate the equal protection claim of males between the ages of 18 and 21 (who were prohibited by law from purchasing that product while females between 18 and 21 were not) since the case of the original plaintiff had been mooted

Burger dissented as to the issue of third-party standing.

> I cannot agree that appellant . . . has standing arising from her status as saloonkeeper to assert the constitutional rights of her customers. . . . There are a few, but strictly limited exceptions [to the rule against third-party standing]; despite the most creative efforts, this case fits within none of them.
>
> . . . .
>
> Craig's successful litigation of [his constitutional rights] was prevented only by the advent of his 21st birthday. There is thus no danger of interminable dilution of those rights if [the "saloonkeeper"] is not permitted to litigate them here.
>
> . . . .
>
> It borders on the ludicrous to draw a parallel between a vendor of beer and the intimate professional physician-patient relationship which undergirded relaxation of standing rules in [Griswold v. Connecticut, 381 U.S. 479 (1965)].
>
> . . . .
>
> In sum, permitting a vendor to assert the constitutional rights of vendees whenever those rights are arguably infringed introduces a new concept of constitutional standing to which I cannot subscribe.[194]

The outcome of *Craig v. Boren* would certainly seem to vindicate the view of Justice Brennan that the Court has "rarely interposed a bar to 'third-party standing' particularly when constitutional violations are alleged."[195] Compared to earlier cases[196] where the court relied heavily on the doctor-patient relationship for satisfaction of the first prong of the two-part test used to create an exception to the usual rule against third-party standing,[197] it also apparently vindicates the view of the script-writers of Star Trek that "sometimes a man'll tell his bartender things he'll never tell his doctor."[198]

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when he turned 21.

194. *Craig*, 429 U.S. at 215-16 (Burger, C.J., dissenting).

195. *See supra* text accompanying note 190. This view should not be altered by the fact that the lower court had already decided the equal protection issue only to have Craig turn 21 before the Supreme Court could decide that issue. *Craig*, 429 U.S. at 192-94.

196. *See supra* note 188.

197. *See supra* text accompanying note 187.

198. Dr. Phillip Boyce to Captain Christopher Pike in "The Menagerie." Quoted in S. SACKETT, F. GOLDSTEIN & S. GOLDSTEIN, STAR TREK SPEAKS (1979).

In any event, the rule is beyond question a prudential one[199] that is at the sole discretion of the Court so long as the plaintiff suffers injury sufficient to satisfy case or controversy and has a likelihood of redress,[200] even though that likelihood is predicated not on his constitution rights, but on those of a third party who also meets the case or controversy requirements.

N. Barrier IV, Part 4. Adequate and Independent State Ground

It would, perhaps, have been possible to deal with this topic under the "federal question" limitation in Barrier I.[201] I did not choose to do so, however, because the very nature of the relatively new seminal case on this topic, *Michigan v. Long*[202] reeks of discretion. No matter how heavily a state court may have relied on state law to provide greater protection of rights than would the federal constitution (this is the "adequate" aspect of the rule), its decision will not be "independent" of the federal constitution unless the state court opinion virtually says exactly that.[203] Therefore, this is not like the clear-cut element in Barrier I that finds that judicial review is always a federal question.[204]

Rather, this issue more nearly resembles the Court's struggles regarding what to do with the advisory opinion problem.[205] The difficulty which faces the Court in the adequate and independent state ground arena is one of being between the *Scylla* of writing what will amount to an advisory opinion if the state court can, on

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199.

> [O]ur decisions have settled that limitations on a litigant's assertions of [the rights of third parties] are not constitutionally mandated, but rather stem from a salutary rule of self-restraint designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.

Craig v. Boren, 429 U.S. 190, 193 (1976).

200. *See supra* text accompanying note 43.

201. *See supra* text accompanying notes 7-9.

202. 463 U.S. 1032 (1983).

203. "We find that we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Michigan*, 463 U.S. at 1044.

204. It can, of course, be argued that if there is truly an adequate and independent state ground then there is no federal question. The difficulty with this line of reasoning is that the issue would never have arisen unless there was at least some putative federal question through the state court's mention of the federal constitution thereby arguably putting the state court's gloss on its meaning.

205. *See supra* text accompanying notes 38-40 & 165-67.

remand, reach the same result on state grounds it reached earlier on federal grounds, and the *Charybdis* of foregoing an opportunity to correct a state court that has at least purported to interpret the federal constitution.

The Court in *Michigan v. Long* has, by its extreme use of the plain statement rule,[206] clearly opted to run the risk of giving an advisory opinion. In doing so, it has exercised a discretionary review power and not acceded to a command of the constitution. The Court referred to the statement found in *Herb v. Pitcairn*[207] that the adequate and independent state ground is partially based on jurisdictional considerations.[208] That consideration was the advisory opinion issue.[209] The other consideration was "found in the partitioning of power between the state and federal judicial systems. . . ."[210]

As to the first consideration, it seems reasonably clear that, given the existence of a case or controversy, the court *can*, but usually chooses not to, issue advisory opinions.[211] Thus, the decision of the Court in *Michigan* to run that risk can be nothing more than an exercise of discretion.[212]

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206. *See supra* note 203.

207. 324 U.S. 117 (1945).

208. *Michigan*, 463 U.S. at 1041-42.

209.

> Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion.

Herb, 324 U.S. at 125-26.

210. *Id.* at 125.

211. *See supra* text accompanying notes 165-67.

212. If there was a reasonable chance that the state decision was predicated to some extent on the state court's interpretation of the federal constitution, and if the state decision created injury sufficient for case or controversy then Article III is satisfied because a reversal by the Supreme Court of the state court's interpretation of the federal constitution will redress the injury until a state court chooses to do otherwise under an adequate and independent state ground. Thus, in *Michigan*, if the *State* was injured by the Michigan Supreme Court's interpretation of the federal constitution, a reversal of the state court on that point will redress the injury. Should the state court choose to recreate the injury to the State under the state constitution by interpreting that document to provide greater protection to those accused of crime than that provided by the federal constitution it is then, and only then, that there would be no federal question.

The second consideration is pure *Ashwander* discretion.[213] A case overruled by *Michigan*[214] on its application of the adequate and independent state ground doctrine, but not apparently on the rationale for that doctrine, was *Minnesota v. National Tea Company*.[215] There, the Court had justified a refusal to hear a case on the basis of an adequate and independent state ground upon the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of a case."[216]

O. Barrier IV, Part 5. Abstention Doctrines

In an introductory course in federal constitutional law, very little is needed regarding discretionary abstention doctrines. For this purpose, the Supreme Court's description of the *Pullman*[217] and *Younger*[218] doctrines in *Hawaii Housing Authority v. Midkiff*[219] is quite adequate. "In [*Pullman*] this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided."[220] The reasons for an limitations on this doctrine, as described by Justice O'Connor in *Hawaii Housing Authority* are closely linked to other prudential rules.[221]

> By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and 'needless friction with state policies. . . .' [*Pullman*, 312 U.S.] at 500. . . . However, federal courts need not abstain on *Pullman* grounds when a state statute is not 'fairly subject to an interpretation which will render unnecessary' adjudication of the federal ques-

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213. *See supra* notes 47, 56, 112 & 164. Note especially, one of Justice Brandeis' examples of the application of the fourth rule. "Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. Berea College v. Kentucky, 211 U.S. 45, 53 . . . (1980)." *Ashwander*, 297 U.S. at 347 (Brandeis, joined by Stone, Roberts and Cardozo, JJ., concurring).

214. *Michigan*, 463 U.S. at 1071, n. 4 (Stevens, J., dissenting).

215. 309 U.S. 551 (1940).

216. *Id.* at 555. This comment can clearly be seen as an amalgam of several of the Ashwander Rules. *See supra* note 213.

217. Railroad Comm. v. Pullman Co., 312 U.S. 496 (1941).

218. Younger v. Harris, 401 U.S. 37 (1971).

219. 467 U.S. 229 (1984).

220. *Id.* at 236.

221. *See, e.g., supra* note 138.

> tion. [Case authority omitted.] *Pullman* abstention is limited to uncertain questions of state law because '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule. [Case authority omitted.][222]

As to *Younger*, "[Under that] doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests."[223] Again, the reason for this rule is obviously similar to other prudential rules.[224] As with *Pullman* abstention, the doctrine is a limited one. "*Younger* abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court.' "[225]

P. Barrier IV, Part 6. Certiorari

With the exception of certain certified questions from the United States Courts of Appeals, the Supreme Court's appellate jurisdiction is based on the writ of certiorari.[226] "A review on writ of certiorari is not a matter of right, but of judicial discretion,. . ."[227] "The Supreme Court has long followed the practice of reviewing a certiorari case if a minimum of four justices favor granting the petition."[228]

IV. CONCLUSION

> We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this fact is probably proof that

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222. *Hawaii Housing Authority*, 467 U.S. at 236.

223. *Id.* at 237-38 (case omitted).

224. *See supra* note 221.

225. 467 U.S. at 238 (case omitted).

226. 28 U.S.C.A. §§ 1254 & 1257.

227. Rule 17.1, Supreme Court Rules. The rule then sets out the considerations it uses in determining whether to grant or deny the writ, but as the rule points out, these considerations are not fully descriptive of all situations, nor are they binding. "Frequently, the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules." R. STERN, E. GRESSMAN, S. SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986) at 195 (quoting J. Harlan, "Manning the Dikes," 13 Record of N.Y.C. Bar Assn., 541, 549 (1958)).

228. R. STERN, E. GRESSMAN, S. SHAPIRO, SUPREME COURT PRACTICE 261 (6th ed. 1986).

> the concept cannot be reduced to a one-sentence or one paragraph definition.[229]

This admission quite arguably goes beyond standing itself in the narrow sense[230] to all elements of the case or controversy problem and to the other barriers to judicial review as well. As to most all of them, Justice Frankfurter's comment about the Court's Fourth Amendment cases applies with roughly equal vigor. "The course of true law . . . as enunciated here, has not — to put it mildly — run smooth."[231]

It has been my goal to suggest a structure by which to approach limitations on the Supreme Court's power of judicial review and, in doing so, to force some order on the system by trying to provide what I hope are persuasive reasons why a particular limitation should be in one place and not in another. I will cheerfully concede that I have, in all likelihood, forced more order on the system than is really there. There will also undoubtedly be disagreement with where I have located various limitations. That's what makes constitutional law, as well as horse races. In any event, I hope that even though the reader may not be in agreement with all of my locational choices, he or she will find the barrier scheme helpful in organizing a most disorderly area of constitutional law.

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229. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982).

230. *See supra* note 46.

231. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).