ARTICLES

Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems

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The concept of separation of powers is inherent in both the United States and Washington State Constitutions, although neither document explicitly provides for it. A critical component of the separation of powers doctrine is a recognition by each government branch of its appropriate sphere of activity. Historically, courts have recognized the appropriate sphere of judicial activity by adopting various doctrines deferring exercise of the full judicial power. Scholars and courts usually refer to these deferring mechanisms as judicial restraint. The exercise of judicial restraint has not always been perfect, as befits the necessary tension between the constitutional branches of government inherent in the concept of "checks and balances."

But in recent years, for a variety of reasons, the appropriate roles of the three constitutional branches have become increasingly more difficult to define. In the judicial branch, judicial activists of both the left and the right have emerged; many judges see themselves as quasi-legislators with the right to speak out on all issues, possessing a broad charge to right all wrongs. Courts are tempted to avoid judicial restraint and resolve any and all controversies litigants may choose to present to the judicial system. In an era of populist criticism of government and general distrust of policymaking by statute or rule, this temptation is further reinforced for certain judges doctrinally oriented toward the individualized, nongeneral decisionmaking that the common law offers. The result of such judicial activism is untoward

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and inappropriate involvement by the courts in political questions and partisan conflicts. In effect, what has emerged too often is a cowboy judiciary riding roughshod over separation of powers in its zeal to save every damsel in distress and to right every wrong.

The resultant risk of the courts' unwillingness or inability to define the appropriate scope of judicial responsibility or to respect notions of judicial restraint is that citizens will view the courts as just another partisan branch of government. Courts will lose their station as impartial resolvers of conflict. To the extent the courts become more like the partisan branches of government and the aura of judicial impartiality disappears, the respect of the people for the courts, and thus the courts' authority, will erode.[1]

We see today some of the consequences of the judiciary's proceeding beyond its core functions. The executive and legislative branches have questioned the core functions of the judiciary, such as judicial review or sentencing in criminal cases, and attacked the independence of the judiciary: "Politicians have long blamed judges for forcing them to take unpopular actions . . . but many of those politicians had enough respect for the courts that they were careful not to take their criticism too far. Today, however, politicians criticize judges for the purpose of intimidating them and getting specific results."[2]

Features of such efforts threatening judicial independence include legislative attempts to curtail court jurisdiction, heaping on the courts additional responsibilities without providing the necessary resources, politicizing judicial selection, and withholding proper compensation. Escalating judicial campaign costs only make these problems worse for judges.

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1. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

2. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997). Erwin Chemerinsky, *When Do Lawmakers Threaten Judicial Independence?* TRIAL, Nov. 1998, at 62-71 (Professor Chemerinsky suggests eight circumstances which threaten judicial independence: legislation undermining institutional functioning of the courts, legislation directing results in specific cases, legislation directing procedures in specific cases of classes of cases, legislation restricting court jurisdiction, legislation restricting court remedies, legislation restricting traditional judicial discretion, legislation assigning nonjudicial functions to the courts, and legislation changing substantive law in response to court decisions).

In this Article, I draw on my legislative and judicial background to focus both on the tendency of the courts to exceed their core constitutional role and the implications of such judicial activism. I contend that modern courts of general jurisdiction are too often embroiled in sociopolitical controversies best left to the political branches of government. Part I addresses the concept of judicial restraint in our constitutional system and the need to define the core powers of the judicial branch of government. Part II discusses principles of judicial restraint in the federal courts. Part III, using the example of Washington State where the judiciary enjoys broad jurisdiction typical of most state court systems,[3] analyzes judicial restraint principles in a general jurisdiction court system. Part IV examines several recent Washington cases exploring these principles. Finally, because courts must confine themselves to their appropriate sphere of action, in Part V I will propose a new, overarching principle of justiciability for courts of general jurisdiction, incorporating principles of judicial restraint.

I. JUDICIAL RESTRAINT AND LEGITIMACY IN COURT DECISIONMAKING

A. The Core Functions of the Courts

The foremost reason for restraint by the judiciary, particularly in controversies with significant political overtones, is the separation of powers inherent in our political structure. Our American constitutional system envisions three distinct and competing branches of government providing "checks and balances" to the inaction or aggressive tendencies of the other branches. Additionally, this system assumes that each branch will give appropriate deference to another in matters constituting the core of the other branch's function. Thus, identification of the core functions of the judicial branch of government is the first step in this analysis.

The most significant court function is dispute resolution; courts are designed to resolve disputes so that the litigants do not resort to private remedies, including violence, to vindicate their interests. In this process, courts assign culpability for behaviors and offer redress to litigants adversely affected by the culpable conduct of others. On the civil side, private interests are generally at stake; on the criminal side,

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3. *See* WASH. CONST. art. IV, §§ 4, 6. Under art. IV, § 6, for example, Washington's superior courts have jurisdiction over all matters in law and equity provided the amount in controversy exceeds $3,000.

because of significant public ramifications of the conduct, the public interest is affected and the State acts as the litigant.

For centuries, Anglo-American courts, with their adversarial system, have functioned effectively, resolving litigants' disputes by determining culpability. The evidentiary hearing before either judge or jury, with its elaborately evolved rules of evidence, is a finely tuned instrument for deciding who did what to whom.[4]

But, while we may feel some high degree of confidence in our procedures for determining culpability, we must admit to decidedly less certainty when courts attempt to determine remedies. Consider, for example, the inherent imprecision of attempts to compensate with money for pain and suffering, a lost limb, emotional distress, or future lost profits. If determining appropriate remedies in cases involving the ordinary business of the courts is so fraught with difficulty, imagine how much more difficult it is for courts to fashion remedies for ongoing intractable political or social problems. For this reason, courts should exercise restraint in deciding such controversies.

The discussions of judicial restraint in earlier literature have focused on decisions generally without differentiating between assessing culpability and fashioning remedies.[5] It is in the area of remedies that the judicial process finds its greatest challenges. The courts are not readily capable of managing the resolution of large-scale political problems. Judges are ill-suited to the role of managers because the courts require deliberation and elaborate process before decisions can be made. The dictates of due process tend to be inconsistent with the typically more immediate operational needs of a business enterprise, a social services organization, or a school system. By its nature, the common law process is not the best means for establishing complex societal policies. What judges may consider is confined to the record developed in court through the testimony of witnesses, frequently experts retained by the parties. They cannot possibly broker the complete array of interests inherent in many issues.[6] While courts can

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4. While courts do a generally effective job of resolving disputes, it is noteworthy that the increasing cost and delay associated with civil case decisionmaking in recent times have helped create a competitor to court decisionmaking in civil cases in the form of alternative dispute resolution (ADR). ADR, whether mediation or arbitration, represents an increasingly important private alternative to public civil justice in America. Eric Lawson, Jr., *Alternative Dispute Resolution*, 69 N.Y. ST. B.J. 18 (Dec. 1997) (noting "phenomenal growth" of ADR in the last twenty-five years).

5. *See infra* note 13.

6. The Washington Supreme Court has recognized this fact repeatedly. Niece v. Elmview Group Home, 131 Wash. 2d 39, 58-59, 929 P.2d 420, 430-31 (1997); Burkhart v. Harrod, 110 Wash. 2d 381, 385, 755 P.2d 759, 761 (1988) ("[W]e fully concur in the statement that 'of the

be effective in deciding that a wrong has been committed or someone is culpable, they are less effective at fashioning remedies for major political or social controversies.

Another core function of the courts is vindication of individual interests against majoritarian impulses to tyranny.[7] Notwithstanding a policy of judicial restraint, this antimajoritarian policy remains a vital, core judicial function often at odds with the principle of limiting court access. Courts must enforce individual liberties and interests against collective needs. In fact, the power of the common law rests in its individualized decisionmaking and its "policy" or ability to create a "rule" based on individual sets of facts. Emblematic of this core function is the duty of Washington courts to safeguard the individual liberties articulated by Washington's constitutional framers in our constitution's Declaration of Rights.[8]

Dating back to early common law days, courts have also had as core functions the inherent power to administer court systems, to regulate advocates before the courts, to regulate judges themselves,[9]

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three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.'").

7. Alexis de Tocqueville in his great essay, *Democracy in America*, noted this impulse to majoritarian tyranny:

> Hence the majority in the United States has immense actual power and a power of opinion which is almost as great. When once its mind is made up on any question, there are, so to say, no obstacles which can retard, much less halt, its progress and give it time to hear the wails of those it crushes as it passes.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J.P. Mayer ed. & George Lawrence trans., Doubleday & Co. 1969) (1850). But de Tocqueville also recognized the antimajoritarian power of American courts: "Restricted within its limits, the power granted to American courts to pronounce on the constitutionality of laws is yet one of the most powerful barriers ever erected against the tyranny of political assemblies." *Id.* at 103-04. Alexander Hamilton similarly understood the power of the judiciary:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

8. WASH. CONST. art. I.

9. The Washington Supreme Court said in *In re Bruen*, 102 Wash. 472, 476, 172 P. 1152, 1153 (1918):

> The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not; the power to promulgate rules for its practice, and the power to provide process where none exists. It is true that the judicial power of this court was created by the constitution, but upon coming into being under the constitution, this court came into being with inherent powers. Among the inherent powers is the power to admit to practice, and

and to develop the common law. The courts in turn apply the law in a myriad of factual circumstances that even the wisest legislative or executive policymaker cannot fully anticipate. This role of "nurturing" the development of the law by common law decisionmaking "enables the law under *stare decisis* to grow and change to meet the ever-changing needs of an ever-changing society and yet, at once, to preserve the very society which gives it shape."[10]

Given the dynamics of judicial branch decisionmaking set forth above, it is not surprising the courts have been criticized, often justly, for intruding aggressively into the American governmental process.[11] Americans bring more and more complex sociopolitical disputes to the courts for ultimate resolution. Significantly, the courts *agree* to decide such issues in many instances in the absence of articulable principles for deciding whether the power of the courts *ought* to be employed. When a court, made up of members little known to the public, using a process not clearly understood, declares an enactment by a majority of legislators or the people themselves to be unconstitutional, some people in the body politic will undoubtedly be upset.[12]

Having reviewed the core functions of the judicial branch of government, I will now examine how constitutional and statutory principles of judicial restraint relate to those core functions. When courts stray beyond the traditional confines of those core functions, it is then that the courts are frequently criticized for judicial activism.

B. Judicial Activism and Judicial Restraint

The criticism of the role of "activist" courts in a democratic society is, of course, not new.[13] However, the temptation of courts

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necessarily therefrom the power to disbar from practice, attorneys at law.

10. State *ex rel.* Washington Fin. Comm. v. Martin, 62 Wash. 2d 645, 673, 384 P.2d 833, 849 (1963) (italicization added).

11. Publications denouncing judicial activism abound. Perhaps most prominent among recent decriers of judicial interference in political matters is Robert Bork. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). *See also* Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767 (1998), and other writings by Professor Graglia. *See also* MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH (1998).

12. While some of the criticism directed at the unelected federal judiciary may be unfairly aimed at an elected state judiciary, the institutional remoteness and relative anonymity of elected judges mean the criticism may still be accurate.

13. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Charles B. Blackmar, *Judicial Activism*, 42 ST. LOUIS U. L.J. 753 (1998); John Paul Stevens, *Judicial Restraint*, 22 SAN DIEGO L. REV. 437 (1985); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Justice Holmes' famous dissent in *Lochner v. New York*, 198 U.S. 45, 75

to solve all societal ills has been exacerbated both by the inability or unwillingness of the more partisan branches of government to address complex societal issues[14] and the increased willingness of courts to entertain lawsuits on nearly every conceivable subject. Some in our society come to the courts precisely for an individualized, case-by-case determination of policy because they do not trust the collective establishment of legislative policy by statute or executive policy by administrative regulation.[15] Accordingly, the courts have become the focus in society for addressing many of our most fundamental and vexing issues.

Robert Bork eloquently described this problem:

> In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels [is] unsatisfying. To give in to temptation, this one time, solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun to rule where a legislator should.[16]

The doctrine of judicial restraint has been encrusted in recent years with considerable ideological cant of both the left and the right.[17] The ideological discussion highlights particular political issues of the day. Many conservatives decry judicial activism with respect to the courts' role in racial desegregation in America or

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(1905) (Holmes, J., dissenting), was an early example of opposition to the notion that a court may interfere with socioeconomic matters that are more properly the domain of the political branches of government: "But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire."

Indeed, it was once said, "[I]n the days when the judges ruled, there was a famine in the land." *Ruth* 1:1.

14. This inability may be the result of a variety of circumstances including the adversarial tone of the media, term limits, the exodus of seasoned political leaders from politics, and campaign financing demands.

15. *See* Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953 (1997).

16. BORK, *supra* note 11, at 1.

17. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 198-222 (1985) (judicial restraint principles used as code words to criticize federal court involvement in racial desegregation).

reproductive rights issues.[18] Liberals complain today of judicial activism in property and economic issues.[19] But this doctrine need not be the captive of the left or the right. The doctrine itself has become "political" largely because it is not susceptible to rigorous and predictable definition.

That the courts are not entirely trusted by the partisan branches of government to announce constitutional principles is illustrated by recent Washington legislation. In 1997, a bill was introduced in the Washington State House of Representatives with thirty-three sponsors. The bill challenged the doctrine of judicial review: "The doctrine of judicial review that the courts have the sole and final say in interpreting the Constitution on behalf of all three branches of government has been subject to serious analysis and criticism by scholars, jurists, and others for almost two hundred years."[20] The legislation's apparent intent was to undercut the finality and authority of judicial review of constitutional questions by permitting the legislature to disagree with a judicial interpretation of the Washington Constitution and to submit the issue to the voters in a statewide referendum.[21]

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18. *See generally* MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION AND INCOMPETENCE ON THE BENCH (1998).

19. Present-day property rights advocates want courts to be more active, and less deferential to the other branches, on property decisions. *See generally* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998) (describing what the authors dub the "Takings Project," a pervasive conservative and libertarian agenda to dismantle federal and state environmental and regulatory law and the role activist judges play in furthering that agenda).

Some conservatives seem to believe the judiciary is not part of "government." In a recent column, George Will decried the willingness of conservative activists to use the courts to achieve "microgovernment of society, 'to have the courts' pry open every aspect of life so government can fine-tune fairness":

> [C]an a conservative be content to have courts controlling universities and other institutions of civil society, permeating their internal operations with government supervision? The unjust treatment of conservatives does not justify their participation in today's reflexive recourse to litigation rather than persuasion—politics—to improve their lot.

George Will, *Students' Cause Raises Questions About Government Involvement*, SEATTLE POST INTELLIGENCER, Oct. 22, 1998, at A13.

20. H.R. 2060, 55th Leg., Reg. Sess. § 3(2) (Wash. 1997). This approach is commended in ROBERT BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 117 (1996). In his later years, Thomas Jefferson became a fierce opponent of judicial review: "The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." Letter to Spencer Roane, Sept. 6, 1819, *in* BERNARD SCHWARTZ, A BASIC HISTORY OF THE SUPREME COURT 110-11 (Louis L. Snyder ed., Robert E. Krieger Pub. 1979) (citing THOMAS JEFFERSON 10, THE WRITINGS OF THOMAS JEFFERSON 140 (Ford ed., 1899)).

21. The proposal had a fatal constitutional infirmity: the legislature may not statutorily proscribe the authority the Washington Constitution, article IV, section 4 confers upon

The sense that the courts are too powerful sometimes conflicts with direction to judges from the partisan branches to state their views more publicly. In 1997, twenty-two sponsors introduced in the Washington State House of Representatives a measure urging the Supreme Court to amend Canon 7 of the Code of Judicial Conduct to afford judges and judicial candidates the right to "speak freely and without fear of governmental retaliation, on issues that are not then before the court."[22]

The United States Congress has also raised serious questions about judicial performance through a different methodology. The United States Senate's recent glacial pace in confirming nominees to judicial vacancies increases judicial workloads and instills trepidation in the minds of the nominees.[23] In recent legislation,[24] Congress

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Washington courts. Gerberding v. Munro, 134 Wash. 2d 188, 191, 949 P.2d 1366, 1368 (1998) (statute adding qualifications to constitutional offices is unconstitutional); North Bend Stage Line v. Dep't of Pub. Works, 170 Wash. 217, 222, 16 P.2d 206, 208 (1932). Judicial review was a firmly entrenched constitutional doctrine in 1889. *See* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 423, 780 P.2d 1282, 1287 (1989) (interpreting the Washington Constitution in accordance with constitutional doctrine understood and accepted at the time of the state's 1889 constitutional convention). The measure also suffered from a further practical flaw: the question of how the present legislature can adjudge the intent of an earlier legislature on a bill. But the proposed legislation underscores the general public misperception of a judiciary poised to seize every opportunity to exercise power.

22. H.R. Mem. 4004, 55th Leg., Sess. (Wash. 1997). The legislation neglected to address the countervailing constitutional imperative that applies to judges—the right of litigants to an *impartial* decisionmaker as a central mandate of Fourteenth Amendment due process. Judges, speaking out like partisan legislators on every issue of the day, run the real risk of trampling on litigants' rights to a fair trial when they are not, or appear not to be, impartial. "[T]he floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 904-05 (1997) (citations omitted). As Justice Anthony Kennedy noted in a recent speech to the American Bar Association: "'The law makes a promise. . . . The promise is neutrality. If that promise is broken, the law ceases to exist. All that's left is the dictate of a tyrant, or a mob.'" Joan Biskupic, *2 Justices Defend Judicial Independence*, SEATTLE TIMES, Dec. 6, 1998, at B1.

It is rather ironic that many of the sponsors of legislation to set aside judicial review want judges to speak out on all political issues, a seeming conflict. This measure, however, may be explained by the fact it addresses the particular case of a libertarian Washington Supreme Court justice disciplined for giving a speech at an antiabortion rally on the steps of Washington's Legislative Building. *See generally In re* Sanders, 135 Wash. 2d 175, 955 P.2d 369 (1998); Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611 (1987); Erwin Chemerinsky, *Is It the Siren's Call?: Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831 (1995); Gregory C. O'Brien, Jr., *Speech May be Free, and Talk Cheap, But Judges Can Pay a Heavy Price for Unguarded Expression*, 28 LOY. L.A. L. REV. 815 (1995).

23. *See* WILLIAM H. REHNQUIST, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY (1998).

24. H.R. 1252 (the Judicial Reform Act), 105th Cong. (1997). *See also* S. 158, 97th Cong. (1981); H.R. 3225, 97th Cong. (1981) (restricting jurisdiction in abortion cases); S. 481, 97th Cong. (1981); H.R. 4756, 97th Cong. (1981) (restricting jurisdiction over cases involving

sought to restrain "judicial activism" by denying judges cost-of-living salary adjustments and limiting federal court jurisdiction. Various versions of the legislation would deny federal courts the power to release federal prisoners because of bad prison conditions and establish special procedures to hear challenges to state initiative measures.

In summary, these issues illustrate the need for the courts continually to revisit and review the core constitutional functions of the judiciary.[25] Within the constitutional sphere, however, the courts should be active and the other branches of government constrained not to act unconstitutionally. The judiciary cannot "restrain" itself from declaring the enactments of legislative bodies violative of constitutional norms. The courts must vigorously protect individuals, particularly minorities, from majoritarian tyranny. But this protective role does not allow the courts to "constitutionalize" every controversy. Judicial self-restraint lends support to the legitimacy of judicial independence.

In our system of separation of powers, achievement of the necessary balance between a judiciary vigorous within its constitutional sphere and independent of the partisan branches of government, and a judiciary restrained in its inclination to right every wrong, is no easy task. That necessary balance is, however, the essence of ordered liberty in the American constitutional system. Likewise, the other branches of government must regard the authority and independence of the judiciary by respecting judicial review, properly funding the courts, and avoiding the imposition of nonjudicial duties or ever-escalating caseloads. The fulfillment of separation of powers is found in the principles of restraint employed in the federal and state court systems.

II. JUDICIAL RESTRAINT IN THE FEDERAL COURTS

Because of the nature of the United States Constitution as a specific grant of powers to the federal government, the federal courts have often addressed issues of judicial restraint. "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted

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voluntary school prayer); S. 3386, 85th Cong. (1958) (depriving federal courts of jurisdiction to review state decisions on who could practice law). *See generally* Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389 (1998); Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982).

25. The Washington constitutional framers exhorted future generations that "[a] frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." WASH. CONST. art. I, § 32.

by Congress pursuant thereto."[26] The Constitution and the first Judiciary Act of 1789, as amended, constrain and prescribe the jurisdiction of the federal courts. The federal courts have distinguished, however, two aspects of these constraints. The first is subject matter jurisdiction, flowing directly from the Constitution and the Federal Judiciary Act. The second involves the concept of justiciability, where a court may find jurisdiction but choose not to exercise it.

Jurisdiction, quite simply, is the power to hear and decide a case. From the beginning, the United States Supreme Court has taken a limited view of its jurisdiction. The Court has noted that it lacks subject matter jurisdiction under Article III, Section 2 of the United States Constitution to decide matters that are not cases or controversies.[27] Federal courts will presume the absence of jurisdiction unless grounds for jurisdiction appear in the record.[28] Subject matter jurisdiction in federal courts must be affirmatively pleaded and proved.[29]

An additional constitutional ground preventing federal courts from deciding a case is known as the political question doctrine, a reflection of separation of powers concerns. Conventionally, the political question doctrine applies to matters that are or ought to be the sole concern of the coordinate branches of government.[30]

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26. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

27. U.S. CONST. art. III, § 2, states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As the United States Supreme Court stated in *Flast v. Cohen*, 392 U.S. 83, 94 (1968): "The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'" *See* Warth v. Seldin, 422 U.S. 490, 498, (1975) ("The issues must arise out of an actual and current case or controversy between adverse litigants. Adjudication of hypothetical or removed disputes would result in advisory opinions—which federal courts may not do.").

28. Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 337 (1895).

29. FED. R. CIV. P. 8(a)(1).

30. The seminal federal political question case, *Baker v. Carr*, 369 U.S. 186 (1962), addressed gerrymandered voter districting by the Tennessee legislature. The United States Supreme Court there noted the key issues to be analyzed in deciding whether or not to confront a political question:

Stemming from the case or controversy requirement, the Supreme Court has promulgated several self-limiting doctrines, not found specifically in the text of the Constitution, which are generally subsumed under the rubric of justiciability.[31] In fact, over the past few decades, the Supreme Court has expanded the reach of these justiciability doctrines with an eye toward increasing judicial restraint in the federal courts. The federal courts will generally not hear cases that are moot,[32] lack ripeness,[33] require advisory opinions,[34] or in

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> 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 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.

Baker, 369 U.S. at 217.

The political question doctrine relates to the subject matter of a controversy. For reasons of separation of powers, deference to the more democratic branches of government with superior expertise as to a particular issue, or a desire to carefully protect the nonpolitical legitimacy of the judiciary in the public eye, the courts deem certain issues outside the purview of the judicial process; such questions are best left to the political process. *See generally* Alexander M. Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 498-511 (1996).

Examples of political questions include issues arising under article IV, section 4 of the United States Constitution, *Nixon v. United States*, 506 U.S. 224 (1993) (impeachment process); *Goldwater v. Carter*, 444 U.S. 996 (1979) (foreign policy); *O'Brien v. Brown*, 409 U.S. 1 (1972) (electoral issues and party delegate selection); *Coleman v. Miller*, 307 U.S. 433 (1939) (process for constitutional amendment); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (foreign policy); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (Republican Form of Government Clause).

31. The lower federal courts, of course, exist only by virtue of statute, and their jurisdiction is entirely prescribed by Congress.

32. In *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982), the United States Supreme Court said that a case is moot when the controversy between the parties ceases to be definite and concrete and when a court's decision no longer affects the litigant's rights. The case or controversy standard of Article III forecloses the issuance of advisory opinions. *Id. See also* Sec. & Exchange Comm'n v. Medical Comm. for Human Rights, 404 U.S. 403, 406-07 (1972); Hall v. Renla, 396 U.S. 45, 48 (1969). Chief Justice Rehnquist has argued, however, that mootness is largely grounded in prudential concerns because the Court can address certain cases that are technically moot under the concept of "capable of repetition, yet evading review" despite the case or controversy mandate of Article III. Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring).

This view has some force given the exceptions to mootness carved out by the federal courts. These include wrongs capable of repetition, *Roe v. Wade*, 410 U.S. 113, 113-14 (1973), and *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); cases with secondary or collateral consequences, *Sibron v. New York*, 392 U.S. 40, 54-56 (1968); voluntary cessation of activities capable of being

which the plaintiff lacks standing.[35] Justiciability constraints constitute the essence of judicial restraint: a court choosing not to decide an issue otherwise properly before it for reasons not flowing from the constitutional text or statutory bases of the court's jurisdiction.

As a result of these constitutional and statutory constraints, the federal courts have developed a jurisprudence that filters a wide variety of nonjusticiable cases out of federal courts. Federal courts, then, are courts of both constitutionally and statutorily limited jurisdiction. But even in the federal system, with its more rigorous jurisdictional imperative, criticism of the imprecise articulation of these justiciability doctrines abounds. Justice O'Connor succinctly expressed the current state of these doctrines:

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question and the like—relate in part, and in different though overlapping ways, to an idea, which is *more than an intuition but less than a rigorous and explicit theory,*

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resumed, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); or class actions, *Sosna v. Iowa*, 419 U.S. 393, 399 (1975).

33. In *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947), the Court stated that a case is ripe for review when the issues are fully crystallized, the controversy is concrete, and the litigants claim actual interference with their rights; hypothetical threats to those rights do not invoke federal adjudicatory power. *Id.* Ripeness is designed to forestall judicial entanglement in "abstract disagreements." Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967). The federal courts balance "the hardship to the parties of withholding court consideration" against "the fitness of the issues for judicial review." *Id.* at 149. *See generally*, Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987). Ripeness is a prudential constraint. The United States Supreme Court has noted that the ripeness doctrine proceeds both from Article III and from prudential concerns. Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 58 n.18 (1993). The prudential concerns relate to "problems of prematurity and abstractness" that may prevent proper adjudication. Socialist Labor Party v. Gilligan, 406 U.S. 588 (1972).

34. In *Flast v. Cohen*, 392 U.S. 83, 96 (1968), the Court said: "When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III."

35. In *Allen v. Wright*, 468 U.S. 737, 750-51 (1984), the Court noted that a plaintiff has standing to invoke the adjudicatory powers of the federal courts when the plaintiff has a personal stake in the suit's outcome. The "personal stake" requirement is met where there is a distinct and palpable (not speculative) injury to the plaintiff, a fairly traceable causal connection exists between the claimed injury and the challenged conduct, and a substantial likelihood that the relief requested will redress the claimed injury.

Taxpayer standing issues must also meet the criteria of *Flast v. Cohen*, 392 U.S. 83 (1968). The expenditure must be an exercise of power under the Taxing and Spending Clause, and the expenditure must violate a specific constitutional provision that limits the taxing and spending power, such as the Establishment Clause of the First Amendment. *Id.* at 101-06.

> about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.[36]

To the extent federal justiciability doctrines are malleable, allowing the federal courts significant latitude in their interpretation, the courts can arbitrarily pick and choose the circumstances in which they are applied. The exercise of federal judicial power on such purely arbitrary grounds may legitimately be criticized as unsound theoretically and unworkable practically.[37] This doctrine of justiciability may be neither a doctrine nor a restraint of federal judicial power.

Critics have suggested federal justiciability doctrines (1) involve arbitrary characterizations or overlap, (2) are unrelated to their original policy purposes not clearly resting on constitutional or prudential grounds, and (3) may be utilized to evade or mask the true issue in a case. For example, Professor Erwin Chemerinsky advocates scrapping the various federal justiciability doctrines in favor of the following four-part test:

> (1) Is the plaintiff legally entitled to relief under the appropriate constitutional, statutory, or treaty provision, regulation, or common law rule? (2) Is there a sufficient likelihood that a federal court ruling for the claimant will have some effect? (3) Should the litigant be allowed to raise the claims of others not before the court? and (4) Is the claim based on a constitutional provision that the judiciary should not enforce (assuming such provisions should exist)?[38]

Perhaps a new paradigm for federal justiciability questions, as well as those in general jurisdiction courts, may be needed.

Notwithstanding criticisms of federal justiciability jurisprudence as courts of specified jurisdiction, the federal courts more often struggle with principles of judicial restraint. Federal justiciability jurisprudence is therefore more developed than the jurisprudence of restraint in general jurisdiction state courts.

III. JUDICIAL RESTRAINT IN WASHINGTON STATE COURTS

By contrast with federal courts, Washington courts have few constraints on their jurisdiction. Article IV of the Washington Constitution establishes the jurisdiction of the supreme court and the

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36. Allen v. Wright, 468 U.S. 737, 750 (1984) (emphasis added) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)).

37. Pushaw, *supra* note 30, at 464 n.350-51.

38. Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 697 (1990).

superior courts in Sections 4 and 6 respectively.[39] Section 6, like Article III, Section 2 of the United States Constitution, enumerates the various cases over which the superior court "shall have original jurisdiction." No "case or controversy" requirement appears in the text of the constitutional grant of jurisdiction, however, and our courts have never implied any.[40] To the contrary, the Washington Supreme Court declared from the outset: "[T]he superior courts of this state are courts of general jurisdiction."[41] Nor has the following proposition

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39. WASH. CONST. art. IV, § 4 states:

> The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

WASH. CONST. art. IV, § 6 provides:

> Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

40. Some states have judicially imposed a case or controversy requirement even though none appears in the state constitution. *See, e.g.*, Petition of Anonymous 1, 558 N.W.2d 784, 790 (Neb. 1997).

41. State v. Jones, 2 Wash. 662, 665, 27 P. 452, 453 (1891). General jurisdiction is distinguished from limited jurisdiction in the following way:

been in doubt over the last 100 years: "At all events, it is manifest that it was not the intention of the framers of this [Washington Constitution, art. IV,] § 6 to exclude any sort or manner of causes from the jurisdiction of the superior court."[42]

From the dawn of this state, Washington courts have been without the subject matter jurisdictional constraints of the federal courts. There is no requirement in the Washington Rules of Civil Procedure or in the rules pertaining to courts of limited jurisdiction analogous to Federal Rule of Civil Procedure 8(a)(1) to plead the basis for jurisdiction. Nor is subject matter jurisdiction often a matter of concern for a court of general jurisdiction:[43] "The superior courts have broad and comprehensive original jurisdiction over all claims which are not within the exclusive jurisdiction of another court. Because of this specific constitutional grant of jurisdiction, exceptions to this broad jurisdiction will be read narrowly."[44]

Because Washington courts of general jurisdiction lack the institutional deterrents to finding jurisdiction the federal courts routinely employ, Washington judges have a perceived imperative to decide. This, of course, is not necessarily a bad thing. The Washington Supreme Court is almost always the court of last resort for disputes arising under Washington law and plainly has an obligation to clarify and harmonize the law of the state, as well as to correct errors in the lower courts. Nevertheless, the imperative to decide disputes needs to be tempered by due consideration of the judiciary's role as one of the three coordinate branches of state government.

Washington courts, though not compelled to employ the language of judicial restraint as are federal courts facing the mandate of Article III, nevertheless have discussed principles of judicial restraint. The discussion has involved terms utilized at the federal level such as mootness, ripeness, political question and the like, but the content of the terms is often strikingly different in the state setting. Washington courts have often chosen to use the more amorphous term "justiciabili-

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> A court's general jurisdiction of the case is the right to exercise judicial power over that class of cases, and such jurisdiction extends to all controversies which may be brought before a court within the legal bounds of rights and remedies. Limited or special jurisdiction, on the other hand, is jurisdiction which is confined to particular cases, or which can be exercised only under the limitations and circumstances prescribed by the statute.

21 C.J.S. *Courts* § 9(a) (1990) (footnotes omitted).

42. Krieschel v. Bd. of Snohomish Cty. Comm'rs, 12 Wash. 428, 439, 41 P. 186, 189 (1895).

43. WASH. CONST. art. IV, § 6.

44. Orwick v. City of Seattle, 103 Wash. 2d 249, 251, 692 P.2d 793, 795 (1984).

ty" in lieu of a separate analysis of the traditional restraint doctrines. Some of these voluntary restraint policies are based on constitutional principles such as separation of powers. Many of the policies are not constitutional but prudential in nature, reflecting goals of economical use of judicial resources or other policies. What is lacking in our law is an overarching principle of judicial restraint.

A. Constitutional Constraints

1. Separation of Powers

The principal constitutional limitation in Washington on the exercise of judicial power in political cases is the separation of powers doctrine. As the Washington Supreme Court in *Lenci v. City of Seattle*[45] cogently put it, "These rules are more than mere rules of judicial convenience. They mark the line of demarcation between legislative and judicial functions."[46] Chief Justice Frank Hale was more pithy in his sense of the doctrine:

> A good restraint among many to be practiced by the judiciary is to curb its tendency to act as a miniparliament. Not only do the constitutions mandate this, but the common law, and common sense as well, ordains it. Aside from the Bill of Rights, the separation of powers of government into three separate functions probably represents the highest achievement of constitutional theory. A basic tenet of the separation of powers proposition is that legislators shall enact the laws and judges shall interpret, apply and enforce them. In brief, legislators should legislate and judges should adjudicate and neither ought do the other. There is a practical as well as constitutional basis for this idea, I think, because, no matter how great the temptation or exalted the claimed purpose, when courts legislate they usually do a bad job of it—and in the long run invite legislative reprisal.[47]

The Washington Constitution provides for three distinct branches of government, and Washington cases have discussed the circumstances in which one branch of government has invaded the province of another branch.[48] In *In re Salary of Juvenile Director*,[49] the Wash-

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45. 63 Wash. 2d 664, 388 P.2d 926 (1964).

46. *Id.* at 668, 388 P.2d at 929.

47. State v. Williams, 85 Wash. 2d 29, 34, 530 P.2d 225, 228 (1975) (Hale, C.J., dissenting).

48. *In re* Discipline of Niemi, 117 Wash. 2d 817, 828, 820 P.2d 41 (1991); *see, e.g.*, Zylstra v. Piva, 85 Wash. 2d 743, 749-50, 539 P.2d 823, 827 (1975) (application of collective bargaining laws to judicial employees holding that a state senator serving as Judge Pro Tempore did not violate the separation of powers doctrine).

ington Supreme Court traced the history of separation of powers under the United States and Washington Constitutions, holding the salary set by county commissioners for the juvenile court director was not so low as to constitute a legislative impairment of the prerogatives of the judicial branch by depriving that officer of his ability to function.[50] In *Carrick v. Locke*,[51] the Washington Supreme Court held the conduct of a coroner's inquest proceeding by a district court judge did not violate the separation of powers doctrine, thus articulating a practical understanding of separation of powers:

> One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments—the legislative, the executive, and the judicial—and that each is separate from the other. Washington's constitution, much like the [F]ederal [C]onstitution, does not contain a formal separation of powers clause. Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine. The validity of this doctrine does not depend on the branches of government being hermetically sealed off from one another. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government. The doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate.
>
> The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread.[52]

Indeed, Washington cases emphasize separation of powers is not a rigid doctrine.[53] The party alleging a violation of separation of powers must demonstrate impairment of a core function of a coordinate branch of government.[54]

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49. 87 Wash. 2d 232, 552 P.2d 163 (1976).

50. *Id.* at 251-52, 552 P.2d at 174-75.

51. 125 Wash. 2d 129, 882 P.2d 173 (1994).

52. *Id.* at 134-35, 882 P.2d at 176-77 (citations omitted).

53. "[T]he doctrine of the separation of powers was never intended to create, and certainly never did create, utterly exclusive spheres of competence. The compartmentalization of governmental powers among the executive, legislative and judicial branches has never been watertight." *Zylstra*, 85 Wash. 2d at 750, 539 P.2d at 827. *See also* Moran v. State, 88 Wash. 2d 867, 873, 568 P.2d 758, 761 (1977).

54. "The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Zylstra*, 85 Wash. 2d at 750, 539 P.2d at 827. *See also* State v. Blilie, 132 Wash. 2d 484, 489-93, 939 P.2d 691, 693-94 (1997).

Like the United States Supreme Court in *Mistretta v. United States*,[55] where the Court upheld judicial involvement in the Sentencing Commission, Washington has grounded its analysis of separation of powers in concern for two potential hazards: handling of tasks more appropriately assigned to other branches of government and invasion by one branch of government of core functions assigned to another branch or branches.[56] Thus, the doctrine of separation of powers represents a broad principle, albeit without precise boundaries, recognizing that not all controversies are cognizable in the courts.[57]

2. Political Questions

Unlike the federal judiciary, which has articulated a political question doctrine to avoid addressing certain issues, Washington courts, while exhibiting some reluctance to decide political issues, have eschewed development of a coherent political question doctrine distinct from the constitutional concept of separation of powers.[58] The

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The Washington Supreme Court has clearly indicated, for example, that any encroachment on its plenary authority to regulate the practice of law steps across the constitutional line. Wash. State Bar Ass'n v. State, 125 Wash. 2d 901, 902, 890 P.2d 1047, 1048 (1995) (legislative designation of Bar Association as public employer for purposes of collective bargaining held unconstitutional); Graham v. State Bar Ass'n, 86 Wash. 2d 624, 633, 548 P.2d 310, 316 (1976) (no performance audit of Bar Association); *see also* Wash. State Legis. v. Lowry, 131 Wash. 2d 309, 317-21, 931 P.2d 885, 890-92 (1997) (scope of legislative power over creation of sections in bills subject to gubernatorial line item veto); Wash. State Motorcycle Dealers Ass'n v. State, 111 Wash. 2d 667, 670, 763 P.2d 442, 443 (1988).

55. 488 U.S. 361 (1989).

56. *Carrick*, 125 Wash. 2d at 136, 882 P.2d at 177.

57. *See generally* Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417 (1998).

58. The following Washington cases note without discussion that political questions lie outside the cognizance of the judiciary: *State v. Manussier*, 129 Wash. 2d 652, 670, 921 P.2d 473, 481 (1996) (political questions are not within the judicial power to determine); *Roehl v. Public Util. Dist. No. 1 of Chelan County*, 43 Wash. 2d 214, 238, 261 P.2d 92, 104 (1953) (holding that political questions lie outside the cognizance of the judiciary). *See also* Gilbreath v. Pacific Coast Coal & Oil Co., 75 Wash. 2d 255, 259, 450 P.2d 173, 175 (1969) (holding that taxation issues are a matter of concern for the legislature, and not within the purview of the courts, in the absence of an attack upon the constitutionality of the legislation involved); Skidmore v. Fuller, 59 Wash. 2d 818, 822, 370 P.2d 975, 977 (1962) (the truth or falsity of the allegations in a recall demand is a political question to be determined by the voters); Capitol Hill Methodist Church v. City of Seattle, 52 Wash. 2d 359, 368, 324 P.2d 1113, 1119 (1958) (holding that the power to vacate streets is a political function which, in the absence of collusion, fraud, or the interference with a vested right, will not be judicially reviewed); State *ex rel.* Donohue v. Coe, 49 Wash. 2d 410, 417, 302 P.2d 202, 206 (1956) (holding that determination of questions arising incidental to the submission of an initiative measure to the voters is a political and not a judicial question, except when there may be express statutory or written constitutional law making the question judicial); State *ex rel.* York v. Bd. of Comm'rs of Walla Walla Cty., 28 Wash. 2d 891, 911, 184 P.2d 577, 588-89 (1947) (holding that protection of the public from unreasonable uses of the highways is a political question, not a judicial one).

political question cases in Washington have fallen into several broad categories: initiatives,[59] recall,[60] political organizations,[61] and gambling.[62] But none of these cases offers principled guidance to the law in Washington.

When Washington courts have actually attempted to state a basis for their rulings on political questions, they have largely followed the *Baker* test.[63] More often, Washington courts have simply asserted in a general fashion that a question is political and beyond the courts' purview.[64] Thus, it is unclear whether Washington courts see the

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59. The constitutionality of the initiative power is a political question, *State v. Manussier*, 129 Wash. 2d 652, 670-71, 921 P.2d 473, 481-82 (1996), but the courts retain authority to review the scope of the initiative power, *Ford v. Logan*, 79 Wash. 2d 147, 151, 483 P.2d 1247, 1249 (1971), and to review certain specific administrative actions of the election officer charged with administering the initiative process, *State ex rel. Donohue v. Coe*, 49 Wash. 2d 410, 415-17, 302 P.2d 202, 205-06 (1956).

60. The decision of the voters on a recall demand is a political question. *See* Skidmore v. Fuller, 59 Wash. 2d 818, 822, 370 P.2d 975, 977 (1962); Gibson v. Campbell, 136 Wash. 467, 471-72, 241 P. 21, 23 (1925). The courts will, however, screen the factual and legal sufficiency of charges before their submission to the voters. *In re* Shipman, 125 Wash. 2d 683, 684-85, 886 P.2d 1127, 1130-31 (1995) (providing charges must be factually sufficient with specific basis for charges justifying recall, and legally sufficient with specific instances of conduct amounting to misfeasance, malfeasance, or violation of the oath of office).

61. The courts may review tort and contract claims of a political party member against a party, but must avoid a party's internal disputes or rules. *See* Snedigar v. Hodderson, 53 Wash. App. 476, 480, 768 P.2d 1, 3 (1989), *rev'd in part*, 114 Wash. 2d 153, 786 P.2d 781 (1990). *But see* Marchioro v. Chaney, 90 Wash. 2d 298, 303, 582 P.2d 487, 490 (1978) (holding that party officials and county party chair have standing to challenge statute on organization of party).

62. Washington courts have declined to review equal protection challenges to gambling laws, leaving to the legislature the responsibility of deciding which forms of gambling are legal. *See* State v. Gedarro, 19 Wash. App. 826, 829, 579 P.2d 949, 951 (1978); Northwest Greyhound Kennel Ass'n, Inc. v. State, 8 Wash. App. 314, 321, 506 P.2d 878, 882 (1973).

63. *See, e.g.*, *Gedarro*, 19 Wash. App. at 829-30, 579 P.2d at 51.

64. In *State v. Manussier*, 129 Wash. 2d 652, 921 P.2d 473 (1996) (quoting Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118, 151 (1911)), the Washington Supreme Court, in upholding the constitutionality of a "three-strikes" initiative, rejected an argument on the constitutionality of the initiative process as applied in that case:

> Appellant's argument challenges the constitutionality of the initiative process itself and thus presents an issue which may be beyond the power of this court to decide. In *Pacific States Telephone and Telegraph Co. v. Oregon*, the United States Supreme Court considered a challenge to the Oregon initiative and referendum process based upon a claim that it was inconsistent with the Federal Constitution's guarantee of a republican form of government. In that case, the Court held that the issue was political and governmental and not within the judicial power to determine:
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> > As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.
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> 223 U.S. at 151.

political question doctrine as arising out of constitutional separation of powers concerns or as the exercise of judicial prudence.

B. Prudential Constraints

Washington courts have developed numerous prudential grounds for limiting judicial decisionmaking, *e.g.*, justiciability, ripeness, standing, and deference to the other branches. These grounds join a variety of other prudential reasons for limiting judicial activity, although not often thought of in such terms, such as the doctrine of exhaustion in administrative law,[65] the requirement that parties raise

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> *Pacific* still represents good law, and earlier cases decided by this court have been in accord with its holding. *See* State *ex. rel.* Mullen v. Howell, 107 Wash. 167, 179, 181 P. 920 (1919); State v. Owen, 97 Wash. 466, 469, 166 P. 793 (1917). Because appellant's argument does not satisfactorily address the power of the court to decide an otherwise political or governmental issue, we decline to rule on it in this case.

State v. Manussier, 129 Wash. 2d 670-71, 921 P.2d 481-82.

65. Classic examples of judicial restraint are present in administrative law. These include limiting court intrusion into the specialized decisionmaking of administrative bodies and requiring litigants to pursue available and effective administrative remedies before actions may be filed in court:

> The exhaustion requirement (1) prevents premature interruption of the administrative process; (2) allows the agency to develop the factual background on which to base a decision; (3) allows the exercise of agency expertise; (4) provides a more efficient process and allows the agency to correct its own mistake; and (5) insures that individuals are not encouraged to ignore administrative procedures by resort to the courts.

Citizens for Clean Air v. City of Spokane, 114 Wash. 2d 20, 30, 785 P.2d 447, 453 (1990). *See also* Estate of Friedman v. Pierce Cty., 112 Wash. 2d 68, 78, 768 P.2d 462, 467 (1989); Orion Corp. v. State, 103 Wash. 2d 441, 456, 693 P.2d 1369, 1378 (1985).

The doctrine of exhaustion of administrative remedies reflects practical concerns. The courts reinforce the expertise of the administrative entity designed to address certain controversies and avoid the expenditure of judicial resources when the administrative body may effectively, and finally, resolve the issue. The rule has been memorialized in the judicial review provisions of the Washington Administrative Procedure Act. WASH. REV. CODE § 34.05.554 (1998). It provides, with limited exceptions, that issues not raised before an agency may not be raised on review. *Id.* *See also* WASH. REV. CODE § 34.05.586 (1998) (stating that a party may not assert a defense to an enforcement action not raised in the substantive agency action).

Important corollaries to the doctrine of exhaustion of administrative remedies are the doctrine of primary jurisdiction and the rule of priority. These doctrines have their roots in separation of powers. Where an executive branch agency has special expertise on an issue, the courts defer to the agency in resolving factual or legal issues within that sphere of expertise. Dioxin/Organochlorine Ctr. v. Dep't of Ecology, 119 Wash. 2d 761, 775, 837 P.2d 1007, 1015 (1992). Where both the courts and an administrative agency have jurisdiction over a question, the courts have chosen to apply the doctrine of priority, deferring resolution of the issue to the administrative tribunal:

> The priority of action rule applies to administrative agencies and the courts. It generally applies only if the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief. The identity must be such that a decision of the controversy by one tribunal would, as res judicata, bar further proceedings in the other tribunal.

issues at trial to preserve them for appeal,[66] and the standard of review in appellate practice.[67]

City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469, 117 Wash. 2d 655, 675, 818 P.2d 1076, 1086 (1991) (footnotes omitted).

66. Similarly, to obtain review of an evidentiary issue, a party must object on proper grounds to the trial court's ruling. WASH. R. EVID. 103(a). A party must also object to the giving or failure to give the instruction to the trial court. WASH. R. CIV. P. 51(f). These policies are designed to afford a trial court the full opportunity to know of and correct possibly erroneous decisions.

A party may not raise most alleged errors for the first time on appeal, but must instead present such errors to the trial court or lower appellate court for consideration. WASH. R. APP. P. 2.5(a). This rule again reflects a policy of conserving judicial resources and forcing litigants to fully articulate their positions as early as possible for resolution. The original reason for the rule that appellate courts will not consider issues the parties did not raise in the trial court seems to have stemmed from solicitude for the unfortunate position of trial judges whose judgments were reversed on appeal. "In the 1200's complaints against judgments took the form of semi-criminal proceedings against the judges." Edson R. Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7 (1940). Paragraph 34, § 1, of the Laws of Henry the First provides:

> If anyone through anger or animosity or fear or partiality or greed or for any reason delivers an unjust judgment or produces any injustice, he shall forfeit 120 shillings and his rank of thegn and be deprived of every judicial dignity, unless he redeems himself vis-à-vis the king, according as the latter, in his discretion, decides.

LEGES HENRICI PRIMI 139 (L.J. Downer ed. & trans., 1972). Thus, the original rule was an expression of fairness to trial judges: they should not be held accountable for rulings on issues they had no opportunity to decide.

67. In appellate practice, the courts have adopted practical, prudential constraints on judicial decisionmaking. The standard of review is one example of such a constraint. Appellate courts generally do not review cases *de novo*, preferring to rely on trial court decisionmaking. Historically, English equity courts actually heard appeals *de novo*. *See* Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 15-19 (1994). Deference to lower court decisions arose for reasons of finality, avoidance of court congestion, and recognition of trial court expertise and close association with witnesses. *Id.* at 19-20.

With respect to many trial court decisions, such as evidentiary rulings, discovery decisions, or other trial procedural matters, the appellate courts give the widest latitude to trial courts' decisions, overturning them only if there is an abuse of discretion. State *ex rel.* Carroll v. Junker, 79 Wash. 2d 12, 26, 482 P.2d 775, 784 (1971); Coggle v. Snow, 56 Wash. App. 499, 504, 784 P.2d 554, 557 (1990). This policy is based on judicial economy, given the numerous evidentiary decisions by trial courts. For trial court factual findings, the decisions are reversible only if unsupported by substantial evidence. Thorndike v. Hesperian Orchards, Inc., 54 Wash. 2d 570, 573, 343 P.2d 183, 185 (1959).

Finally, only those errors that are "prejudicial," as opposed to "harmless," will result in an appellate court's altering of a lower court's decision. Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L. REV. 277, 278 (1995-96) (criticizing lack of standards for exercise of doctrine, suggesting doctrine is one of expediency). *See also* ROGER TRAYNER, THE RIDDLE OF HARMLESS ERROR (1970).

1. Justiciability

Justiciability and ripeness are analogous doctrines in Washington cases and, indeed, are all too often discussed simultaneously.[68] Justiciability ordinarily involves concern with whether an issue is judicially cognizable at all; ripeness, on the other hand, is more readily associated with the timing of a court action. The Washington Supreme Court has held that although Washington's Declaratory Judgment Act[69] confers jurisdiction on Washington courts to render declaratory judgments, the Act does not grant jurisdiction over nonjusticiable controversies.[70] To meet the test of justiciability, there must be:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract[,] or academic, and (4) a judicial determination of which will be final and conclusive.[71]

This test suggests a case or controversy requirement. Moreover, despite their general jurisdiction and the Declaratory Judgment Act, Washington courts generally do not give advisory opinions.[72]

Nevertheless, despite these similarities to federal justiciability principles, Washington courts may disregard these prudential

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68. *See, e.g.*, First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Preservation Bd., 129 Wash. 2d 238, 253-54, 916 P.2d 374, 382 (1996) (Dolliver, J., dissenting).

69. WASH. REV. CODE §§ 7.24.010-.020 (1998).

70. Walker v. Munro, 124 Wash. 2d 402, 411, 879 P.2d 920, 926 (1994).

71. Nollette v. Christianson, 115 Wash. 2d 594, 599, 800 P.2d 359, 362 (1990) (citing Diversified Indus. Dev. Corp. v. Ripley, 82 Wash. 2d 811, 815, 514 P.2d 137, 139 (1973)). *See also* City of Spokane v. Taxpayers of Spokane, 111 Wash. 2d 91, 96, 758 P.2d 480, 482 (1988).

72. It should be remembered that this court is not authorized to render advisory opinions or pronouncements upon abstract or speculative questions under the declaratory judgment act. The action still must be adversary in character between real parties and upon real issues, that is, between a plaintiff and defendant having opposing interests, and the interests must be direct and substantial and involve an actual[,] as distinguished from a possible or potential dispute, to meet the requirements of justiciability.

Washington Beauty College, Inc. v. Huse, 195 Wash. 160, 164-65, 80 P.2d 403, 405 (1938).

Despite this policy, Washington courts accept legal questions certified by federal courts. WASH. R. APP. P. 16.16; WASH. REV. CODE § 2.60.010 (1998). Certified federal questions are to an extent advisory in nature, although the Washington Supreme Court has indicated that they are not, due to the live nature of the controversy in federal court and the res judicata effect of the opinion. *In re* Elliott, 74 Wash. 2d 600, 610-11, 446 P.2d 347, 354 (1968).

constraints if the question is one of great public interest.[73] Also, the courts may choose to resolve issues "on the merits" rather than permit principles of restraint to prevent the resolution of controversies.[74]

2. Ripeness

Ripeness concerns the prematurity of court involvement in an issue.[75] In this respect, it is akin to the concept of exhaustion of administrative remedies.[76] The doctrine is discussed largely in the land use context. As to the substance of the doctrine, Washington courts have largely applied the federal test of balancing the fitness of the issues for judicial decision against the hardship to the parties in not deciding a matter.[77]

3. Standing

In federal courts, standing is a requirement for subject matter jurisdiction.[78] In Washington, however, the parties may waive the question of standing by not submitting it to the trial court.[79] If standing were a question of subject matter jurisdiction in Washington, the parties could not waive it and an appellate court could hear it

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73. State *ex rel.* Distilled Spirits Inst., Inc. v. Kinnear, 80 Wash. 2d 175, 178, 492 P.2d 1012, 1014 (1972) (providing declaratory relief although the question was not presented to the court as a declaratory judgment action).

74. Where the question is one of great public interest and has been brought to the court's attention in the action where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.

Id.

75. First Covenant Church v. City of Seattle, 114 Wash. 2d 392, 398, 787 P.2d 1352, 1355 (1990), *vacated*, 499 U.S. 901 (1991), *reinstated on remand*, 120 Wash. 2d 203, 840 P.2d 174 (1992).

76. Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 30-31, 829 P.2d 765, 781-82 (1992) (Utter, J., concurring).

77. *First Covenant Church*, 114 Wash. 2d at 399, 787 P.2d at 1356 (citing Abbott Lab. v. Gardner, 387 U.S. 136, 149 (1967)). The concurrence in *First Covenant Church*, however, argued for a conception of the doctrine different from that articulated in the federal cases, more closely linking it with finality of decision and exhaustion of remedies. 114 Wash. 2d at 411-12, 787 P.2d at 1362 (Utter, J., concurring).

78. ACF Indus. v. Cal. State Bd. of Equalization, 42 F.3d 1286, 1291 (9th Cir. 1994) (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990)).

79. Tyler Pipe Indus., Inc. v. Dep't of Revenue, 105 Wash. 2d 318, 327, 715 P.2d 123, 128 (1986) (standing not considered on appeal because not raised in the trial court), *judgment vacated on other grounds*, 483 U.S. 232 (1987).

anytime or decide it *sua sponte*.[80] Some other state courts treat standing as a question of subject matter jurisdiction.[81]

4. Mootness

Washington courts generally hold cases to be moot if the courts cannot provide either the relief sought by the parties or effective relief generally.[82] The Washington rule in this respect is akin to the federal rule. It is in the exceptions to the general rule, however, that the Washington courts part company with their federal counterparts.

The Washington Supreme Court in 1937 adopted a rather fuzzy exception to mootness: the courts will decide a case that is otherwise moot if it involves matters of continuing and substantial public interest.[83] This exception has largely swallowed the general rule:

> The use of the continuing and substantial public interest exception in moot cases has increased significantly in the last 15 to 20 years. Apparently first used in Washington in 1937 to issue a decision in a moot case, the exception has been used in moot cases at least 34 times by Washington appellate courts. The exception also seems to have been rejected by a majority or advocated by a dissent in another 14 cases. The overwhelming number of these cases has arisen since 1965, with over half of all the public interest exception cases arising in the 1980's.[84]

The use of the exception, which is not a picture of analytical clarity, has not abated.[85] As a result, Washington courts have left the mootness doctrine largely ill-defined.

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80. Miller v. St. Regis Paper Co., 366 P.2d 214, 215 (1961), *on reh'g*, 60 Wash. 2d 484, 374 P.2d 675 (1962); WASH. R. CIV. P. 12(h)(3).

81. *See, e.g.*, Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993) (also citing cases).

82. Sorenson v. City of Bellingham, 80 Wash. 2d 547, 558, 496 P.2d 512, 518 (1972); Snohomish Cty. v. State, 69 Wash. App. 655, 660, 850 P.2d 546, 549 (1993).

83. State *ex rel.* Yakima Amusement Co. v. Yakima Cty., 192 Wash. 179, 183, 73 P.2d 759, 761 (1937).

84. Hart v. Dep't of Soc. & Health Servs., 111 Wash. 2d 445, 447-48, 759 P.2d 1206, 1208 (1988) (citations omitted).

85. A recent case illustrates the scope of this exception. In *State v. J.D.*, 86 Wash. App. 501, 937 P.2d 630 (1997), a juvenile was apprehended by police after he was seen out past the time permitted by the Bellingham curfew ordinance. The juvenile was never charged with violating the curfew ordinance, but was charged with resisting arrest and convicted. Upon appeal, a deal was struck resulting in a dismissal of all charges. The Washington Court of Appeals nevertheless issued an opinion finding the curfew ordinance (again under which the juvenile was never charged) to be unconstitutional. *Id.* at 510, 937 P.2d at 635. The Washington Supreme Court initially granted review, *State v. Doidge*, 134 Wash. 2d 1006, 954 P.2d 277 (1998), but later withdrew the grant of review and denied reconsideration of its decision, *State v. Doidge*, 1998 WL 438663 (Wash. Jul. 10, 1998).

5. Constitutional Interpretation

In the appellate setting in particular, a well-developed policy has emerged in Washington for avoiding resolution of cases on constitutional grounds when other, nonconstitutional bases to resolve a case exist.[86] This approach reflects conservatism in adjudication and a determination not to bring into play our fundamental principles of government unless absolutely necessary to do so. As Justice Holmes recognized, declaring legislative enactments unconstitutional "is the gravest and most delicate duty that this Court is called on to perform."[87] It is all too easy and tempting for judges to wrap themselves in either the federal or state constitutions to impose their own public policy preferences.

Washington courts have also aggressively applied independent state constitutional grounds for resolving issues.[88] After *State v. Gunwall*,[89] however, Washington courts may not engage in random constitutional decisionmaking.[90] In that case, the Washington Supreme Court established a multipart test to determine if the state constitution affords more generous protection of citizens' rights than the Federal Constitution.

6. Deference to Coordinate Branches of Government in Judicial Review

Perhaps the most commonly employed prudential constraint,[91] the reluctance of courts to overturn legislative enactments, arises out

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86. Weiss v. Glemp, 127 Wash. 2d 726, 730, 903 P.2d 455, 457 (1995). *See also* United States v. Locke, 471 U.S. 84, 92 (1985) ("[W]hen a case arrives here by appeal under 28 U.S.C. § 1252, this Court will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided.").

87. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring in per curiam decision).

88. Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984).

89. 106 Wash. 2d 54, 720 P.2d 808 (1986).

90. "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *In re* Rosier, 105 Wash. 2d 606, 616, 717 P.2d 1353, 1359 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)).

91. Additional expressions of this rule include the enrolled bill doctrine pursuant to which Washington courts decline to evaluate the procedure by which bills are enacted in the legislature. *See* Citizens Council v. Bjork, 84 Wash. 2d 891, 897-8 n.1, 529 P.2d 1072, 1076 n.1 (1975); Reed v. Jones, 6 Wash. 452, 458-59, 34 P. 201, 203 (1893). Deference is also accorded to legislative declarations of an emergency requiring immediate effectiveness of legislation. CLEAN v. State, 130 Wash. 2d 782, 807, 928 P.2d 1054, 1066 (1996).

of separation of powers concerns. Justice Stone expressed this principle for the United States Supreme Court:

> The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.[92]

Characteristically, Justice Oliver Wendell Holmes said of the role of judicial review of legislation in a letter to Harold Laski, "[I]f my fellow citizens want to go to Hell I will help them. It's my job."[93] Luther Martin was undoubtedly correct when he argued during the American Constitutional Convention, "[a] knowledge of mankind and of legislative affairs cannot be presumed to belong in a higher degree to the judges than to the legislature."[94]

Washington cases have expressed this principle of deference to the more democratic branches of government by suggesting that legislative enactments will stand absent proof the enactment is unconstitutional beyond a reasonable doubt; this test is not an evidentiary standard, but the embodiment of the principle of constitutional deference.[95]

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92. U.S. v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting).

93. EUGENE C. GERHART, QUOTE IT! MEMORABLE LEGAL QUOTATIONS 254 (1969).

94. SAUL K. PADOVER, TO SECURE THESE BLESSINGS 415-16 (1962).

95. As the Washington Supreme Court stated in *Island County v. State*, 135 Wash. 2d 141, 146-47, 955 P.2d 377, 380 (1998) (citations omitted):

> Our traditional articulation of the standard of review in a case where the constitutionality of a statute is challenged is that a statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. While we adhere to this standard, we take this opportunity to explain the rationale of such a standard. The "reasonable doubt" standard, when used in the context of a criminal proceeding as the standard necessary to convict an accused of a crime, is an evidentiary standard and refers to "'the necessity of reaching a subjective state of certitude of the facts in issue.'"
>
> In contrast, the "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to

This prudential constraint is not without controversy. In a recent concurring opinion, a justice of the Washington Supreme Court argued for the elimination of any deference to legislative enactments:

> [T]oday's majority, which regales itself in legislative deference, thereby surrenders at least a portion of that righteous power necessary to check that power exercised by the Legislature. Such capitulation in the face of unconstitutional legislative usurpation is no virtue. It eliminates the most important constitutional check upon legislative abuse. It is license for the strong to vanquish the weak.
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> Such surrender, often euphemistically denominated "restraint," is sometimes falsely glorified as an aspect of the judiciary's role as a co-equal branch of government; however, in matters of constitutional law, the judiciary is not co-equal, but supreme.[96]

This prompted a sharply worded special concurrence from another member of the court reaffirming the traditional principle of deference:

> The concurrence's approach is judicial activism in full flower: "By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit." . . . Unlike the concurrence, I do not believe the judiciary has a charter, in the guise of constitutional interpretation, to substitute itself for the executive and legislative branches of government. We do not have a constitutional mandate to roam across the governmental landscape[,] changing in our discretion decisions by other constitutional branches of government with which we disagree. There is no check, no balance to such unfettered power. The concurrence offers a paean not only to judicial activism, but to judicial supremacy in our government. I do not agree with such a fundamentally flawed notion of judicial power.
>
> Our role is to analyze the Legislature's enactments against the overarching principles of the constitution, and resolve the dispute brought to us, as we did in this case. It decidedly is not our function to express disrespect for coordinate constitutional branches of government by lightly tossing away their decisions with arrogant judicial fiat, as the concurrence would have us do.[97]

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strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution. Ultimately, however, the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate.

96. *Id.* at 165, 955 P.2d at 389 (Sanders, J., concurring).

97. *Id.* at 174, 955 P.2d at 394 (Talmadge, J., concurring) (citations omitted).

It is perhaps significant to note that judicial review of the constitutionality of statutes, although a core judicial function, is one the judiciary has only sparingly applied out of deference to the coordinate branches of government.[98] It is incumbent on the other branches to be equally restrained in employing permissible constitutional checks on the judiciary.

IV. JUDICIAL RESTRAINT IN RECENT WASHINGTON STATE CASES

Having reviewed the general theories of judicial independence and self-restraint, and the application of constitutional and statutory principles of judicial restraint in federal and Washington state law, we must turn to how restraint principles are actually applied, or not applied, in a general jurisdiction state court system like Washington's.

Washington courts have exhibited a tendency to expand the procedural reach of the judicial power to decide sociopolitical controversies better addressed by the other governmental branches, as recent case examples illustrate. These recent decisions have expanded judicial power by fashioning new procedures for court action. The cases also involve judicial intrusion into issues the judicial process cannot readily handle.

A. Sociopolitical Controversies

Several recent examples of the Washington courts' role in complex social issues teach us how easy it is for courts to be drawn into important sociopolitical controversies, even though courts are ill-equipped to tackle the magnitude of the problems or weigh the interests of the competing sociopolitical forces. A prime example of a case implicating these issues is *Seattle School District No. 1 v. State*,[99] where Washington's largest school district sued the State over its failure to provide full funding of common school education pursuant to the state constitutional mandate that education was the "paramount duty" of state government.[100] The school district sought a declaration that the legislature's reliance on special excess levy funding for discharging its duty to provide for the education of resident children was unconstitutional.

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98. For instance, Chief Justice John Marshall's only use of judicial review to strike down a federal statute occurred in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

99. 90 Wash. 2d 476, 585 P.2d 71 (1978).

100. *Id.* at 481, 585 P.2d at 76; WASH. CONST. art. IX, § 1.

The Washington Supreme Court interpreted the Washington Constitution to require the legislature to fund education at a higher level, holding that the State breached its constitutional duty in failing to fund a "basic education" for Washington students.[101] The Washington Supreme Court did not believe itself constrained by separation of powers in interpreting the Washington Constitution, and declined to exercise judicial restraint in declaring a constitutional violation.[102] However, the court declined the invitation of respondents to render "guidelines" for such specific issues as staffing ratios and employment, special programs, support staff, and the like, leaving the responsibility of defining and funding such a basic education to the legislature.[103] The court stated: "While the Legislature must act pursuant to the constitutional mandate to discharge its duty, the general authority to select the means of discharging that duty should be left to the Legislature."[104]

The dissent in *Seattle School District* contended the majority had usurped legislative powers, becoming a "super legislature."[105] Justice Rosellini noted: "[T]he relief sought amounts to no less than a directive to the members of the legislature to vote, not according to their consciences or the wishes of their constituents, but according to the judgment of the majority of this court."[106] The dissent suggested the legislature was better equipped to meet the constitutional mandate, stating: "A legislature may be a hard horse to harness, but it is not quite the stubborn mule that a court can be. Most importantly, the court is not designed or equipped to make public policy decisions, as this case so forcibly demonstrates."[107]

Other state courts have attempted to compel similar legislative action. The New Jersey Supreme Court found itself in a quagmire after issuing a decision in a case analogous to the Seattle School District case. In *Southern Burlington County NAACP v. Township of Mount Laurel*[108] (*Mount Laurel I*), the New Jersey Supreme Court struck down a zoning ordinance on the grounds it failed to provide a realistic opportunity for low and moderate income housing, which the

101. *Id.* at 522, 588 P.2d at 97.
102. *Id.* at 504-10, 585 P.2d at 87-90.
103. *Id.* at 519-20, 585 P.2d at 95-96.
104. *Seattle Sch. Dist. No. 1*, 90 Wash. 2d at 520, 585 P.2d at 96.
105. *Id.* at 562-63, 585 P.2d at 119.
106. *Id.* at 578, 585 P.2d at 127 (Rosellini, J., dissenting).
107. *Id.* at 564, 585 P.2d at 120 (Rosellini, J., dissenting).
108. 336 A.2d 713 (N.J. 1975).

court interpreted as a requirement under the New Jersey Constitution.[109] The *Mount Laurel* court promulgated a rule that placed an affirmative duty on local legislators to enact legislation that would meet the requirements of the New Jersey Constitution and provided guidelines for what that legislation should entail.[110] The court effectively assumed responsibility for housing and zoning policy in that community.[111]

Despite the New Jersey court's ruling, the politicians in local communities continued to allow "exclusionary" zoning ordinances.[112] After eight years of universal noncompliance, the New Jersey Supreme Court was presented with a dilemma: (1) either ignore the noncompliance, thereby encouraging future noncompliance with court orders that lacked an enforcement mechanism, or (2) attempt to develop a remedy that would specifically spell out how all communities in the state must go about providing a "realistic opportunity for low and moderate income housing."[113]

The court chose the second option in *Mount Laurel II*.[114] Intruding upon the legislative function, the court proceeded to outline

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109. The court based its decision on art. I, ¶. 1, of the New Jersey Constitution of 1947:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, *of acquiring, possessing, and protecting property*, and of pursuing and obtaining safety and happiness.

Id. at 725 (italics added).

110. *Id.* at 734.

111. By way of summary, what we have said comes down to this. As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multifamily housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs. Certainly when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses. (If planned unit developments are authorized, one would assume that each must include a reasonable amount of low and moderate income housing in its residential "mix," unless opportunity for such housing has already been realistically provided for elsewhere in the municipality.) The amount of land removed from residential use by allocation to industrial and commercial purposes must be reasonably related to the present and future potential for such purposes. In other words, such municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate.

336 A.2d at 731-32.

112. *See* Southern Burlington Cty. NAACP v. Township of Mt. Laurel, 456 A.2d 390, 409-10 (N.J. 1983).

113. *Id.* at 410.

114. *Id.* at 409-10.

affirmative obligations upon all cities, such as requiring set-asides and incentive zoning.[115] If a city failed to adopt such measures, the New Jersey Supreme Court vested the trial court with the authority to adopt ordinances for the city, to stop development of projects, and to void the city's entire zoning plan.[116] The court also sacrificed the traditional structure of the judicial system when it required that any future "Mount Laurel litigation" be assigned only to those judges selected by the Chief Justice with the approval of the New Jersey Supreme Court.[117] The proffered reason for this alteration was to develop consistency in decisions.[118]

By issuing an opinion with no enforcement "teeth" in *Mount Laurel I*, the court found itself facing a very unpalatable choice. The court arguably chose the lesser of two evils when it chose to act as a legislative body in *Mount Laurel II*. In retrospect, it seems the court might have been better advised to declare the case nonjusticiable as either a question best resolved in the political arena (*i.e.*, the state legislature) or as a case with nonjudicially manageable standards.

Other states have faced comparable dilemmas on school funding issues.[119]

The dangers of the *Mount Laurel* experience were present in *Seattle School District*. Like the New Jersey court, the Washington Supreme Court was asked to deal with a sociopolitical problem that (1) lacked judicially manageable standards—a remedy could not be fashioned by the court without usurping the legislative function, and (2) had an adequate alternative remedy—namely, resort to the political arena where legislation could have been created to resolve the problem.

The *Seattle School District* court's ruling, although ultimately narrower in scope than the *Mount Laurel* court's ruling, nevertheless placed an affirmative duty upon a co-equal branch of government to enact legislation. Accordingly, the ruling suffers from the same

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115. *Id.* at 418-19.

116. *Id.* at 418-19.

117. *Southern Burlington Cty. NAACP*, 456 A.2d at 419.

118. *Id.*

119. *See, e.g.*, Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) (holding system of financing public education through school taxes assessed in school districts was disproportionate and unreasonable within meaning of constitutional provision requiring proportional and reasonable tax assessments). The New Hampshire court's decision prompted a political outcry in the legislature. To date, the legislature has refused to provide necessary funding to implement the court's decision. Legislation has been proposed to strip the courts of jurisdiction over school funding questions. David Brock, *Lightning Rod*, GOVERNING, Oct. 1998, at 76. *See also* Alan Ehrenhalt, *Schools + Taxes + Politics = Chaos*, GOVERNING, Jan. 1999, at 27.

infirmities found in *Mount Laurel*. First, serious questions are raised about separation of powers. Second, and for practical purposes the most troublesome problem, the court lacked a judicially enforceable mechanism to compel legislative compliance.[120] Had the legislature not seen fit to increase the level of educational funding, the Washington Supreme Court would have been in the same predicament as the New Jersey court. It is unthinkable that any Washington court would issue an order to individual legislators and the governor enjoining them to enact and sign into law specific, court-drafted legislation.[121] Third, an adequate alternative remedy was available. Specifically, the plaintiffs could have fought their battle in the political arena either by mobilizing state legislative support or by electing legislators who would fund education at a higher level.

Likewise, in an era where public-private partnerships are common, the courts have been asked to revisit the wisdom of legislative enactments concerning such activities in the guise of judicial review. In *CLEAN v. State*,[122] opponents of funding for a baseball stadium for the Seattle Mariners baseball team filed suit against the State challenging the basis for an emergency clause in the stadium funding legislation—an emergency clause foreclosed a referendum on the legislation. The Washington Supreme Court upheld the emergency clause as necessary for "public peace, health or safety" of the people of Washington.[123] The court indicated it would not presume to overturn the legislature's designation of an emergency unless the legislative action was "obviously false and a palpable attempt at dissimulation."[124]

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120. The majority tacitly acknowledged the lack of any enforceable mechanism in its numerous statements to the effect it trusted the legislature to do the right thing. *See, e.g.*, *Seattle Sch. Dist.*, 90 Wash. 2d at 537, 585 P.2d at 104 ("We have great faith in the Legislature and its ability to define 'basic education' and a basic program of education and also to fund such education without reliance upon special excess levies.").

In his dissent, Justice Rosellini reminded the majority the enforcement of the court's decree was impossible without the court itself violating the constitution. *Seattle Sch. Dist.*, 90 Wash. 2d at 579, 585 P.2d at 128 (Rosellini, J., dissenting).

121. One is inevitably reminded in this context of the famous and perhaps apocryphal story of President Andrew Jackson's reaction to the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). When told of the ruling, Jackson reportedly declared: "John Marshall has made his decision, now let him enforce it." MARQUIS JAMES, THE LIFE OF ANDREW JACKSON 603 (1938).

122. 130 Wash. 2d 782, 928 P.2d 1054 (1996).

123. *Id.* at 812, 928 P.2d at 1069.

124. *Id.* at 808, 928 P.2d at 1066 (quoting State *ex rel.* Hamilton v. Martin, 173 Wash. 249, 257, 23 P.2d 1, 4 (1933)). *See also* Brower v. State, 1998 WL 893152 (Wash. Dec. 24, 1998) (football stadium); Washington Convention and Trade Center v. Evans, 136 Wash. 2d 811, 966 P.2d 1252 (1998) (convention center); Citizens for More Important Things v. King Cty., 131

The dissent argued for a more intrusive standard, requiring the legislature to make findings to support the existence of an emergency.[125] These findings presumably would be reviewable by the courts, offering courts an unfettered opportunity to intrude upon the legislative process. This would be a profound judicial invasion of the prerogatives of a coordinate branch of government and an elementary violation of the separation of powers doctrine.[126]

Courts are also asked to referee political battles between the other branches as to the extent of their respective powers. In *Washington State Legislature v. Lowry*,[127] individual legislators filed suit against the governor challenging his ability to exercise the veto power over certain sections of general and appropriations bills. The record on appeal did not show the legislature sought to override the governor's vetoes of any of the affected sections.[128] The Washington Supreme Court opinion upheld the governor's ability to veto sections of bills, if they were formerly complete sections of bills, and his authority to veto

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Wash. 2d 411, 932 P.2d 135 (1997) (baseball stadium); City of Kennewick v. Benton Cty., 131 Wash. 2d 768, 935 P.2d 606 (1997) (coliseum); CLEAN v. City of Spokane, 133 Wash. 2d 455, 947 P.2d 1169 (1997) (parking garage), *cert. petition filed*, 66 USLW 3750 (May 6, 1998, No. 97-1807); King Cty. v. Taxpayers of King Cty., 133 Wash. 2d 584, 949 P.2d 1260 (1997) (baseball stadium).

125. *CLEAN*, 130 Wash. 2d at 833-34, 928 P.2d at 1079 (Sanders, J., dissenting).

126. Indeed, it is at least arguable that Washington's standard of review for the legislature's determination of an emergency—an "obviously false and palpable attempt at dissimulation," *CLEAN*, 130 Wash. 2d at 808, 928 P.2d at 1066 (quoting State *ex. rel.* Hamilton v. Martin, 173 Wash. 249, 257, 23 P.2d 1, 4 (1933))—as difficult to meet as it is, also unconstitutionally intrudes on the legislature's sphere of influence. The Idaho Supreme Court held as much in reviewing nearly identical circumstances in *Idaho State AFL-CIO v. Leroy*, 718 P.2d 1129, 1136 (Idaho 1986):

> Whether [an actual emergency exists] or not, we hold that the legislature's determination of an emergency in an act is a policy decision exclusively within the ambit of legislative authority, and the judiciary cannot second-guess that decision. In the absence of a legislative invasion of constitutionally protected rights, the judicial branch must respect and defer to the legislature's exclusive policy decisions. Such is the very nature of our tripartite representative form of government.

Some Washington legislators have introduced a bill that would cede to the Washington Supreme Court the authority to review legislative determinations of an emergency both as to the facts and the law. Washington Senate Bill 6563 provides, in pertinent part, that "[a]ny legislative measure [not subject to referendum because of a declaration of an emergency] shall be subject to immediate review by the supreme court both as to the facts asserted and the conclusion drawn therefrom that such an emergency exists as to justify exempting the measure from referendum." S. 6563, 55th Leg. Reg. Sess. § 2(3) (Wash. 1998). In its present form, the bill does not identify who has standing to challenge such a legislative enactment, or what standard of review the courts should employ. The bill seems to invite the courts to act as a super legislature.

127. 131 Wash. 2d 309, 931 P.2d 885 (1997).

128. *Id.* at 313, 931 P.2d at 888.

appropriations items, provided the overall agency appropriation was reduced by the amount of the item vetoed.[129]

In addition to arbitrating interbranch disputes, the courts are asked to force other branches to act when they have neglected or refused to address a problem. In *Hillis v. Department of Ecology*,[130] a citizen sought priority attention for his water right application by writ of mandamus. The application had not been processed by the State because the legislature had not adequately funded the permit reviewing segment of the applicable administrative agency. The Washington Supreme Court reversed a trial court order mandating the agency process the permit. The court reasoned there was no statutory or constitutional right to a permit and any court order to process a permit would inevitably force a court to order the legislature to appropriate funds to carry out the permitting function. Such an order would be beyond the authority of the judiciary:

> While it may be very tempting for this [c]ourt to order the Legislature to appropriate a reasonable amount of funds (or attempt to do so through court orders to Ecology) so that water rights applicants could have their requests for water decided in a timely manner, such action would violate the separation of powers doctrine. The separation of powers doctrine ensures that the fundamental functions of each branch of government remain inviolate. The legislative branch generally has control over appropriations. While we may find a waiting period of years to be intolerable, we would find it even more intolerable for the judicial branch of government to invade the power of the legislative branch. Just because we do not think the legislators have acted wisely or responsibly does not give us the right to assume their duties or to substitute our judgment for theirs. The judiciary is the branch of government that is empowered to interpret statutes, not enact them. While there are special situations when the courts can and should order the expenditure of funds, specific appropriation to fund a statutory right, not involving constitutional rights or judicial functions, is normally beyond our powers to order. If every time we decided that the Legislature had not appropriated enough funds to an agency for a given purpose we could rule that the agency was "arbitrary or capricious" for failing to act and order the agency to act, then the funding of all agency action would be effectively shifted from the Legislature to the courts.[131]

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129. *Id.* at 331, 931 P.2d at 897.

130. 131 Wash. 2d 373, 932 P.2d 139 (1997).

131. *Id.* at 389-90, 932 P.2d at 147-48. (Sanders, J., concurring in part, dissenting in part) (citations omitted). The dissent, however, would have ordered the agency to process the permit,

Similarly, a contentious sociopolitical controversy like term limits may prompt litigation to compel the courts to resolve public policy controversies not addressed by the political branches. In *Gerberding v. Munro*,[132] a group of prominent Washington citizens and incumbent legislators filed an original action for a writ of mandamus to challenge the constitutionality of Washington's term limits law enacted by initiative. The Washington Supreme Court held the statute was unconstitutional because it prescribed additional qualifications for constitutional officers when only the constitution can prescribe such qualifications.[133]

A very troubling recent case indicates how judicial involvement in an issue can place the courts squarely in the center of a general societal problem. In *Washington Homeless Coalition v. Department of Social & Health Services*,[134] various advocates for the homeless brought an action against Washington's social service agency alleging that homeless children had a statutory and constitutional right to a plan to alleviate homelessness and that the State was obligated to fund it.

A majority of the Washington Supreme Court determined the child welfare plan of the State's social services agency did not meet the statutory imperative to protect "homeless, dependent, or neglected children."[135] The majority acknowledged the statutory directive did not create a right to a specific kind of service, but determined the agency had a mandatory statutory duty to devise a plan that, at a minimum, provided for prevention services, emergency programs, and assistance to families to obtain affordable housing.[136] The supreme court also held juvenile courts, in deciding whether to place a child in foster care, had the authority to order housing assistance to children and families if lack of housing was a primary factor in placing a child out of the home.[137] The supreme court's opinion is silent on the question of whether similar separate plans are necessary for dependent and neglected children.[138] In effect, the Washington Supreme Court, not the governor, the Department of Social and Health Services, nor

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notwithstanding the intrusion on the legislature's constitutional budgetary role. *Id.* at 410, 932 P.2d at 157.

132. 134 Wash. 2d 188, 949 P.2d 1366 (1998).

133. *Id.* at 211, 949 P.2d at 1377-78.

134. 133 Wash. 2d 894, 949 P.2d 1291 (1997).

135. WASH. REV. CODE § 74.13.020(2) (1998); *Washington Homeless Coalition*, 133 Wash. 2d at 912-14, 949 P.2d at 1301.

136. *Washington Homeless Coalition*, 133 Wash. 2d at 910-12, 949 P.2d at 1300-01.

137. *Id.* at 924-25, 949 P.2d at 1307-08.

138. *Id.* at 944, 949 P.2d at 1316-17 (Durham, C.J., dissenting).

the legislature,[139] established general state policy on homeless children.

The Chief Justice dissented from the majority opinion, contending the adequacy of the agency plan was not justiciable. The dissent noted the statute was a policy statement and did not create an enforceable duty; the dissent further noted the majority's decision placed the courts in the position of micromanaging services and would inevitably lead the courts to intrude upon the legislature's constitutional budgetary power.[140]

The Washington Supreme Court in *CLEAN*, *Washington State Legislature*, and *Hillis* exhibited an admirable restraint by declining to intrude upon the constitutional authority of a coordinate branch of government and by generally rejecting invitations such as that of the *CLEAN* or *Hillis* dissents actively to breach separation of powers or to become embroiled in political controversy. By contrast, in *Gerberding*, the supreme court did intrude into a lively political battle. Similarly, as in *Seattle School District*, the *Washington Homeless Coalition* Court evidenced a new inclination to place the judiciary in the middle of intractable sociopolitical controversies. Such action compels the judiciary to undertake detailed steps to address such controversies, when the discretion to undertake such steps is within the constitutional prerogatives of the other branches.

By embroiling itself in sociopolitical controversies, the Washington judiciary may be forced to craft remedies inconsistent with the Washington Constitution, statutes, and the common law. Worse, venturing into the political thicket may diminish the courts' reputation for independence and impartiality, thereby diminishing the public's respect for the courts as a separate branch of government. The following cases illustrate the temptation to expand judicial power, perhaps without even being aware of doing so, because of a perceived need to "do justice."

B. Expansion of the Courts' Remedial Power

Not only do courts expand judicial power by resolving specific controversies best entrusted to the other branches of government, but by also creating new avenues for the exercise of judicial power. By expanding judicial remedies available to litigants, the courts assume an ever greater role in the government of our society.

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139. *Id.* at 946-47, 949 P.2d at 1318 (Durham, C.J., dissenting).

140. *Id.* at 944-47, 949 P.2d at 1316-7 (Durham, C.J., dissenting).

In *Saldin Securities, Inc. v. Snohomish County*,[141] the Washington Supreme Court held it had jurisdiction over a land use controversy by virtue of a constitutional writ of certiorari, invoking the court's inherent authority under article IV, section 6 of the Washington Constitution to review issues. In so doing, the court chose to ignore a plain legislative directive to permit judicial review of only final, as opposed to interlocutory, determinations made pursuant to the State Environmental Protection Act.[142] Departing from the limited remedial scope of the writ of certiorari as it existed at the time of Washington's statehood in 1889, the court held that the writ could issue even though an adequate remedy existed at law, as long as the petitioner could show "good cause" why that remedy did not work in that particular case.[143] The writ also applied to *any* governmental decisionmaker in Washington, not just to inferior judicial tribunals.[144] The revival of this ancient and traditionally extremely limited common law remedy creates authority for a free-ranging judicial charge to right any wrong wherever found.

Similarly, in *Gossett v. Farmers Insurance Co. of Washington*,[145] the Washington Supreme Court held its common law equitable decisions could be challenged collaterally on constitutional grounds to provide a remedy not otherwise available. The court analyzed a due process/equal protection challenge to an earlier decision that added a further equitable exception to the American Rule on attorney fees in civil litigation.[146] Thus, the court invited constitutional challenges to well-settled common law or equitable principles and significantly expanded the range of Washington constitutional law to overturn judicial decisions on grounds identical to those employed to analyze the constitutionality of statutes, rules, or ordinances.

As these cases illustrate, the courts must be cautious about expanding judicial power by increasing the opportunity and scope of judicial action. A Washington judiciary with a charter to review all

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141. 134 Wash. 2d 288, 949 P.2d 370 (1998).

142. WASH. REV. CODE § 43.21C.075(6)(c) (1998) provides: "Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations."

143. *Saldin Sec.*, 134 Wash. 2d at 293, 949 P.2d at 373.

144. *Id.* at 305-08, 949 P.2d at 379-81 (Talmadge, J., concurring).

145. 133 Wash. 2d 954, 948 P.2d 1264 (1997).

146. *Id.* at 977-78, 948 P.2d at 1276. The American Rule on attorney fees in civil litigation provides that a prevailing party may recover fees as costs only if authorized by statute, contract, or equity. State *ex rel* Macri v. City of Bremerton, 8 Wash. 2d 93, 113, 111 P.2d 612, 621 (1941). *See generally* Philip A. Talmadge, *The Award of Attorneys' Fees in Civil Litigation in Washington*, 16 GONZ. L. REV. 57, 57-59 (1980).

actions of any subordinate level of government, as *Saldin* implies, or a judiciary analyzing its common law precedents under constitutional principles, as in *Gossett*, is a judiciary without restraint.

The lesson of some of the cases involving political-social controversies is that the courts can often effectively address a constitutional or statutory violation, but may choose to leave the precise outlines of the remedy to the more political branches of government. When the remedy requested involves placing an affirmative[147] duty upon a co-equal branch of government, the court—more than ever—should be cautious about its involvement in the dispute. The reasons for this are numerous: (1) separation of powers concerns; (2) lack of an enforcement mechanism to compel compliance; and (3) availability of remedies elsewhere, namely in the political arena. Where a viable political remedy may resolve a litigant's concern, the courts should be reluctant to intrude until it is manifest that the political branches will not or cannot resolve the issue. As in *Seattle School District* and *Hillis*, the judiciary's involvement, if any, should be confined to compelling the political institutions to act.

V. A NEW GENERAL PRINCIPLE OF JUDICIAL RESTRAINT FOR GENERAL JURISDICTION COURTS

Having reviewed examples of actual cases in which Washington courts have fashioned expansive remedies or addressed sociopolitical questions with varying degrees of judicial activity, I now offer a general set of principles for evaluating whether, or to what extent, general jurisdiction courts should resolve a controversy. While the entire judiciary should apply these maxims of restraint, the Washington Supreme Court has an excellent point in its review process for applying these principles—its caseload is largely discretionary and it may choose not to take cases for review.[148]

Judicial restraint appropriately comes into play in questions with significant sociopolitical overtones. Notwithstanding their general jurisdiction and the "imperative to decide," Washington courts should be reticent about deciding significant sociopolitical controversies, particularly where viable remedies for litigants exist in the political process and elsewhere. The courts should defer to the more partisan

147. "Affirmative" is defined as requiring positive action, as opposed to invalidating or negating current action. In the legislative context, "affirmative" means mandating that legislation be enacted, as opposed to simply striking down legislation.

148. *See, e.g.*, WASH. R. APP. P. 4.2(a) (direct review of trial court decisions); WASH. R. APP. P. 13.5(b) (review of Court of Appeals decision). The court meets monthly in its departments to screen cases for review. These principles should be applied in such a setting.

branches of government on such questions. Those branches are better situated institutionally to make policy judgments necessary to execute political decisions. They can hold hearings to affirmatively seek the input of a variety of interest groups. They, more than the judiciary, can better broker the competing interests that characterize a democratic political process.[149]

The appropriate test for deciding whether, and to what extent, the courts may address a problem should be a composite test with elements addressing the timing of court involvement as well as the nature of the decision subject to review. The test should compel litigants and courts alike to understand that the bar has been raised for obtaining judicial review of sociopolitical controversies. It should compel litigants and judges to carefully analyze the proper role of the courts in such controversies, both as to liability and remedies. I suggest that considerations of exhaustion of remedies and justiciability are appropriate to the task.

A. Exhaustion of Remedies

This first question is essentially a procedural matter relating to the finality of the lower court's decision. General jurisdiction courts should employ an initial screening test to determine if the litigants have exhausted available remedies before seeking judicial resolution of a case. Borrowing from the administrative law context, courts should employ a doctrine akin to exhaustion of administrative remedies in deciding whether to address a controversy with substantial political overtones which affect the actions of other branches of government or

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149. As Chief Justice Durham stated in *Washington Homeless Coalition v. Dept. of Social and Health Services*:

> Regardless of how firmly any of may personally support the appropriation of government funds for housing assistance for homeless families, such policy determinations are not the prerogative of the judicial branch of government. The judicial branch is by design, in many respects, the branch most distant from the political fray and least capable of resolving complex social problems with significant political and budgetary overtones. We cannot hold public hearings to investigate issues and hear from the myriad of competing interests. We are ill-equipped to balance the competing visions of such interest groups. As a result, we should be most reluctant to involve ourselves in such political issues. We should leave their resolution to the political branches whose processes are more amenable to political give and take and the development of social policy. Conscientious observance of the separation of powers doctrine, "the dominant principle of the American political system[,]" requires no less.

133 Wash. 2d 894, 946, 949 P.2d 1291, 1318 (1997) (Durham, C.J., dissenting) (citations omitted). *See also CLEAN*, 130 Wash. 2d at 797, 928 P.2d at 1061 ("The Legislature with its staff and committees is the branch of government better suited to monitor and assess contemporary attitudes than are the courts.").

large-scale societal interests. The litigants in such controversies must demonstrate that they have exhausted available political remedies, including constitutional remedies or amendment/repeal of legislation, before seeking court involvement. Obviously, the definition for inaction by the other branches of government does not involve a bright-line temporal test of one month, one year, or the like, but assumes some good faith effort by the litigants to employ available constitutional or political procedures. As with the doctrine of exhaustion of administrative remedies, the political remedies available to the litigants must be effective, and exhaustion is not necessary if such acts would be futile.

The United States Supreme Court has imposed exhaustion as a prudential matter in a variety of contexts. For example, the Court considered a claim that a tribal court had no jurisdiction to adjudicate claims of a driver, who was not a tribal member, for injuries arising from an automobile accident on a state highway that ran through reservation land. The Court announced what it called "a prudential exhaustion rule" in deference to the capacity of tribal courts to explain the basis for tribal court jurisdiction.[150]

Another example of the application of prudential constraint may be found in the federal courts' standing jurisprudence. In considering standing, the United States Supreme Court has observed "prudential limitations on [the] exercise [of jurisdiction] . . . founded in concern about the proper—and properly limited—role of the courts in a democratic society."[151]

Thus, under proper principles of exhaustion, the litigants in *Washington Legislature v. Lowry* should have first resorted to available political remedies by seeking an override of the governor's veto. Similarly, the litigants in *Gerberding* may have failed the exhaustion test by not introducing a bill to amend the term limits initiative.[152] On the other hand, the litigants in *Baker v. Carr* probably satisfied the doctrine because they had no viable political remedy in legislatures gerrymandered in favor of rural interests. Similarly, the litigants in *Seattle School District* and *Hillis* may have satisfied the test because long-standing legislative inaction on the issue demonstrated the

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150. Strate v. A-1 Contractors, 520 U.S. 438, 450 (1997) (finding suit in federal court premature until tribal court has full opportunity to determine its own jurisdiction).

151. Warth v. Seldin, 422 U.S. 490, 498 (1975) (citing Barrows v. Jackson, 346 U.S. 249, 255-56 (1953)).

152. These litigants, however, had a strong futility argument where the initiative measure could be amended only by a two-thirds vote of both houses of the legislature. *See* WASH. CONST. art. II, § 1.

indifference of the political institutions toward the issue. This exhaustion doctrine requires the best efforts of the affected parties. If the political process simply does not afford a practical remedy, exhaustion is satisfied.[153]

A policy requiring exhaustion of political or constitutional remedies advances judicial economy and compels the other branches of government to make their best efforts to resolve an issue before the courts become involved. This encourages responsible action by those branches of government.

B. Justiciability

Assuming the litigants have exhausted available remedies, there is no requirement the courts *must* resolve every controversy. The judiciary can, and should, decide to resolve significant sociopolitical questions only when the courts can *effectively* articulate the controversy and a remedy for it. This set of principles is designed to compel careful evaluation of judicial involvement in every controversy and to conserve judicial involvement in sociopolitical controversies to those situations where judicial resolution is necessary and effective.

Considering Washington's tests for a political question, justiciability, and ripeness, it is more appropriate for a general jurisdiction court system to abandon these separate doctrines and blend them into a single standard for justiciability. The courts need such an overarching set of threshold principles for determining whether to decide a case with substantial political overtones. These principles should be applied aggressively by general jurisdiction courts to exclude certain controversies from judicial consideration. To further reinforce the need for attention to this analysis, I would, by an addition to the pleading rules in our rules of civil procedure, require the plaintiff in any action to plead affirmatively the action is justiciable, much as the federal civil rules require parties to plead the basis for federal jurisdiction.[154] Such a rule would place the question of justiciability at issue and thereby compel the parties and the courts to contemplate and address what previously has been given too little attention—the propriety of judicial involvement in the controversy. In this way, a body of case

153. *See, e.g.*, Smoke v. City of Seattle, 132 Wash. 2d 214, 224-27, 937 P.2d 186, 190-92 (1997) (excusing exhaustion of administrative remedies if the administrative agency is not empowered to grant the necessary relief or the administrative remedy cannot alleviate the harmful consequences of the governmental activity at issue).

154. FED. R. CIV. P. 8(a).

law on justiciability in our general jurisdiction courts will develop by necessity.

The court should resolve the question of justiciability by addressing three key questions. First, is the party litigating the issue one who has a real, nontheoretical interest in the outcome of the decision? This question is designed to ensure a party has a live interest in a real controversy. Courts should not decide issues that are not "live" without real parties with real interests at stake. This rule in effect creates a case or controversy requirement;[155] our courts may then look to the rich federal case or controversy jurisprudence for guidance on close questions. The exceptions that have swallowed up the general rule of mootness should be avoided.[156]

Second, does the judicial resolution of an issue affect a core function of a coordinate constitutional branch? This question is designed to focus the courts on separation of powers concerns so as to avoid impinging upon the core functions of coordinate constitutional branches of government. The overlap of functions among the branches of government is often a gray area without easily demarcated parameters. The courts must be sensitive to the interests at issue when resolving problems in this sphere. For example, in *Lowry*, both the legislative and executive branches jockeyed for particular advantage when asking the courts to define the scope of the governor's line item veto power. More troubling yet is the invitation by those branches to the judiciary to address the issue at all.[157] Once the principle is established that courts will referee conflicts between the executive and the legislature, the door is opened for the courts to referee additional conflicts of this nature.

Finally, can the judiciary articulate coherent, manageable standards for the resolution of the controversy and provide effective relief? This is the most critical question of the justiciability test. This

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155. *See supra* note 27.

156. As noted previously, *supra* text accompanying notes 85-87, the exception for "matters of continuing and substantial public interest" has largely swallowed up the rule on mootness. The exception should be curtailed. Only in those cases where review would always be unavailable to the litigants by the nature of the case at stake should the exception apply. *See, e.g., In re* Detention of Dydasco, 135 Wash. 2d 943, 959 P.2d 1111 (1998). *Dydasco* illustrates the point because, in any challenge to the lack of seventy-two hours notice, temporal reality will render the case moot.

157. Legislation is plainly the core function of the legislative branch; the governor exercises a legislative function in using the veto. Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wash. 2d 205, 213, 848 P.2d 1258, 1262 (1993). Thus, only "rarely" and "reluctantly" should courts intrude in such disputes. Wash. State Legis. v. Lowry, 131 Wash. 2d 309, 320, 931 P.2d 885, 891 (1997).

question compels the courts carefully to assess the possible remedies the court can order and whether those remedies are judicially manageable. Whether the courts can adequately address the issue and dispense an appropriate, effective remedy is an extremely critical concern in political cases. For example, the *Seattle School District* decision compelled court involvement in such intractable political issues as the definition of basic education, student achievement, and the adequacy of educational funding. The court in *Hillis* also posed the proper question when it asked if courts could order the legislature to spend money on a program not constitutionally mandated. In *Washington Homeless Coalition*, the judiciary would solve the problem of homelessness for children by mandating the development, and presumably the funding, of a plan to abate homelessness. The scope of the involvement in the politics of housing—identifying, building, operating, maintaining, and funding housing for low-income people with children—is truly mammoth in dimension and a task beyond the capability of even the most well-intentioned court.

Courts must assess whether a potential remedy for a statutory or constitutional wrong in political cases appropriately resolves the problem brought before the courts. The remedy ordered must be the least intrusive remedy; that is, the least intrusive upon the coordinate branches of government, but still consistent with resolving the problem. In the absence of the ability to articulate and implement such a remedy, the courts should be reluctant to intrude upon the issue.

VI. CONCLUSION

Within their carefully delineated constitutional sphere, the courts must function in a vigorous and independent fashion without fear of attack or intrusion by the other branches of government. General jurisdiction courts must be willing to define their core functions with care to prevent the other branches, with their more political and majoritarian focus, from trampling upon the constitutional imperative of the judiciary to uphold individual liberties, even when such efforts may be unpopular.

At the same time, however, the judiciary must be wise enough to restrain itself from becoming an unnecessary and inappropriate participant in every sociopolitical controversy, thereby diminishing the respect afforded the courts for their dispassionate impartiality. In an era where every wrong must have its day in court and some judges are all too eager to have the judiciary address every societal issue, the concept of judicial restraint, without the ideological baggage of the left

or right, bears reconsideration. The temptation of general jurisdiction courts to right all wrongs, to undertake what Justice Kennedy described as "a power grab in a black robe,"[158] should be resisted. In our constitutional scheme, many issues are better left to the more political branches of government to decide. Where the courts become embroiled in political controversies, the legitimacy of the courts, their aura of impartiality and independence, are apt to suffer as each new political issue has its day in the sun. If the courts are to survive with the core constitutional functions of the judiciary intact, it is crucial for general jurisdiction courts to employ an appropriate paradigm for deciding if, and when, to resolve sociopolitical questions.

158. *See* Biskupic, *supra* note 22.