Ripeness and the Constitution

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In a decade and a half of decision making, the record of the Burger Court proved, in many ways, a surprising one. Neither the conservative monolith suggested by its early “Nixon Court” label, nor the enthusiastic heir of its predecessor’s egalitarian agenda, the Court constructed a mixed legacy of activism and restraint.1 Although the Court’s overriding approach to constitutional problems has proven difficult to characterize,2 recurrent themes are clearly ascertainable.3 This article will touch on one particular, perhaps distinctive, legacy of the Burger Court: the constitutionalization of the law of federal justiciability.4

For decades prior to the 1970s, principles of justiciability—standing, mootness, ripeness, political questions, and

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2 See Blasi, The Burger Court at 198-217 (cited in note 1).

3 See generally Nichol, 98 Harv. L. Rev. at 319-22 (cited in note 1); Blasi, The Burger Court (cited in note 1).

4 Article III, § 2 of the United States Constitution states in part: “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 under their Authority; . . . to Controversies between two or more states.” These phrases have been interpreted to encompass the “case or controversy” requirement of article III. To limit repetition, I have used the terms “case or controversy” and “article III” interchangeably. There is, of course, more to article III than the case or controversy requirement. The provision sets forth the “arising under” jurisdiction, the constitutional diversity jurisdiction, and so on. In this essay, however, I consider only the case or controversy component of article III.

Throughout this article, I use the term “jurisdiction” in a limited sense. This essay addresses the constitutional and quasi-constitutional limitations on the power of the federal courts found in article III. Accordingly, “jurisdiction” here refers to limits on federal power that relate to the case or controversy requirement, rather than other jurisdictional barriers such as subject matter jurisdiction and personal jurisdiction.
the like—a hazy middle ground between prudential concern and constitutional mandate. If traditional limits on the exercise of judicial power operated restrictively, their claimed ties to the Constitution were at best indistinct and not fully articulated. The Warren Court, in response to the fused justiciability doctrines it encountered, launched an energetic, if ultimately imperfect, attempt both to segregate and to liberalize the various strands of jurisdictional analysis.

The resulting expansion of judicial purview caused the Burger Court immediate concern. The reaction of the justices over the course of the past decade has been, if not consistent, at least directed. The Court has fortified the barriers of standing, mootness, and ripeness faced by federal litigants. Indeed, the Burger Court has suggested quite pointedly that these justiciability doctrines are rooted in, and demanded by, the Constitution itself—specifically, the "case or controversy" requirement of article III. By limiting intervention to the protection of concrete, particularized, continu-

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8 For examples of other principles the Supreme Court has used in denying federal jurisdiction, see United States v. Johnson, 319 U.S. 302, 305 (1943) (feigned or collusive cases); Henry v. Mississippi, 379 U.S. 443, 446 (1965) (adequate and independent state ground); Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971) (no real issue between parties).

6 Consider, for example, the constitutional status of Frothingham v. Mellon, 262 U.S. 447, 486-89 (1923) (dismissing taxpayer challenge to allegedly illegal appropriation on ground that allowing such suits would encroach upon the legislative power).


8 See the Chief Justice's opinion in Laird v. Tatum, 408 U.S. 1, 15 (1972), reversing the court of appeals' finding of jurisdiction on the ground that the litigant's theory of standing would make the federal courts "virtually continuing monitors of the wisdom and soundness of Executive action."


11 The Burger Court clearly viewed standing as a doctrine of constitutional stature. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39, 44-46 (1976) ("EKWRO"); Warth, 422 U.S. at 502-03. The same is true of the mootness doctrine, see DeFunis, 416 U.S. at 316-20, and the ripeness doctrine, see, e.g., Babbitt v. Farm Workers, 442 U.S. 289, 297 (1979). See also notes 64-67 and accompanying text below.
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ing injuries,12 article III assertedly restrains federal courts from moving beyond the scope of the "judicial Power."13 Article III requirements have been designed, as a group, to ensure the "proper—and properly limited—role"14 of the unelected federal judiciary in our democratic system of government.

This essay will focus on one aspect of the Burger Court's article III legacy: the ripeness doctrine. The subject of little academic comment, at least compared to other components of justiciability,15 the ripeness analysis employed by modern federal courts has met with consistent approval.16 However, the Burger Court's decision to constitutionalize ripeness poses special problems for the clarity and workability of the doctrine. It also bodes poorly for the comprehensibility of the case or controversy requirement of article III.

Aspects of the ripeness doctrine are anomalous for a requirement rooted in the Constitution. The demands of the principle vary greatly according to the dictates and posture of the claim on the merits. In operation, therefore, the ripeness requirement often is indistinguishable from actionability analysis. Other cases use this requirement to ensure that judicial decision making is carried on with the requisite factual foundation, or under a time frame that avoids premature interference with the regulatory actions of other government bodies. In short, except for those instances in which ripeness analysis is employed to eschew advisory opinions—a task performed more directly by the standing requirement—the doctrine serves goals that the Court has typically characterized as prudential rather than constitutional. It aims to fine-tune the decision-making process of the federal courts and to measure the demands of substantive constitutional principle. These tasks are essential. They are not best performed, however, by an

12 EKWRO, 426 U.S. at 39, 44-46; Warth, 422 U.S. at 502-08; DeFunis, 416 U.S. at 316-20.
13 Article III provides, in part, that the "judicial Power" extends to the determination of various "Cases" and "Controversies."
14 Warth, 422 U.S. at 498.
15 The literature on standing is voluminous. See, for example, the authorities listed in Gene R. Nichol, Jr., Rethinking Standing, 72 Cal. L. Rev. 68, 68 n.3 (1984). The mootness doctrine has received attention as well. See, e.g., Don B. Kates, Jr. and William T. Barker, Mootness in Judicial Proceedings: Toward a Coherent Theory, 62 Cal. L. Rev. 1385 (1974); Comment, A Search for Principles of Mootness in the Federal Courts, 54 Tex. L. Rev. 1289 (1976).
overarching barrier to the exercise of judicial power.

It is my view, therefore, that the Court's effort to bring the ripeness doctrine under the umbrella of the case or controversy requirement is unfortunate. Not only is constitutionalization inconsistent with the doctrine's premises, but it implies a rigidity and formalism that are at odds with the doctrine's operation. It threatens further to complicate and confuse the case or controversy requirement as well. Ripeness analysis is intertwined with the posture, factual record, and substantive standards of the claim being litigated. It cannot easily be encompassed by an independent, uniform constitutional limitation on judicial authority.

My efforts will explore both the nature of the ripeness standard and its relationship to the Court's vision of article III. In order to examine the propriety of making ripeness an article III requirement, it is necessary initially to consider briefly the Burger Court's vision of the case or controversy standard. Part I of this essay argues that the Court consistently turned to the concept of "distinct and palpable injury" as constituting the "essence" of the case or controversy requirement. By demanding the demonstration of concrete harm to trigger judicial power, this injury standard is designed to ensure that justiciability analysis is not influenced by the validity, importance, or political desirability of the claim on the merits.

Part II turns to the workings of the ripeness doctrine. After examining the goals and methodologies of the various types of ripeness decisions, I conclude that they have little in common with article III jurisprudence. The chief purposes of the ripeness inquiries—to fine-tune both the substantive claim and judicial decision making—are intimately connected with the merits of the particular claim, an inquiry that the uniform requirement of concrete injury tries to avoid.

Finally, in part III, I argue that a marriage of ripeness and article III is flawed. Not only is it inconsistent with the Court's depiction of the case or controversy requirement, it is a wrong turn analytically—both for ripeness and for article III.

I. THE BURGER COURT AND ARTICLE III

The decisions of the Burger Court implementing the case or controversy requirement can reasonably be described as inconsis-

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17 See Warth, 422 U.S. at 501.
18 Id. at 499-500.
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The Court has been quite consistent, however, in its descriptions of article III's demands. In Valley Forge v. Americans United for Separation of Church and State, it explained that a "recent line of decisions . . . has resolved the ambiguity" over the fundamental content of article III. At an "irreducible minimum" the Constitution requires "actual or threatened injury as a result of the putatively illegal conduct of the defendant." This individual injury standard, as Justice Powell has written, forms the "essence" of the case or controversy requirement. In explaining the contours of the requirement, modern standing rulings have provided the fullest exploration of the aims and rationale of the article III standard, as well as the distinctions to be drawn between the constitutional and prudential limits on the exercise of judicial power.

As the framers envisioned, article III limits the authority of the federal courts to the consideration of cases of "a Judiciary nature." Of course, describing the parameters of the judicial case requirement has proved no easy matter. For the bulk of our legal history, the case or controversy standard was defined, if at all, by analogy to the common law system of adjudication. Occasionally, decisions construing article III suggested prohibitions against issuing advisory opinions and entertaining collusive suits, and even constitutional limits on the reach of the Declaratory Judgment Act. Primarily, however, the federal courts measured their power to decide cases by asking whether the litigant asserted a legal in-

21 Id.
22 Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 218-19 (1974). See also Richardson, 418 U.S. at 194 (Powell, J., concurring). Justice Powell is the principal architect of the constitutional standard of particularized injury. For the prime example, see Warth, 422 U.S. at 490.
23 Max Farrand, 2 Records of the Federal Convention of 1787 at 430 (1911).
26 See, e.g., Johnson, 319 U.S. at 303-05 (collusive suit not a real case or controversy).
27 See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (upholding constitutionality of Declaratory Judgment Act of 1934 as applied to "actual cases or controversies"). In part II-B, I will argue that cases such as Haworth are most appropriately seen as standing decisions, not as ripeness decisions.
terest recognized by the Constitution, statutes, or the common law.  

But the expansion of "public law" litigation eventually forced the courts to stop interpreting the case or controversy standard by analogy to common law adjudication, and thus to abandon the legal interest test. By the early 1970s, in Association of Data Processing v. Camp, the Supreme Court had scrapped the legal interest test in favor of a simple demand for "injury in fact." Building on this foundation, the Burger Court regularly characterized the case or controversy mandate as a demand for "distinct and palpable injury." The goal in turning to the harm standard was straightforward. The Court contended that its harm-based standard is a "means of 'defining the role assigned to the judiciary in a tripartite allocation of power.'" Absent litigants "who can show 'injury in fact,'" the Court indicated, "the power 'is not judicial . . . in the sense in which judicial power is granted by the Constitution to the Courts of the United States.'" Article III's "bedrock requirement" of individual harm, therefore, is the primary tool by which the Court has attempted to limit the purview of the federal tribunals to cases of a "judiciary nature."

The injury test was adopted expressly to remove the article III "case" determination from the sway of the decision on the merits. In Data Processing, the Court declared that while "the 'legal interest' test goes to the merits," article III's core standing require-
ment is "different." The constitutional standard "in no way depends" on the substantive issues litigated or on the evaluation of the claim. Moreover, the demands of the case or controversy standard do not "diminish as the 'importance' of the claim . . . increases," nor do they countenance a "hierarchy of constitutional values or a complementary 'sliding scale' allowing easier access for some actions than for others.

In short, the Burger Court's treatment of the case or controversy requirement in the standing area—the area in which the Court has most fully articulated the requirements of article III—casts the constitutional "case" demand as an objective, concrete, independent barrier to the exercise of judicial power. Removed from the validity of the cause of action—its importance or attractiveness—article III provides a supposed freestanding trigger to the employment of judicial authority while ostensibly avoiding the "premature legal value judgments" that would follow from turning to the merits.

The Burger Court's vision of article III also can be illuminated by considering the standing guidelines that the Court has imposed that are not required by the case or controversy mandate. Cases consistently point to a set of "prudential" principles restricting the availability of the federal forum. Claimants must, in the usual course, assert their own rights rather than those of third parties. The Court will not consider "abstract questions of wide public significance" or a mere "'generalized grievance' shared in substantially equal measure by all or a large class of citizens." And a plaintiff's claim must fall within the "zone of interests to be protected or regulated by the . . . guarantee in question." It is now "settled that such rules of self-restraint are not required by Art[icle] III but are 'judicially created overlays that Congress may

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38 Id.
39 Richardson, 418 U.S. at 174, 180-81 (Powell, J., concurring).
40 Valley Forge, 454 U.S. at 484.
41 Id.
42 I have argued elsewhere that the injury determination is far more complex and malleable than the Burger Court's article III rulings suggest. See Gene R. Nichol, Jr., Injury and the Disintegration of Article III, 74 Cal. L. Rev. (forthcoming 1987).
44 Warth, 422 U.S. at 498.
45 Id. at 499.
47 Data Processing, 397 U.S. at 153.
As a package, then, the modern standing decisions reveal an ascertainable portrait of both the purpose and the configuration of the case or controversy requirement of article III. Employing an overarching trigger based on individual harm, the injury standard ensures the existence of a constitutional case—and thus comports with the judicial power—without becoming embroiled in the particulars of the substantive claim.

The third party, generalized grievance, and zone of interest rules each assume the existence of constitutionally recognized injury. The third party and zone of interest tests explore the intended beneficiaries of the substantive principles on which the cause of action is based; they attempt to ensure that appropriate parties control the decision to litigate.48 The Court cautions restraint in suits based on widely shared injuries so as to temper interference with the operation of other branches of government when those injured may have the political power to protect themselves.50

The Burger Court's portrait of article III is to this extent a reasonable one. It carves out for the case or controversy requirement a limited but vital role. The constitutional standard does not embody all that is good or valuable in jurisdictional decision making. A variety of determinations are characterized as examples of prudent "self-governance"—allowing for a heavy dose of fact-based discretion and the essential involvement of legislative choice. Even more importantly, some jurisdictional rulings are spared the fate of being constitutional decisions.

Only the heart of the inquiry—the admittedly complex51 injury determination—is given constitutional status. It "states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called 'prudential' considerations."52 According to the Court, "neither the counsels of prudence nor the policies implicit in the 'case or controversy' requirement should be mistaken for the rigorous article III requirements themselves."53 As the following sections reveal, the multifaceted ripeness requirement is difficult to square with such a stark portrait of article III.

49 See Nichol, 72 Cal. L. Rev. at 95-98 (cited in note 15).
50 See Warth, 422 U.S. at 501.
51 See generally Nichol, 74 Cal. L. Rev. (cited in note 42).
52 Valley Forge, 454 U.S. at 475.
53 Id.
II. RIPENESS

The central principles of the ripeness doctrine are unproblematic. The "basic rationale" of the ripeness requirement is "to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements" with other organs of government. In Abbott Laboratories v. Gardner, still characterized as the "leading discussion" of the doctrine, the Court indicated that the question of ripeness turns on "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration."

It is easy to conclude, with Professor Davis, that the approach of Abbott Laboratories provides an "excellent foundation" for the analysis of ripeness issues. Its open inquiry avoids both the rigidity of prior ripeness law and the questionable systems of classification that characterize other justiciability doctrines.

As the following sections reveal, ripeness analysis serves a variety of goals and employs several distinct processes. Commentators have ordinarily approached the decisions either chronologically or by reviewing the nature of the factors shaping the various

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44 Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). Although Abbott Laboratories raised the possibility of a dispute between the courts and an administrative agency, the ripeness doctrine is likewise used to avoid disputes between the courts and other organs of government. See, e.g., Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring) (using ripeness principles to dismiss challenge to President's abrogation of treaty with Taiwan).


48 Davis, 4 Administrative Law Treatise § 25:6 at 370 (cited in note 16). See also Wright, Miller, and Cooper, 13A Federal Practice at 112 (cited in note 16) (Abbott formula "generally satisfactory").

49 Compare, for example, the modern decisions with the analysis employed in Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 242-43 (1952) (declaratory judgment available only in cases that admit of "an immediate and definitive determination" of the legal rights of the parties) and International Longshoremen's Union v. Boyd, 347 U.S. 222, 224 (1954) (declaratory relief not available "to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable"). See also Pub. Util. Comm'n v. United Air Lines, 346 U.S. 402 (1953) (two-sentence dismissal of declaratory judgment suit without any analysis of the facts). But note id. at 403 (Douglas, J., dissenting) (arguing that the case is "peculiarly one for declaratory judgment").

50 See Nichol, 72 Cal. L. Rev. at 73-82 (cited in note 15). (discussing "thinness and artificiality" of Burger Court's application of injury in fact standard in standing cases).

51 See C. Douglas Floyd, The Justiciability Decisions of the Burger Court, 60 Notre
ripeness determinations. Although it may oversimplify the inquiry somewhat, my claim is that the bulk of the ripeness decisions fall into three interrelated, but analytically distinct categories.

First, the ripeness doctrine has perhaps most frequently been used to measure the demands of substantive statutory or constitutional causes of action. This application of the doctrine does not relate to jurisdictional power at all. Instead, it is an aspect of actionability analysis—that is, the determination of whether the litigant has stated a claim on which relief can be granted. Second, ripeness review often has been employed to determine whether the litigant’s asserted harm is real and concrete rather than speculative and conjectural. This methodology parallels standing analysis. Third, the ripeness requirement has been used to serve the goals of prudent judicial decision making. In a series of decisions in which the Abbott Laboratories formula figures prominently, the Supreme Court has attempted to time the intervention of judicial power so as to ensure more accurate rulings by the courts and to allow the challenged government action to run its course more completely.

For the most part, these goals and processes are distinct from those of the case or controversy requirement’s injury determination. But the Supreme Court has been clear that, although the ripeness demand may have begun as an exercise in judicial discretion, it is now firmly planted in the Constitution. In a series of

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62 See Wright, Miller, and Cooper, 13A Federal Practice at § 3532 (cited in note 16).


64 Earlier decisions distinguished the doctrines of standing, mootness, and ripeness from the core article III “case or controversy” requirement:

The restriction of our jurisdiction to cases and controversies within the meaning of Article III of the Constitution . . . is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional questions. . . . “The Court [has] developed, for its own governance in the cases admittedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.” . . .

The various doctrines of “standing,” “ripeness,” and “mootness” . . . are but several manifestations—each having its own “varied application”—of the primary conception that federal judicial power is to be exercised . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.

cases dating from the mid-1970s, the Court has conflated the ripeness inquiry and the case or controversy requirement of article III, repeatedly describing the ripeness inquiry as a "threshold" determination designed to measure whether the "actual controversy" requirement imposed by Article III of the Constitution is met.\(^6\) The decision in Babbitt v. Farm Workers, for example, employed the entire panoply of ripeness tools as aspects of the "case or controversy [requirement] within the meaning of Article III of the Constitution."\(^6\) It is this turn that I find troubling.\(^6\)


\(^6\) 442 U.S. 289, 297 (1979). Babbitt employed substantive/actionability ripeness to conclude that a vagueness challenge to a labor ordinance was timely. Id. at 303-04. It used injury/ripeness analysis to conclude that a challenge to a consumer publicity regulation was appropriate. Id. at 300-02. And, it employed ripeness as a tool for factual specificity to reject a challenge to the organizer access provisions of the ordinance on the ground that it was not yet mature. Id. at 300, 303-04.

Prior to Babbitt, one still could have hoped that only part of the ripeness doctrine was brought within article III. For example, in Buckley v. Valeo, 424 U.S. 1 (1976), the Court purported to distinguish between article III and "problems of prematurity and abstractness." Id. at 114. If that distinction had stood, the decisions could be read to constitutionalize only the injury/ripeness determination. Buckley involved an express statutory grant of jurisdiction "intended to provide judicial review to the extent permitted by Art. III," id. at 12, and since the case involved a "real and substantial controversy," the Court accordingly held the claim involved to be justiciable. Id. at 117-18. In standing law as well, the Court has applied its standards liberally in instances where Congress evinced similar intent. See, e.g., Gladstone, Realtors, 441 U.S. 91 and Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (both holding that plaintiffs had standing under the Fair Housing Act of 1968, because Congress intended standing under the Act to extend to the limits permitted by article III).

But after Babbitt, it seems that the Court will treat all uses of ripeness as equally commanded by article III. Moreover, Hodel, 452 U.S. at 293-97, and Steffel, 415 U.S. at 458-60, employed substantive ripeness analysis as an article III endeavor. While Abbott Laboratories was originally an administrative law decision, most recently, in Pacific Gas & Elec., 461 U.S. 191, the Court characterized Abbott Laboratories as the "leading discussion" of the ripeness doctrine while citing a case holding the ripeness standard to be part of article III. 461 U.S. at 201, citing Regional Rail Reorganization Act Cases, 419 U.S. 102.

\(^6\) I realize that some cases predating the Burger Court appear to treat ripeness as a demand of article III, especially cases involving the interpretation and constitutionality of the Declaratory Judgment Act. For example, see Golden, 394 U.S. at 103; Haworth, 300 U.S. at 239-40. Others at least read the Declaratory Judgment Act in conformity with article III. See Wycoff, 344 U.S. 237. Some decisions, on the other hand, are simply unclear. See United
In the next three sections, I sort out in greater detail the three uses of ripeness doctrine identified above and consider their relation to the dictates of article III.

A. Ripeness and the Demands of Substantive Law

A comparison of two cases reviewed in the Supreme Court’s 1984 term indicates that the ripeness determination is more complex than the apparent simplicity of the Abbott Laboratories formula might suggest. In Williamson County Regional Planning v. Hamilton Bank, the Court ruled that the plaintiff’s fifth amendment takings claim challenging various zoning regulations was premature because the plaintiff had yet to institute an inverse condemnation action under local law and had also failed to apply for zoning variances. Prior to the Court’s determination, however, the plaintiff bank and its predecessor in interest, a real estate developer, had engaged in a fairly extensive series of transactions with the zoning commission whose decision the bank sought to overturn.

Some twelve years before the Court’s ruling, the developer had submitted a preliminary plat that was approved by the Planning Commission. Based upon that acceptance, the developer conveyed to the county a “permanent open space easement” for a golf course and spent approximately $3,000,000 building the golf course and $500,000 installing a sewer system. Six years after the acceptance of the preliminary plat, the zoning commission gave final approval to the permanent plat. Shortly thereafter, however, the commission changed its regulations and rejected the previously accepted plat. When the developer, at the commission’s request, submitted a revised plat, the commission rejected it as well. The developer

Air Lines, 346 U.S. 402 (per curiam denial of declaratory relief, simply citing Wycoff). Yet, before the string of cases cited in note 65 above, the constitutionalization of ripeness was far from certain. An abundance of pre-Burger Court decisions characterize ripeness in other than constitutional terms. For examples, see note 64 above.

My claim is that the constitutionalization of ripeness is unfortunate. I am less concerned with laying blame for the problem than with pointing out jurisprudential shortcomings. I do, however, attribute the problem to the Burger Court for two reasons. First, in the Burger era, the Court made explicit what was before unclear: ripeness is part of article II. Second, the Burger Court’s decision, in Data Processing, to make standing law’s injury requirement the core component of article III has rendered any tie of the ripeness doctrine to the case or controversy requirement redundant. I discuss this second point in part II-B below.

69 105 S.Ct. at 3119-22.
70 Id. at 3112-14.
next appealed to the county zoning board, which reversed the de-
cision of the commission. On remand, however, the commission de-
termined that the county board lacked jurisdiction to hear com-
mission appeals. The commission thus stood by its earlier ruling
rejecting the plat. At this point, the bank (now the owner) sought
relief in federal court— and its case was ruled premature.71

The plaintiffs in National Gay Task Force v. Board of Educa-
tion of the City of Oklahoma City72 had a considerably easier time
of it. There the plaintiffs, whose membership included teachers in
the Oklahoma public school system,73 challenged a newly enacted
Oklahoma statute that made teachers' advocacy or promotion of
"public or private homosexual activity"74 censurable. The record
did not reflect how the statute would actually have been enforced;
nor did it identify the specific activity, prohibited by the statute,
in which the litigants hoped to engage. No limiting construction
had been sought in the state courts, nor was any disciplinary ac-
tion instituted or threatened. Yet the Tenth Circuit proceeded to
strike down the advocacy section of the statute without analyzing
the ripeness issue. The Supreme Court split four to four, thus af-
firming (without opinion) the decision below. Most surprisingly,
perhaps, it is fair to say that both Hamilton Bank and National
Gay Task Force were correctly decided under present ripeness
principles.75

What is the measure of an independent constitutional barrier
that requires one litigant to pursue his claims for years with local
decision makers at great expense in order to bring his federal ac-
tion to maturity, while another's action is thought to be ripe at the
mere enactment of the regulation challenged? The contrast be-
tween the jurisdictional hurdles applied in Hamilton Bank and
National Gay Task Force highlights the variable nature of the
ripeness doctrine.

In fact, the cases tell us far more about the demands of the
takings clause and the first amendment, respectively, than about
the requisites of article III. The ripeness requirement consistently
has been molded to meet the dictates of the substantive claim on
the merits. For several decades, the Court has allowed pre-enforce-

71 Id.
72 Id. at 3119-22.
73 729 F.2d 1270 (10th Cir. 1984), aff'd without opinion, 470 U.S. 903 (1985).
74 729 F.2d at 1272.
75 Id.
76 See text at notes 77-84 and 101 below.
ment challenges to laws regulating speech. Laws threatening sanctions for expression are said to "chill" potential speech. Rather than force citizens to curtail the exercise of their asserted first amendment rights in order to avoid prosecution, courts have permitted facial challenges to regulations of expression even before the institution of other legal proceedings. Thus, the plaintiffs in National Gay Task Force appropriately could assert concrete, present injury to their interests in free expression with the mere passage of the Oklahoma advocacy statute. As the Supreme Court ruled in Keyishian v. Board of Regents, it is not permissible to inhibit first amendment expression by forcing a teacher to "guess what conduct or utterance may lose him his position" by violating a "complicated and intricate scheme" of regulation.

The law of the takings clause of the fifth amendment, however, has followed a very different path. The Supreme Court has characterized the takings inquiry as turning on "ad hoc factual" determinations directed to "particular estimates of [the] economic impact" on the property in question. The Court has also ruled it "particularly important" in takings cases that adjudication take place in a concrete factual setting. The possibility of an administrative solution, of course, may alter the magnitude of the property diminution. Thus, part of the concrete factual setting necessary to the demonstration of a takings claim, apparently, is a showing that the regulatory authority would deny approval for all uses that would enable the plaintiff to obtain a "reasonable return" on its investment. Since the developer in Hamilton Bank had failed to exhaust all avenues afforded by local zoning ordinances, the claim was ruled premature.

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78 See, e.g., Steffel, 415 U.S. at 459.


80 Id. at 604.

81 Hodel, 452 U.S. at 295.

82 Id. at 295-96.

83 Penn Central Transportation Co. v. New York City, 438 U.S. 104, 136 (1978). As the Supreme Court ruled in its latest term:

It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. MacDonald, Sommer & Frates v. Yolo County, 106 S.Ct. 2561, 2566 (1986).
In short, while the first amendment allows citizens to attack regulations that may inhibit their speech even before such regulations have been enforced, the takings clause demands a showing by the challenger that the regulating authority has foreclosed all economically viable options. It is obviously more difficult, therefore, to present a ripe takings claim than a ripe first amendment challenge. 48

The central reason for the distinction between the two lines of cases is that the ripeness determination is inescapably intertwined with both the substance of the claim on the merits and the procedural posture of the case on review. Whereas free speech and electoral challenges have faced minimal ripeness hurdles, claims based on the freedom of association, equal protection, the fourth amendment, and the right to travel have been ruled context-dependent and therefore subject to more stringent ripeness demands. Broad-based facial attacks on legislative regimes, while less likely to prevail on the merits, have faced little difficulty with the ripeness standard. 89 The common theme of such rulings is the examination of what it takes to state a concrete cause of action under the substantive principles upon which the claim is based. As Professor Vining has written, the "court actually does make a decision on the merits when it purports to choose the context in which the decision will be made." 90

The interplay between ripeness and the substance of the claim

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8 Compare Hodel, 452 U.S. 264 (takings challenge to federal statute regulating surface mining dismissed as unripe challenge), with Steffel, 415 U.S. 452, and Keyishian, 385 U.S. 589 (first amendment claims held justiciable even at pre-enforcement stage).
89 See Babbitt, 442 U.S. at 301; Buckley, 424 U.S. at 117-18; Morial v. Judiciary Commission, 565 F.2d 295, 298 (5th Cir. 1977).
92 Southland Royalty Co. v. Navaho Tribe of Indians, 715 F.2d 486, 491 (10th Cir. 1983).
93 Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243, 1248 (9th Cir. 1982).
is illustrated by Hoffman Estates v. Flipside, Hoffman Estates. There, a vendor challenged a statute prohibiting the sale of materials "designed or marketed for use with illegal cannabis or drugs." The attack was multifaceted. Flipside alleged that the provision was both vague and overbroad under first amendment guidelines. It also claimed that the statute could give rise to a pattern of discriminatory enforcement. The Supreme Court considered, and rejected, the vagueness and overbreadth claims. It held that the regulation satisfied specificity demands, and that the overbreadth doctrine does not apply to commercial speech. The equal protection challenge, however, was dismissed on ripeness grounds. Although the likelihood of discriminatory application was substantial, the Court refused to address the problem at the pre-enforcement stage. Instead, it recognized that opportunities were available for clarification by administrative regulation and that there would be sufficient time to consider any specific claim of discriminatory enforcement when the village actually attempted such enforcement.

Since Flipside had been advised by local officials not to sell various products thought to be prohibited by the statute, a sufficient controversy was presented to allow the vagueness and overbreadth claims to be determined. The law of the first amendment demanded no more than that the Court examine the face of the statute to settle the substantive challenge. The rejection of the attack based on equal protection turned on substantive grounds as well. The Court implicitly ruled that a cause of action based on discriminatory enforcement demands the demonstration of specific instances of harassment. Also implicitly, of course, the Court concluded that neither the equal protection clause nor the first amendment invalidate a statute that merely poses a substantial risk of discriminatory enforcement. In other factual contexts, however, such arguments have prevailed.

95 Id. at 492.
96 Id. at 494, 503.
97 Id. at 497-504.
98 Id. at 493.
99 Id. at 503-06 & n.21.
The point here, of course, is not that the Court came to the wrong conclusion in *Flipside*, but that its ripeness determinations were substance through and through. The litigant's claims were either accepted or rejected not because of some constitutional barrier to the exercise of judicial power, but because in an exercise of judicial power the justices ruled that no claim for relief had been pleaded and proven. The *Hamilton Bank* decision, also employing ripeness analysis, came to a similar conclusion about the takings clause. The plaintiff in *Hamilton Bank* could present no ripe takings claim until all local avenues of relief had been pursued. In both instances, the Court concluded that no constitutional violation had been shown.

To claim that ripeness decisions are often substantive rulings in another form is not to argue that this use of the doctrine is illegitimate. It seems likely that Professor Bickel had it right when he wrote that the ripeness determination "must depend on at least an initial judgment of the merits." It may well be that some of the cases rejected as unripe for lack of concrete application should have been dismissed for failure to state a claim upon which relief could be granted, rather than for lack of jurisdiction. But the ripeness formula at least suggests that the legal shortcoming is one of timing or factual development. It implies to the shunned litigant that she may eventually have a cognizable claim.

It seems to me a major mistake, however, to confuse this sort of inquiry with the application of a constitutional barrier to the exercise of judicial power. The Burger Court treated the article III case or controversy requirement as an independent, objective limitation on judicial authority. The necessary implication of the Court's moves to constitutionalize the ripeness doctrine, therefore, is an assertion that the judiciary has no power to address the "premature" issues considered in the ripeness cases. When the Court uses the ripeness standard in decisions such as those discussed above, however, it does make a judgment on the merits. By ac-

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101 The Court in *Flipside* made no claim to be applying any article III requirement. Nevertheless, elsewhere it has made clear that it intends to constitutionalize this aspect of ripeness analysis which concentrates on the substantive claim. The decision in *Babbitt*, for example, employed substantive or actionability ripeness to conclude that a challenge to an allegedly vague labor ordinance was timely. 442 U.S. at 303-04. For other similar applications of ripeness analysis, see *Hodel*, 452 U.S. at 293-97; *Steffel*, 415 U.S. at 458-59.


103 See, e.g., *Hamilton Bank*, 105 S.Ct. at 3116-22; *Hodel*, 452 U.S. 264.

104 Fed. Rule Civil Proc. 12(b)(6) provides for dismissal of suits for "failure to state a claim upon which relief can be granted."
cepting pre-enforcement facial challenges in some substantive areas while demanding precise factual specificity in others, the Court hones and adjusts its exercise of substantive review. It is probably a mistake to characterize this method of analysis as jurisdictional at all. It certainly cannot be considered a reasonable interpretation of article III. The first problem with the Court’s constitutionalization of ripeness analysis, therefore, is that it is inconsistent with much of the actual operation of the doctrine.

B. Ripeness and the Requirement of Actual Injury

Not every inquiry subsumed under the “compendious” label of ripeness constitutes substantive review. A substantial number of ripeness cases ask whether the plaintiff has suffered harm or threat of harm that is “direct and immediate,” rather than conjectural, hypothetical, or remote. Because the federal courts may not issue advisory opinions, the ripeness requirement demands that the litigant show that he actually has been hurt—in immediate terms—by the actions of the defendant. Clearly this branch of ripeness analysis is jurisdictional in nature. It may be argued as well that the “real and immediate” standard involves the appropriate scope of article III “judicial Power.”

By applying a more sensitive measurement of concrete injury, the Court has substantially liberalized access to judicial review over the past three decades. Gradually, the Court has alleviated the traditional dilemma of the federal plaintiff seeking to challenge the constitutionality of government regulation. No longer do the principles of federal jurisdiction require that he become a lawbreaker in order to get into court. Ultimately, the Supreme Court has concluded, with Professor Jaffe, that “even a wrongdoer

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105 Bickel, The Least Dangerous Branch at 123 (cited in note 102).
107 See Dames & Moore v. Regan, 453 U.S. 654, 690 (1981) (Stevens, J., concurring) (injury too remote); Ellis, 421 U.S. at 434 (no “genuine threat”); Roe, 410 U.S. at 128 (injury to marital happiness “indirect” and “speculative”).
108 U.S. Const. art. III.
109 Contrast Lake Carriers Assn., 406 U.S. 498 (pre-enforcement challenge to state water pollution control statute presented “actual controversy” within meaning of Declaratory Judgment Act) with Longshoremen’s Union, 347 U.S. 222 (dismissing as unripe a pre-enforcement challenge to construction of immigration statute that would treat plaintiff’s members as aliens entering United States for first time).
is entitled to know his rights." Moreover, ripeness decisions repeatedly have recognized the present harms that flow from the threat of future sanction.

Courts have used the ripeness standard to deny jurisdiction where the plaintiffs have not, at least in the jurisdictional sense, suffered real injury. The ripeness barrier has prevented review, for example, of an assertedly dormant statute proscribing the use of contraceptives. In other instances, courts have held contingent harms too remote to support jurisdiction. Plaintiffs deemed merely to have searched the statute books for grievances to assert against the government have been rejected. The Court also has ruled that victims of government action that allegedly inhibits free expression, but does not threaten legal sanction, have failed to demonstrate immediate injury. Finally, a federal court has ruled that no concrete injury is established on the basis of uncertainty whether a statute may be applicable to a plaintiff in the future.

To my mind, the Supreme Court has not always hit home in its measurement of actual injury. In Roe v. Wade, for example, the Court characterized as contingent and speculative the injury suffered by a married couple, who feared the failure of contraceptive devices and to whom pregnancy posed health risks, as the result of a restrictive abortion statute. But certainly the abortion ban imposed real and present limitations on the couple's sexual intimacy. More surprisingly, in City of Los Angeles v. Lyons, the Court re-

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112 Poe, 367 U.S. at 501-09. When the statute later was enforced, the Court struck it down in Griswold v. Connecticut, 381 U.S. 479 (1965).
115 Tatum, 408 U.S. at 13-14. The Court distinguished Keyishian on the ground that the plaintiffs there had actually been fired or threatened with firing. Id. at 12.
116 J.N.S., Inc. v. State of Ind., 712 F.2d 303, 305-06 (7th Cir. 1983). The J.N.S. case illustrates the confusion existing in the federal courts regarding the roles of the case or controversy requirement, standing, and ripeness. The Seventh Circuit reviewed the relevant cases on article III and standing, id. at 305, and then simply concluded: "Whether couched in terms of standing (the party bringing the suit) or ripeness (the timing of the suit), it is clear that this plaintiff does not have sufficient stake in the outcome of this action at this time to satisfy the case or controversy requirement of Article III." Id. at 306 (emphasis in original).
117 410 U.S. at 128. Another plaintiff, who alleged that the restrictive abortion statute intruded upon her right to privacy as guaranteed by the due process clause, was given standing and, of course, ultimately prevailed on her claim. Id. at 124-25.
fused to hear an injunctive claim lodged by the victim of a nearly-
fatal police chokehold, since the plaintiff could not demonstrate
that "he was likely to suffer future injury from the use of . . .
chokeholds by police officers."\textsuperscript{118} Again, the present injury sus-
tained from the continuing employment of the practice could eas-
ily have qualified as tangible.

Regardless of these possible miscues, however, it seems clear
that inquiry into the nature and reality of the injury asserted is a
legitimate, if not essential, jurisdictional exercise. Under this ru-
bric, the courts may measure the actuality of the claimed triggers
of federal power.

The problem with this line of ripeness cases, therefore, is not
the enterprise undertaken. Rather, it is doubtful that they are
truly ripeness determinations at all. In measuring whether the liti-
gant has asserted an injury that is real and concrete rather than
speculative and hypothetical, the ripeness inquiry merges almost
completely with standing analysis. The standing requirement, the
cornerstone of the Burger Court's article III jurisprudence,\textsuperscript{119} de-
mands that a litigant show that he personally "has suffered some
threatened or actual injury" as the result of the conduct of the
defendant.\textsuperscript{120} This requirement of particularized actual injury re-
peatedly has been treated by the Court not only as constitutionally
mandated, but as the very core of the standing determination.\textsuperscript{121}

What then is the distinction between the standing doctrine's
demand for "threatened or actual injury" and the ripeness cases'focus on "direct and immediate" harm? Analytically, the two con-
cepts could be segregated, despite the similar phraseology of their
standards. The standing doctrine might be used to analyze the na-
ture and magnitude of present injuries. Only if such harms could
be considered concrete, objective, and judicially cognizable would
the standing barrier be overcome. The ripeness requirement, on
the other hand, would focus on the substantiality of threatened or
actually pending future injuries. Applying injury analysis on a for-
ward-looking time frame, the ripeness demand would measure the
present effects and hardships imposed by the threat of future gov-

\textsuperscript{118} 461 U.S. 95, 105 (1983).
\textsuperscript{119} The standing requirement has been the tool that the Court has used most consist-
ently to measure the dictates of article III. See Valley Forge, 454 U.S. at 471-76. See also
to have 'standing' to invoke the power of a federal court is perhaps the most important" of
the article III doctrines).
\textsuperscript{120} Warth, 422 U.S. at 499.
\textsuperscript{121} See Allen, 468 U.S. at 751; Valley Forge, 454 U.S. at 472; Warth, 422 U.S. at 501.
ernment action. In theory, therefore, each doctrine could serve distinct but related functions.

It is clear, however, that no such line of demarcation can be located in the cases. The “natural” overlap between standing and ripeness analysis occurs in the measurement of the cognizability of contingent or threatened harms. In such cases, the Burger Court appears to have used the two lines of inquiry interchangeably.

_Laird v. Tatum_,122 for example, presented a challenge to the operation of a domestic army intelligence-gathering system. Because the plaintiffs could point to no threat of sanction resulting from the security operation, the Court characterized their claim as a naked allegation that the army might someday misuse the information to the detriment of the plaintiffs.123 Employing standing analysis to dismiss the claim, the justices ruled that the plaintiffs had failed to demonstrate that they were “‘immediately in danger of sustaining a direct injury as a result of [the Army’s] action’” and, therefore, “‘could not invoke the judicial power to determine the validity of [the] action.’”124 In _Planned Parenthood of Missouri v. Danforth_,125 the Court similarly employed standing rather than ripeness principles, this time to determine that a group of doctors had alleged a “sufficiently direct threat of personal detriment” to obtain pre-enforcement review of an allegedly restrictive abortion statute that had been enacted but had not yet taken effect when the action was filed.126

In _O'Shea v. Littleton_127 and _Rizzo v. Goode_,128 suits aimed at correcting future problems in the administration of criminal justice were dismissed on jurisdictional grounds. As if to emphasize the confusion, the Court in _Rizzo_ simply concluded that the “requisite ‘personal stake’”129 to make out “the requisite Art[icle] III case or controversy”130 was lacking—without indicating whether it was the standing or the ripeness hurdle, or both, that had proven fatal.131

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122 408 U.S. 1 (1972).
123 Id. at 13.
126 Id. at 62.
130 Id. at 371-72. See also _Littleton_, 414 U.S. at 493-94.
131 A number of courts of appeals decisions also appear to have used standing and ripeness analysis interchangeably. See, e.g., _Athens Lumber Co., Inc. v. Federal Election Commission_, 689 F.2d 1006, 1011-13 (11th Cir. 1982); _Reeves v. McConn_, 631 F.2d 377, 381 (5th Cir. 1980).
More recently, in *Lyons*, the Court relied on the standing doctrine to hold that a victim of a prior chokehold could appropriately present a damage claim based upon his past injury, but could assert no "real and immediate" harm to justify enjoining the future use of the practice.\(^{132}\) Commentators have, not unreasonably, treated *Lyons* as a ripeness case.\(^{133}\) But the Court did not.

This all appears, no doubt, as the rankest sort of debate over semantics. More, however, is at stake. It is likely that this confusion between the two lines of inquiry has contributed to the Burger Court's inclination to constitutionalize ripeness. The Court has consistently maintained that standing's formula of injury, causation, and redressability is mandated by article III.\(^{134}\) If much of the ripeness determination is indistinguishable from the injury analysis demanded by the standing doctrine, it follows easily that the ripeness hurdle is constitutionally commanded as well. It is my contention, though, that the determination of whether a litigant actually suffers real or threatened injury is a task that "case or controversy" jurisprudence has allocated to the standing doctrine. The ripeness inquiry, on the other hand, is designed to serve goals quite separate from the injury requirement.

Professor Wright has argued that "as compared to standing, ripeness assumes that an asserted injury is sufficient to support standing, but asks whether the injury is too contingent or remote to support present adjudication."\(^{135}\) A finding of actual or threatened injury sufficient for purposes of article III, therefore, is a first step, subsumed by the standing doctrine, in the examination of whether jurisdiction attaches. The ripeness standard, designed to be discretionary in nature, operates as an additional hurdle to the exercise of judicial power. Serving to fine-tune the decision-making process of the federal courts rather than measure the demands of substantive constitutional principle, ripeness analysis carries the banner of prudence rather than power.

The *Abbott Laboratories* formula itself bears out this interpretation. Balancing the "fitness of the issues for judicial decision" against the "hardship on the parties of withholding court consider-

\(^{132}\) *Lyons*, 461 U.S. at 110.

\(^{133}\) See, e.g., Floyd, 60 Notre Dame L. Rev. at 929-30 (cited in note 61). This interpretation of *Lyons* is understandable because the Court used the "direct and immediate" standard—normally part of the ripeness inquiry—as its guidepost in determining standing. *Lyons*, 461 U.S. at 102.

\(^{134}\) See note 119 above.

\(^{135}\) Wright, Miller, and Cooper, 13A Federal Practice at 130 (cited in note 16).
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assumes the existence of concrete injury. The balancing formula then asks if the injury is of sufficient magnitude to overcome problems of contingency or speculation in the decision on the merits. Professor Bickel described the relationship between the two methodologies in perhaps the clearest terms:

To state the matter plainly, government action may well have hurt the individual plaintiff, so that his standing in the pure or constitutional sense is beyond doubt. . . . But the action he complains of may nevertheless be in its initial stages only; if he waits a little while longer, he will be hurt more. This sounds gratuitously harsh, but the damage may not be major or irremediable. The point is that, if litigation is postponed, the Court will have before it and will be able to use, both in forming and supporting its judgment, the full rather than merely the initial impact of the statute or executive measure whose constitutionality is in question. To put it in yet another way, pure standing ensures a minimum of concreteness; the other impure elements of standing and the concept of ripeness seek further concreteness, in varying conditions that cannot be described by a fixed constitutional generalization.137

In the decades since Bickel wrote that passage, the Court consistently has loosened the ripeness standard, asking less frequently that the litigant “wait a while longer” and “be hurt more.” As part of the process of liberalization, however, it appears that the Court on occasion has fused the two lines of inquiry. It has employed ripeness to measure the “minimum of concreteness” thought to be demanded by article III.

That first mistake is perhaps the cause of a second one: the conclusion that the ripeness doctrine itself springs from the article III case or controversy requirement. Professor David Currie has written that while standing asks who is a proper party to litigate, ripeness asks “when a proper party may litigate.”138 The Burger Court has stated in quite specific terms that whether one is a proper party for purposes of the case or controversy requirement depends on whether one is actually injured. Ripeness occasionally demands more of admittedly injured plaintiffs. It is, therefore, as Justice Brandeis claimed, a rule fashioned by the Court “for its own governance,” shaping the decision-making process in cases

136 Abbott Laboratories, 387 U.S. at 149.

137 Bickel, The Least Dangerous Branch at 123-24 (cited in note 102).

"confessedly within its jurisdiction."\textsuperscript{139}

C. Ripeness as a Tool of Judicial Decision Making

Stripped of its ties to standing and the case or controversy requirement, ripeness is best understood as a malleable tool of judicial decision making serving a number of interrelated purposes. As discussed above,\textsuperscript{140} there is a desirable, perhaps even necessary, link between the ripeness determination and the substantive claim. So considered, the ripeness standard has been used to measure whether the litigant, in the case before the court, has set forth the essential elements of a mature challenge. The Supreme Court also may have used the ripeness standard, as Professor Bickel urged, to examine the ripeness not only "of the case, but of the ultimate issue itself . . . in the largest sense, and in the full political and historical context."\textsuperscript{141} Justice Powell's concurring opinion in \textit{Goldwater v. Carter}\textsuperscript{142} suggested this somewhat grander use of ripeness. In refusing to consider Senator Goldwater's constitutional objections to the revocation of a treaty with Taiwan, Justice Powell hinted that such substantial oversight of presidential authority should, at the least, occur only on a strong showing of necessity.\textsuperscript{143} The opinion also can be read to go further, recognizing that the Court should refuse to entertain a dispute between the branches of government unless Congress forces its hand.\textsuperscript{144}

The balancing contemplated by \textit{Abbott Laboratories}, however, includes a range of concerns broader than the dictates of the claim on the merits. Other considerations can caution against review. Ripeness analysis has been used, for example, as a tool by the Court to help ensure precision in judicial decision making and to prevent judicial intrusions on proper and efficient allocation of governmental powers.

It is obviously permissible for a court to demand that one asking it to exercise powers of constitutional or statutory review demonstrate with clarity the case for employing judicial authority. It seems apparent, then, that a case is not ripe "for judicial determination if issues are unclear or needed facts are undeveloped."\textsuperscript{145}

\textsuperscript{139} Ashwander, 297 U.S. at 346 (concurring opinion).
\textsuperscript{140} See part II-A above.
\textsuperscript{141} Bickel, The Least Dangerous Branch at 124 (cited in note 102).
\textsuperscript{142} 444 U.S. 996, 997 (1979). The majority dismissed the \textit{Goldwater} lawsuit in a per curiam opinion.
\textsuperscript{143} Id. at 997.
\textsuperscript{144} Id. at 998.
\textsuperscript{145} Davis, 4 Administrative Law Treatise § 25:11 at 385 (cited in note 16).
Rescue Army v. Municipal Court provides perhaps the leading example. There, the Court refused to entertain a constitutional challenge to a local prosecution. The appeal arose from a ruling on a demurrer and presented a particularly poor record: many of the statute’s issues were inextricably intertwined, and many of the underlying issues had yet to be resolved by the state courts. The shape in which the constitutional issues reached the Court was seen as an “insuperable obstacle to any exercise of jurisdiction.”

The opinion indicated that a dispute is ripe only if the issues are presented in a “clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts.”

In cases like Rescue Army, the judicial decision to wait is designed neither to ensure that the requisite harm exists to invoke jurisdiction nor to measure the demands of a particular claim on the merits. Injury, again, is assumed. As the Court ruled in Babbitt v. Farm Workers, adjudication may be postponed until a better record exists “[e]ven though a challenged statute is sure to work the injury alleged.” The interest protected by the Court is its own. Litigation based upon hypothetical possibility rather than concrete fact is apt to be poor litigation. The demand for specificity, therefore, stems from a judicial desire for better lawmaking.

The District of Columbia Circuit made this point clearly in a recent ripeness ruling, Androde v. Lauer. The court concluded that the Abbott Laboratories formula required the judiciary to “balance its interest in deciding the issue in a more concrete setting against the hardship to the parties caused by delaying review.” Analytically, therefore, this use of the ripeness doctrine is largely indistinguishable from the courts’ employment of the panoply of other tools to assure the adequacy of the record and the requisite breadth of representation by the parties. Once actual injury for purposes of article III standing is shown, however, this

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146 331 U.S. 549 (1947).
147 Id. at 574.
148 Id. at 584.
149 Babbitt, 442 U.S. at 300.
150 729 F.2d 1475 (D.C. Cir. 1984).
151 Id. at 1480, quoting Webb v. Dep’t of Health & Human Services, 696 F.2d 101, 106 (D.C. Cir. 1982) (emphasis added).
152 I have in mind especially the tools available to judges such as inviting intervention and amicus presentations and giving discretionary notice in class actions. See Mark V. Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv. L. Rev. 1698, 1707 (1980).
demand of ripeness analysis amounts to no more than a prudential counsel in factually ambiguous circumstances to "delay resolution . . . until a time closer to the actual occurrence of the disputed event" if a "better factual record might be available."153

Finally, the ripeness formula of Abbott Laboratories allows the courts to postpone interfering when necessary so that other branches of government, state and federal, may perform their functions unimpeded. Developed in the context of federal administrative law, the formula provides agencies "an opportunity to function—to iron out differences, to accommodate special problems, [and] to grant exemptions" before judicial intervention occurs.154 Analogous problems arise when federal courts review the acts of state officials. The doctrine thus has been employed to limit judicial examination of the decisions of state administrative,155 judicial,156 legislative,157 and executive158 officers and federal administrative officers159 that the courts have considered still preliminary in some regard. The ripeness barrier thus allows federal courts to give due respect to the scope of responsibilities allocated to other government decision makers. It limits any judicial proclivity to "pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal."160

Of course, the standing doctrine's demand for "actual or threatened injury" carries the bulk of the burden in dismissing claims challenging government action that has yet to mature. A lit-

153 Regional Rail Reorganization Cases, 419 U.S. at 143.
154 Toilet Goods Assn., 387 U.S. at 200 (Fortas, J., concurring and dissenting).
155 Employing the ripeness doctrine to allow other governmental decision makers “an opportunity to function . . . to accommodate special problems” obviously entails use of the doctrine to further interests in the separation of powers and federalism. There is no reason, however, that prudential jurisdictional devices should be precluded from serving the goals of federalism and separation of powers. When the Court ruled in Warth v. Seldin that prudential concerns weigh against the judiciary addressing “abstract issues of wide public significance” or mere “generalized grievances,” 422 U.S. at 499-500, I assume the justices sought to ensure an appropriate separation of powers. The rule in Younger v. Harris, 401 U.S. 37 (1971), limiting federal court injunctions against state criminal proceedings, is a nonconstitutional jurisdictional principle designed to serve the ends of federalism. The same is true of Stone v. Powell, 428 U.S. 465 (1976) (limiting habeas corpus review of fourth amendment claims), and Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (abstention doctrine).
157 Cross v. Lucius, 713 F.2d 153 (5th Cir. 1983); Peterson v. Sheran, 635 F.2d 1335 (8th Cir. 1980); Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980).
159 Broderick v. di Grazia, 504 F.2d 643, 645 (1st Cir. 1974).
160 Atlanta Gas Light Co. v. U.S. Dept. of Energy, 666 F.2d 1359, 1370 (11th Cir. 1982).
161 Wycoff, 344 U.S. at 246.
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igant is not hurt, for example, by a rule that is considered but not adopted. The ripeness standard provides an additional reason to hesitate from taking jurisdiction, however, in circumstances in which early judicial interference carries the implication that other decision makers would be inclined to disregard the litigant's interest.

In *Broderick v. di Grazia*, for example, the First Circuit dismissed a section 1983 action filed by police officers against the city police commissioner. The plaintiffs claimed that the commissioner, by declaring that “disciplinary cases against police officers should be handled on the assumption that policeman are guilty until proven innocent,” effectively denied them due process in future administrative determinations. Even if the commissioner's actions threatened an injury to the plaintiffs, however, the court chose to defer to the eventual workings of local administrative and judicial process. Similar theories have led courts to postpone adjudication so as to leave open the “range of solutions” that legislative, executive, and judicial officials might consider. Federal

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161 504 F.2d 643 (1st Cir. 1974).
162 Id. at 644-45.
163 Id. at 645.

It may appear that by arguing in this section for the use of ripeness as a prudential, case-sensitive device, I attempt to reopen the classic debate between Professors Bickel and Gunther over whether courts have discretion to decline for prudential reasons to exercise jurisdiction properly given. See generally Bickel, The Least Dangerous Branch (cited in note 102); Gerald Gunther, The Subtle Vices of the Passive Virtues—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964).

The earliest statement in the debate was *Cohens v. Virginia*’s dictum that “[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” 19 U.S. 264, 404 (1821) (Marshall, C.J.). Bickel, however, believed that the Supreme Court, as the ultimate principled expositor of constitutional values, could appropriately exercise “prudence” in deciding when to decide. Bickel, The Least Dangerous Branch at 131-33. Accordingly, he thought the Court’s refusal to scrutinize Virginia’s antimiscegenation statute in *Naim v. Naim*, 350 U.S. 985 (1956), was justified because of the political realities of striking down such a statute in 1956. Bickel, The Least Dangerous Branch at 174. Gunther forcefully attacked this thesis. 64 Colum. L. Rev. at 11-13.

I do not, and need not, embrace such a powerful vision of “prudence” here. The “discretion” described here under ripeness analysis does not include consideration of the ability of legal principle to withstand political fire. Much of the “discretion” in ripeness analysis is an inescapable aspect of judicial decision making. A court must decide, for example, whether first amendment claims are cognizable based on mere threat or only on the application of actual sanctions. And it must have the power as well to demand a full and concrete record on which to base its decisions. See notes 145-53 and accompanying text above.

One ripeness consideration identified here could be seen as contrary to the *Cohens* mandate: that of timing deference to other institutions of government. Even here, however, the duty to “exercise the jurisdiction which is given” begs the question of whether what is
courts, in short, are not the only entities charged with doing justice.

III. RIPENESS AND ARTICLE III

The benefits of disassociating ripeness from the case or controversy requirement of article III are numerous. First, the fusion of the two doctrines threatens the comprehensibility of article III. The Burger Court tendered the theory—at least reasonable on its face—that its article III analysis "in no way depends on the merits of the . . . contention that the particular conduct is illegal." Nor, according to the justices, does article III countenance the recognition of any hierarchy of constitutional rights, some of which pass the case or controversy hurdle more easily than others. It is difficult to lay the ripeness doctrine, which is so heavily intertwined with the substantive cause of action and the posture of the claim on the merits, alongside these article III case or controversy pronouncements. If the ripeness rulings are rooted in the Constitution, then the free expression and electoral rights decisions establish, at a minimum, the hierarchy of textual rights that the Court claims to eschew.

Ripeness rulings vary quite naturally, I have argued, with the nature of the claim on the merits. It is not surprising, therefore, that litigants and judges, following the Supreme Court's constitutionalization of the ripeness doctrine, are led to ask whether the article III case or controversy requirement vacillates according to the judge's view of the substantive cause. The Seventh Circuit, for example, recently has declared that the ripeness requirement is "less strictly construed in the first amendment context." Of course, that court correctly described the operation of the ripeness principle. So put, however, the characterization seems strange for a clear-cut, constitutionally imposed restriction on the power of the federal courts.

Moreover, if the ripeness principle is to be subsumed within
the case or controversy standard, one can easily begin to wonder what other doctrines of justiciability should enjoy that status. Standing jurisprudence has excluded the third party rule and the zone of interest test from constitutional status, largely because those standards assume the existence of injury and then proceed to foster other purposes that are substantive and prudential. Ripeness stands in an identical posture. Are the zone of interest test and the third party standing prohibition—despite the Court's constant indications to the contrary—now embraced by article III?

Moreover, as discussed above, many ripeness cases do no more than analyze whether the litigant has stated a substantial federal question under applicable substantive principles. This use of the ripeness doctrine serves the same purpose as Rule 12(b)(1) and 12(b)(6) defenses. While the takings clause demands the effective exhaustion of every possible avenue of redress, free expression claims often can be presented on the basis of potential abrogation. This difference is the product of the difference in the substantive, constitutional law of the first and fifth amendments. Of course it is possible to claim that federal courts lack the power to hear takings cases unless a litigant has lost at every turn in the locale. But defining the elements of a cause of action is hardly the work of article III. Would we also say that a section 1983 claim against a law enforcement official that fails to allege that the defendant's action was taken under color of law should be dismissed for want of a case or controversy?

The ripeness doctrine's demand for an adequate factual basis for decision making, typified most prominently by the Rescue Army decision, no doubt reflects sound judicial policy. However, if it flows from the case or controversy standard, what then of Rule 19's indispensable party requirement or Rule 23(a)(4)'s demand that representative parties fairly protect the interests of the class? Both are valuable tools for effective judicial decision mak-

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168 Nichol, 72 Cal. L. Rev. at 95-98 (cited in note 15).
169 See discussion in text at notes 140-44 above.
170 See, e.g., Warth, 422 U.S. at 499; Richardson, 418 U.S. at 196 n.18 (Powell, J., concurring); Data Processing, 397 U.S. at 153.
171 These rules provide that a plaintiff's case can be dismissed for "lack of jurisdiction over the subject matter," Fed. Rule Civil Proc. 12(b)(1), or for "failure to state a claim upon which relief can be granted," Fed. Rule Civil Proc. 12(b)(6).
172 "If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable." Fed. Rule Civil Proc. 19(b).
173 "One or more members of a class may sue or be sued as representative parties on
ing. Are they demanded by article III?

These examples may exaggerate the point. Nonetheless, it is true that a doctrine as multifaceted as ripeness cannot easily be confined within the limited horizons of article III's case or controversy doctrine. The Burger Court explained the case or controversy requirement strictly in terms of the demand for concrete injury to ensure the existence of a constitutional case. That venture alone has led to substantial complications. If the purview of the case or controversy requirement is now, without explanation, to be expanded to include a plethora of unrelated interests, the future of the doctrine's comprehensibility is bleak.

Nor is constitutionalization a good turn for the ripeness doctrine. First, it hardly serves clarity to link the ripeness principle to its unfortunate jurisdictional counterpart, the standing doctrine. The ripeness standard, when embodied in the Abbott Laboratories formula, has performed admirably, if not flawlessly. No one makes a similar claim for the standing doctrine, which is plagued by vagueness and contradiction. It is, to speak charitably, a doctrine in search of both principle and rationale. Prudence counsels against permitting it to contaminate ripeness.

More fundamentally, constitutionalizing ripeness is at odds with the flexible nature of the doctrine. The announcement that the premature adjudication of claims violates the Constitution suggests a rigidity and uniformity of analysis, as well as an adherence to principle, that have little in common with ripeness review. Consider an example. In Young v. Klutznick, the mayor and city of Detroit challenged findings made by the federal census, claiming that the census systematically undercounted minorities with the result that Detroit would be underrepresented in Congress. The Sixth Circuit dismissed the challenge as premature on the ground

behalf of all only if . . . the representative parties will fairly and adequately protect the interest of the class." Fed. Rule Civil Proc. 23(a)(4).

174 See generally Nichol, 72 Cal. L. Rev. 68 (cited in note 15) (exploring difficulties in current standing doctrine).

176 For example, many cases under the Abbott Laboratories balancing formula underestimate the present harm flowing from future sanctions. Consider, for example, Citizens Action Coalition of Ind., Inc. v. Westfall, 582 F.Supp. 11 (S.D. Ind. 1983) (pre-enforcement challenge to ordinance prohibiting solicitation of funds after sunset); McCollester v. City of Keene, 668 F.2d 617 (1st Cir. 1982) (pre-enforcement challenge to local curfew); Boating Industry Assn. v. Marshall, 601 F.2d 1376 (9th Cir. 1979) (suit for declaratory judgment as to coverage under Longshoremen's and Harbor Workers' Compensation Act, where Benefits Review Board had yet to construe scope of "maritime employment" coverage provision).

176 See the authorities cited in Nichol, 72 Cal. L. Rev. at 68 n.3 (cited in note 15).

177 See generally Nichol, 72 Cal. L. Rev. 68 (cited in note 15).

178 652 F.2d 617 (6th Cir. 1981).
that the Michigan legislature had not yet expressed its reaction to the census. If Detroit’s claims were true, Michigan might well choose to adjust an upcoming apportionment to accommodate the count deficiencies. Accordingly, the court of appeals ruled that the issues presented were not “as ‘specific’ or as ‘particularized’” as they would be after the legislature acted.  

Under the Abbott Laboratories formula, Young was probably a close call. The likelihood, or perhaps even the requirement, that the Michigan legislature would use federal census figures to reapportion would seem sufficiently strong to constitute hardship. Moreover, given the article I, section 2 “as nearly as practicable” standard, underrepresentation could well have been rendered more difficult to challenge after legislative action. Yet, a forthcoming apportionment scheme might have met Detroit’s complaints, and judicial review of the census process could have proven particularly troublesome. But however Young should have been decided, it hardly aids the weighing process to give it constitutional overtones.

Ripeness, as Young demonstrates, often calls for a uniquely case-oriented evaluation of the practical probabilities presented by the litigation. As Professor Jaffe argued, the doctrine demands “reasoned balancing of certain typical and relevant factors for and against the assumption of jurisdiction.” If the ripeness calculus is rooted in the Constitution, however, the Abbott Laboratories balancing process certainly will be skewed.

Tying ripeness to article III’s case or controversy requirement effectively instructs a federal judge that if she misapplies the ripeness standard and decides to reach the merits, she has not only erred but has also passed a constitutional limit and abused judicial power. The conscientious jurist thus might tend to dismiss any close call under the Abbott Laboratories formula to avoid even potential usurpation. The careful weighing of factors both for and against review that Abbott Laboratories solicits would be tipped needlessly against plaintiffs. The wiser course, I suggest, is to return the ripeness doctrine to its prudential status.

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179 Id. at 626.
180 Judge Keith filed a dissenting opinion in Young, disputing the majority’s contentions that the legislature might decide not to rely on the census figures and that the hardship to the parties was speculative. Id. at 626.
182 Jaffe, Judicial Control at 396 (cited in note 110).