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Recalibrating Justiciability in Ohio Courts

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RECALIBRATING JUSTICIABILITY IN OHIO COURTS

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I. INTRODUCTION

The bicentennial of the State of Ohio and its Constitution is an appropriate time to revisit a fundamental precept of governance in this State: the separation of powers. The concept is not just familiar to the legal community but, presumably, is known as well by the broader public through civics lessons. While the concept lacks a precise definition, at its core it means a distribution of power among the executive, legislative, and judicial branches of government. The political theory is that the three branches will check and balance each other, leaving no one branch supreme.[2] Governmental authority has been distributed this way in Ohio since the founding of the State.[3]

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[2]LARRY W. YACKLE, FEDERAL COURTS 3-4 (2d ed. 2003).

[3]OHIO CONST. of 1802, art. I (legislature), art. II (executive), art. III (courts); OHIO CONST. of 1851, art. II (legislature), art. III (executive), art. IV (courts). This is not to say that the *content* of the separation of power has always been the same. For example, it is generally acknowledged that the 1802 Constitution created a weak executive, in response to an overreaching territorial governor. In contrast, the 1851 Constitution strengthened the executive and weakened the legislative branch. *See* Curtis Rodebush, *Separation of Powers in Ohio: A Critical Analysis*, 51 CLEV. ST. L. REV. 505 (2003); Barbara Terzian, *Ohio's Constitutions: An Historical Perspective*, 51 CLEV. ST. L. REV. 357 (2003). This history, of course, finds no parallel in the federal government. That said, at some level of generality both the federal government, and the State of Ohio, have followed the same separation of powers model.

The term "separation of powers" does not appear in either the United States or Ohio Constitutions,[4] but the concept has important implications for the adjudication of rights under both documents. In federal courts, litigants must possess certain characteristics, summarized under the rubric of "standing," to pursue such cases. To have standing, litigants traditionally must have suffered a concrete and ripe injury that was the result of the allegedly unlawful conduct. And even when those criteria are satisfied, cases that call for "political questions" to be resolved can be dismissed by federal judges. These limits to federal court authority are drawn not only from the separation of powers doctrine, but particularly from the requirement in Article III of the U.S. Constitution that federal courts may only adjudicate "cases" or "controversies."[5] Most Ohio courts have followed these standing requirements as well, but in several recent cases the Ohio Supreme Court has departed from federal doctrine and lowered the thresholds of justiciability.

Part II of this Essay summarizes the standing requirements and the political question doctrine in the federal courts. Part III of the Essay then turns to Ohio jurisprudence, and discusses two Ohio Supreme Court decisions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,[6] and *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation*,[7] in which court majorities permitted cases raising state, and federal, constitutional law issues to proceed with plaintiffs who probably did not satisfy traditional standing requirements. Acknowledging that the Ohio Constitution has no specific analogue to Article III, and that Ohio courts are not bound by federal law on these issues, Part III discusses various rationales for lowering the threshold for standing. Part III concludes that federal standing doctrine remains optimal and should continue to be followed by Ohio courts.

Part IV of the Essay turns to the political question doctrine. In the past some Ohio cases appeared to utilize that doctrine, but it was a sharp point of contention in the initial phases of the long-running school-funding case, *DeRolph v. State*.[8] That case addresses whether Ohio's methods of funding public schools satisfies the requirement in the Ohio Constitution that there be a "thorough and efficient system of common schools."[9] The majority in the first *DeRolph* opinion in 1997[10] quickly dismissed any argument that deciding the merits of the case called for a political question to be resolved, a point disputed at length by the lead dissent in that case by Chief Justice Thomas Moyer. In contrast to Part III, this Part concludes that the

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[4]*See* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1236 n.109 (1993) (Ohio is one of ten states that follow the U.S. Constitution in having no express constitutional requirement that there be a separation of powers).

[5]U.S. CONST. art. III, § 2.

[6]86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

[7]97 Ohio St. 3d 504, 780 N.E.2d 981 (2002).

[8]The litigation was initially filed in 1991. It first reached the Ohio Supreme Court in 1997, and has been the subject of frequent litigation and opinions in that forum, the latest of which is State *ex rel*. State v. Lewis, 99 Ohio St. 3d 97, 789 N.E.2d 195 (2003) (*DeRolph V*) (completely dismissing the case), *cert. denied*, 124 S. Ct. 432 (2003).

[9]OHIO CONST. art. VI, § 2.

[10]DeRolph v. State, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) (*DeRolph I*).

political question doctrine has weaker roots in both federal and Ohio jurisprudence, and thus was correctly not used to resolve the *DeRolph* case. Part V briefly concludes the Essay.

II. JUSTICIABILITY DOCTRINES IN FEDERAL COURT

Justiciability requirements in federal courts have generated a large number of cases and an enormous amount of academic commentary. A full review of those cases and that literature is beyond the scope of the present Essay, and instead a brief review will suffice.

As a general matter, "the justiciability doctrines govern *what* matters are susceptible to determination in federal court, *who* can invoke federal judicial power, and *when* federal court action is timely."[11] Standing usually[12] refers to the second issue, that is, the characteristics a person or another juridical entity must possess to bring a suit. The political question doctrine usually refers to the first issue, that even in a suit where a plaintiff has standing, federal courts should not resolve such questions.

Let us consider standing first. According to the Supreme Court, standing has both a constitutional and prudential component. The constitutional prong is primarily based on the Article III language that in exercising "judicial power," federal courts may only hear "cases" or "controversies." This prong requires that plaintiffs have an "injury in fact," that is "fairly traceable" to and caused by the defendant's allegedly unlawful conduct, and that the injury is likely to be redressed by a favorable decision.[13] The prudential prong is non-constitutional in nature, and may be relaxed in some circumstances. Among the cluster of prudential requirements are that litigants cannot present mere generalized grievances, and ordinarily may only advance their own rights and not those of third parties.[14] Both the constitutional and prudential prongs also serve functional goals. For example, they conserve judicial resources (by filtering disputes that might come before a court in some form), and arguably improve judicial decisionmaking (by requiring cases to be

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[11]YACKLE, *supra* note 2, at 278 (footnote omitted, emphasis in original).

[12]"Standing" is "derived from the Latin phrase locus standi (a place to stand), used in England to describe one's capacity to 'stand' before Parliament to address a bill." *Id.* at 289 n.70. But the word lacks a precise definition in justiciability discourse, and is sometimes used in the context of other, albeit related, issues. For example, the Ohio Supreme Court recently held that the City of Cincinnati had "standing" to pursue a suit against handgun manufacturers and others on public nuisance and other grounds. Cincinnati v. Beretta U.S.A. Corp., 95 Ohio St. 3d 416, 425-27, 768 N.E.2d 1136, 1147-48 (2002). But as the court itself observed, *id.*, the primary issue was whether the harm alleged by the City was proximately caused by the acts of the defendants, an issue governed more by tort law than standing doctrine as such. *See also id.* at 436-37, 768 N.E.2d at 1156 (Cook, J., dissenting) (making similar point).

[13]*E.g.*, Allen v. Wright, 468 U.S. 737, 750-52 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

[14]*Allen*, 468 U.S. at 751. See generally, YACKLE, *supra* note 2, at 289-331. There are still other standing requirements. For example, subject to certain exceptions, a plaintiff's claim must be ripe for adjudication (i.e., the harm must be sufficiently imminent), and not be moot (i.e., the dispute must not have disappeared). *Id.* at 347-55.

litigated by interested adverse parties with a stake in the outcome and in creating a worthwhile record).[15]

A full discussion of how the present state of standing doctrine came to be is beyond the scope of this Essay. But it is worth observing that the Supreme Court, for the past two or three decades, has taken what many would characterize as a stricter attitude toward the fulfillment of standing requirements.[16] Why is that? One[17] useful way to consider the question is to compare and contrast two different models of adjudication. A private rights model is premised on a limited view of the judicial role in our government. Under this view, courts should exercise review of the actions of other branches of government only when absolutely necessary and only in the context of a legal dispute "historically viewed as appropriate for judicial resolution–paradigmatically, those in which a defendant's violation of a legal duty to the plaintiff has caused a distinct and palpable injury to an economic or other legally protected interest[.]"[18] In contrast, a public rights model of adjudication "argues that the judiciary should not be viewed as a mere settler of disputes, but rather as an institution with a distinctive capacity to declare and explicate public values–norms that transcend individual controversies."[19] While the private rights model is supported by traditional separation of powers concerns, the public rights model is premised in part on the creation or development of constitutional and statutory rights,

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[15]ERWIN CHEMERINSKY, FEDERAL JURISDICTION 45-46 (4th ed. 2003).

[16]*E.g.*, MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 311 (2000); YACKLE, *supra* note 2, at 289-301. This is of course not to say that the Supreme Court constantly issues decisions denying standing to a plaintiff. For some notable counterexamples, see FEC v. Akins, 524 U.S. 11 (1998) (voters who suffered inability to obtain information had standing to challenge FEC's determination that a political committee was not required to make certain disclosures); Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) (plaintiffs alleged sufficient harm to recreational and aesthetic interests to establish standing in suit under Clean Water Act); Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (potential transfer student had standing to challenge use of affirmative action in university undergraduate admission program). But it appears clear that the overall trend of the decisions, and their implementation by lower courts, is to make it more difficult to meet standing requirements.

[17]There are, of course, other preferred explanations for the Court's stricter turn, or for its standing decisions in general. Some would crudely argue that the Court "may grant standing to litigants whose substantive claims it approves and may refuse standing to litigants whose claims it disclaims." YACKLE, *supra* note 2, at 289 (footnote omitted). Conversely, others may charge that standing doctrine is used in an unprincipled fashion to avoid reaching the merits of claims, because the issue is a political hot potato, or the Court cannot reach agreement on the merits of a case, or for other reasons. *Id.* at 289-90. While it is probably unavoidable for any judge's views on the merits of a case to be completely decoupled from standing and other jurisdictional or procedural issues, I agree with Professor Yackle that there "is a good deal to be learned" by examining the standing decisions of the United States (and Ohio) Supreme Courts for "what they purport to be and trying to understand standing doctrine by its own terms." *Id.* at 290.

[18]RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67 (5th ed. 2003). *See also* YACKLE, *supra* note 2, at 16-19 (discussing private rights model).

[19]FALLON, *supra* note 18, at 68.

and the vast increase in administrative regulation, in the twentieth century, which creates "diffuse rights shared by large groups and new legal relationships that are hard to capture in traditional, private law terms."[20] The public rights model would support, among other things, broader conceptions of standing.[21]

To be sure, the distinction between the models is not "watertight,"[22] and the Supreme Court has never explicitly embraced or expressly disavowed either model.[23] Actual litigation of particular cases may, explicitly or implicitly, contain elements of both models. And much might depend on the issues raised in a suit, its potential impact, or whether the primary relief sought is monetary or injunctive, among other things. But under either model, it would seem, a properly presented case should have a concrete set of facts permitting legal issues to be resolved in an adversarial process, which in turn will limit the "scope of implications of the legal determination," as well as any relief that might be ordered.[24]

Even when a litigant clearly has standing, other justiciability doctrines may raise hurdles to federal courts reaching the merits of cases. One such barrier is the political question doctrine, which posits that certain legal questions call for "political" issues to be resolved, and those are better left to the other, more politically accountable branches of government. Like standing, the doctrine has its roots in separation of powers theory, and the private rights model of adjudication.[25]

The political question doctrine has an impressive historical pedigree, and has generated a modest number of cases and a large academic commentary. A full review of those matters is unnecessary here. Suffice to say that some of the cases invoking the doctrine seem to have a constitutional dimension, relying on the text and structure of the Constitution, to determine nonjusticiability, while other cases seem to rely on prudential concerns, that certain sensitive issues are better left for resolution to the political branches. As has been noted,[26] the Court in its classic formulation and summary of the doctrine in 1962 in *Baker v. Carr*,[27] appeared to reconcile or fuse the two approaches. There, the Court listed six factors to guide determination of whether a question was political, or not: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) a "lack of judicially discoverable and manageable standards for resolving it;" (3) the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) the "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning

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[20]*Id.* at 69.

[21]YACKLE, *supra* note 2, at 20-24, 291-301 (discussing public rights model and its implications for standing).

[22]FALLON, *supra* note 18, at 70.

[23]*Id.* at 71.

[24]*Id.*

[25]YACKLE, *supra* note 2, at 284.

[26]*Id.* at 285-86; Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 265 (2002).

[27]369 U.S. 186 (1962).

adherence to a political decision already made;" and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[28] The first factor is obviously of constitutional origins; the remaining factors seem primarily prudential in nature.

Despite its longevity, only a handful of cases in the Supreme Court or the lower federal courts (as compared to, say, standing) explicitly decline to hear cases premised on the political question doctrine. Nonetheless, the doctrine (especially its prudential branch) has come in for considerable criticism in the academic literature, as being unprincipled and difficult to apply.[29] Conversely, some argue that certain cases *are* in fact political questions that the Court should not have decided.[30] Perhaps it is surprising that the doctrine stubbornly remains alive despite the academic criticism and its relative lack of use by litigants and judges.

III. STANDING DOCTRINES IN OHIO COURTS

A. Standing Requirements and the Public Rights Exception

Many Ohio cases, both in the supreme court and the lower courts, have routinely followed standing doctrines developed in federal courts. Thus, Ohio courts have held that litigants must have "standing,"[31] described in ways very similar to federal courts jurisprudence.[32] As only one example, in 1994 the Ohio Supreme Court held in *Ohio Contractors Association v. Bicking*[33] that a group of contractors could not challenge a village's bidding procedure on contracts, when none of the group actually submitted a bid. The court unanimously held that the group lacked standing to pursue the case. According to the court, the members of the association must have suffered an "actual" and "concrete" injury, not simply "abstract or suspected."[34] The failure of any member of the group to bid deprived them of an injury.

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[28]*Id.* at 217.

[29]*E.g.*, MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 111-36 (1991). For general summaries and discussions of the criticism, see FALLON, *supra* note 18, at 253-67; Barkow, *supra* note 26.

[30]*See, e.g.*, the considerable literature on whether Bush v. Gore, 531 U.S. 98 (2000) (per curiam), presented a political question, a point not explicitly addressed by any of the justices in the case. For discussion, see FALLON, *supra* note 18, at 265-67; Barkow, *supra* note 26, at 273-300; Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1167 (2002).

[31]*E.g.*, State *ex rel.* Dallman v. Franklin City Court of Common Pleas, 35 Ohio St. 2d 176, 178-79, 298 N.E.2d 515, 516-17 (1973); Ohio Contrs. Assn. v. Bicking, 71 Ohio St. 3d 318, 320, 643 N.E.2d 1088, 1089 (1994).

[32]*E.g.*, Fortner v. Thomas, 22 Ohio St. 2d 13, 14-15, 257 N.E.2d 371, 372 (1970); *Ohio Contrs. Assn.*, 71 Ohio St. 3d at 320, 643 N.E.2d at 1089. These cases often cite federal cases on point. *See generally* Jonathan I. Blake, Note, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward: The Extraordinary Application of Extraordinary Writs and Other Issues; The Cases that Never Should Have Been*, 29 CAP. U. L. REV. 433, 454-55 (2001).

[33]71 Ohio St. 3d 318, 643 N.E.2d 1088 (1994).

[34]*Id.* at 320, 643 N.E.2d at 1090 (citing or quoting three U.S. Supreme Court cases).

A separate line of cases developed an exception to the standing requirements. In several cases, the court held that a claimant who apparently lacked standing could nonetheless pursue an action when there was a "public right" involved.[35] According to the court,

> [w]here a public right, as distinguished from a purely private right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relationship to such public right.[36]

Later cases held that public rights were those involving a claimant acting on behalf of the public, especially seeking a public official to comply with duties imposed by law.[37]

Both the standing requirements and a public rights exception were revisited by the supreme court in 1999 in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*.[38] That case held that the 1996 Tort Reform Act[39] violated the separation of powers doctrine, and the one-subject provision,[40] of the Ohio Constitution. Before reaching the merits, the court engaged justiciability issues. About ten months after the Act was passed,[41] a group of claimants—the Ohio Academy of Trial Lawyers (OATL), Ohio AFL-CIO, and two individuals (the executive director and the president, respectively, of the first two parties)—brought an original action in prohibition and mandamus in the supreme court.[42] Six common pleas judges were named as defendants, and the claimants sought relief that would prevent the judges from implementing the provisions of the Act.[43]

Contrast this to the more typical presentation of constitutional issues (or any legal issue) in the litigation process. For civil litigation, an injured plaintiff sues an allegedly culpable defendant.[44] The legal issue in dispute is presented by counsel to the trial court for decision via a pre-trial motion, at the trial itself, or in some other way. The trial judge's decision on that issue is then appealed, by an interlocutory appeal or after a final judgment. It proceeds up the appellate ladder for eventual resolution by the state's supreme court. It is rare for the litigants to proceed directly to the high court. As the supreme court has frequently emphasized, "[c]onstitutional challenges to legislation are generally resolved in an action in a common pleas court

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[35]Blake, *supra* note 32, at 455-56.

[36]State *ex rel*. Newell v. Brown, 162 Ohio St. 147, 150-51, 122 N.E.2d 105, 107 (1954).

[37]*E.g.*, State *ex rel*. Cater v. N. Olmsted, 69 Ohio St. 3d 315, 322-23, 631 N.E.2d 1048, 1054-55 (1994).

[38]86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

[39]Am. Sub. H.B. 350, 121st Gen. Assembly, 1995-96 Reg. Sess. (Ohio 1996).

[40]OHIO CONST. art. II, § 15(D).

[41]*Sheward*, 86 Ohio St. 3d at 452 & n.2, 715 N.E.2d at 1068 & n.2.

[42]*Id.* at 451, 715 N.E.2d at 1068.

[43]*Id.* at 451-52, 715 N.E.2d at 1068-69.

[44]The arguments presented here would equally apply to constitutional and other legal issues presented in criminal litigation.

rather than in an extraordinary writ action filed [in the Ohio Supreme Court]."[45] At the very least, departure from the normal path of litigation ought to be substantially justified by the litigants that seek it and courts that permit it.[46]

Not surprisingly, then, the defendants in *Sheward* (and the state as an intervenor) moved to dismiss for lack of standing, and the justices discussed the issue at some length.[47] The defendants argued, among other things, that the claimants lacked a concrete injury, were asserting mere generalized grievances, and in any event did not fall under any public rights exception.[48] The majority initially responded by repeating the traditional standing requirements, as outlined above,[49] and added that they apply to "the vast majority of cases brought by a private litigant."[50] The court observed that federal courts could not waive these standing requirements, but in effect state courts could do so:

> However, the federal decisions in this area are not binding upon this court, and we are free to dispense with the requirement for injury where the public interest so demands. Unlike the federal courts, state courts are not bound by constitutional strictures on standing; with state courts standing is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.[51]

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[45]State *ex rel*. Satow v. Gausse-Milliken, 98 Ohio St. 3d 479, 483, 786 N.E.2d 1289, 1292 (2003) (quoting Rammage v. Saros, 97 Ohio St. 3d 430, 431, 780 N.E.2d 278, 280 (2002)).

[46]It is not clear why the litigants in *Sheward* (or similar cases discussed in this Essay) filed original actions in the supreme court, as opposed to pursuing the typical path of litigation described in this paragraph. Perhaps they simply wished to have a quick, definitive judicial resolution of the constitutionality of the legislation—a desire probably shared by anyone possibly affected by a possibly unconstitutional law. A more cynical explanation might be that those litigants rushed the case, to enable it to be resolved by the supreme court when the court had a favorable set of justices, in the eyes of those litigants.

[47]Intertwined with the standing issue was significant discussion of the related, but analytically separate, issue of whether an original action in mandamus or prohibition, in the supreme court, was an appropriate procedural vehicle to litigate the merits. I will not specifically address that issue, since even if the prerequisites of those writs were otherwise satisfied, the standing controversy would remain. For discussion of *Sheward's* treatment of mandamus and prohibition, see Blake, *supra* note 32, at 456-77; Basil M. Loeb, Comment, *Abuse of Power: Certain State Courts Are Disregarding Standing and Original Jurisdiction Principles So They Can Declare Tort Reform Unconstitutional*, 84 MARQ. L. REV. 491, 508-13 (2000); State *ex rel*. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp., 97 Ohio St. 3d 504, 518-20, 780 N.E.2d 981, 995-96 (2002) (Moyer, C.J., dissenting); State *ex rel*. United Auto Aerospace & Agri. Implement Workers of Am. v. Ohio Bur. of Workers' Comp., 95 Ohio St. 3d 408, 411-14, 768 N.E.2d 1129, 1132-34 (2002) (Moyer, C.J., dissenting).

[48]*Sheward*, 86 Ohio St. 3d at 467-69, 715 N.E.2d at 1079-80.

[49]*Id.* at 469, 715 N.E.2d at 1080-81.

[50]*Id.* at 469, 715 N.E.2d at 1081.

[51]*Id.* at 470, 715 N.E.2d at 1081 (footnote omitted).

"[W]hen the issues sought to be litigated are of great importance and interest to the public," the majority continued, "they may be resolved in a form of action that involves no rights or obligations peculiar to named parties."[52] And this case satisfied those criteria. One of the claimants, the OATL, a group of plaintiffs lawyers,[53] submitted affidavits asserting that it would "lose dues-paying members, and its members [would] lose fees and clients,"[54] should the Tort Reform Act go into effect. The majority rejected this theory of what is called "lawyer standing."[55] Almost any legislative action is bound to affect some attorneys in some manner, so the majority found that this would improperly broaden standing.[56] Nonetheless, the suit could proceed under the public rights exception. "[T]here can be no doubt," the court held, that the issues sought to be litigated were of "a high order of public concern."[57] The Tort Reform Act, according to the majority, had aggregated judicial power to the legislative branch, and reenacted legislation struck down as unconstitutional by the court in prior decisions. This purported invasion of judicial power, the court concluded, made it "difficult to imagine a right more public in nature."[58]

Chief Justice Thomas Moyer, joined by two other justices, dissented on the standing issue. Emphasizing the majority's concession that the claimants failed to meet traditional standing criteria, the dissent argued that the majority had "created a new judicial doctrine pursuant to which any citizen is deemed to have standing to assert violation of the public right to preservation of judicial power and implementation of the doctrine of separation of powers."[59] While not directly addressing the prior "public rights" cases of the court, the dissent appeared to argue that the majority had improperly expanded the scope of the public rights exception. The dissent concluded that the majority relied on "circular reasoning": The Tort Reform Act "is unconstitutional because it encroaches upon judicial authority; therefore [the claimants had] standing in mandamus and prohibition to assert that [the Act] is unconstitutional because it encroaches on judicial authority."[60]

The supreme court more recently encountered standing issues in *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation (OBWC)*.[61] That case involved a challenge to a state statute that permitted warrantless drug and alcohol testing of injured workers applying for workers' compensation, without individualized suspicion of drug or alcohol use, on the basis that it violated both the

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[52]*Id.* at 471, 715 N.E.2d at 1082.

[53]*Id.* at 451 n.1, 715 N.E.2d at 1068 n.1 (describing OATL).

[54]*Id.* at 473, 715 N.E.2d at 1084.

[55]*Id.* at 473, 715 N.E.2d at 1084.

[56]*Id.* at 473-74, 715 N.E.2d at 1084 ("[T]here would be no objective basis upon which to disallow suits by attorneys or their organizations to challenge any number of statutory enactments.").

[57]*Id.* at 474, 715 N.E.2d at 1084.

[58]*Id*. at 474, 715 N.E.2d at 1084.

[59]*Id.* at 526, 715 N.E.2d at 1119 (Moyer, C.J., dissenting).

[60]*Id.* at 530, 715 N.E.2d at 1122 (Moyer, C.J., dissenting).

[61]97 Ohio St. 3d 504, 780 N.E.2d 981 (2002).

Fourth Amendment to the U.S. Constitution[62] and its analogue in the Ohio Constitution.[63] The procedural posture of the case was similar to *Sheward*: Two labor unions, whose members were alleged to be "potential subjects" of the testing, filed an original action in mandamus in the supreme court. And once again, the defendants (state agencies) moved to dismiss on standing grounds.

Unlike *Sheward*, however, the majority did not find it necessary to discuss the issue at length before holding that there was standing. First, the majority pointed out that similarly postured parties had been permitted, in a prior case, to file an original action in the court challenging other aspects of the workers' compensation statute on state constitutional grounds.[64] Second, the court relied on the public right exception developed in *Sheward*. Using that exception "to determine the constitutionality of statutes will 'remain extraordinary' and 'limited to exceptional circumstances that demand early resolution.'"[65] According to the court, this was one of those "rare cases":

> As the statutory scheme at issue in *Sheward* affected every tort claim filed in Ohio, [the Act here] affects every injured worker who seeks to participate in the workers' compensation system. It affects virtually everyone who works in Ohio. The right at stake, to be free from unreasonable searches, is so fundamental as to be contained in our Bill of Rights. [The Act] has sweeping applicability and affects a core right. Since [the Act] therefore implicates a public right, we find that relators meet the standing requirements of *Sheward*.[66]

Chief Justice Moyer, and two other justices, once again dissented. Emphasizing that the claimants lacked the traditional indicia of standing, and that their claimed injuries were "speculative,"[67] the Chief Justice turned his attention to *Sheward*. He renewed his "vehement opposition to *Sheward*,"[68] but argued that the decision, properly understood, does not expand the "public rights" exception. More is required, he said, "than a showing that a statute of questioned constitutionality is of widespread public interest, or even that it potentially may effect a large number of

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[62]U.S. CONST. amend. IV.

[63]OHIO CONST. art. I, § 14.

[64]*OBWC*, 97 Ohio St. 3d at 506, 780 N.E.2d at 984 (citing State *ex rel*. Ohio AFL-CIO v. Voinovich, 69 Ohio St. 3d 225, 631 N.E.2d 582 (1994)). The *Voinovich* case indeed has similarities to *OBWC*, but it is a stretch to infer, as did the majority, that the earlier case had in effect set a "precedent" for standing, *id.* at 506, 780 N.E.2d at 984, for none of the opinions in *Voinovich* discuss standing.

[65]*OBWC*, 97 Ohio St. 3d at 506, 780 N.E.2d at 985 (quoting *Sheward*, 86 Ohio St. 3d at 515, 715 N.E.2d at 1112 (Pfeifer, J., concurring)). Justice Pfeifer authored the majority opinion in *OBWC.*

[66]*OBWC*, 97 Ohio St. 3d at 506, 780 N.E.2d at 985.

[67]*Id.* at 516, 780 N.E.2d at 992 (Moyer, C.J., dissenting).

[68]*Id.* at 516, 780 N.E.2d at 993 (Moyer, C.J., dissenting). Chief Justice Moyer observed that other commentators had also criticized *Sheward*. *Id.* (citing, inter alia, Blake, *supra* note 32; Loeb, *supra* note 47).

Ohio citizens."[69] *Sheward*, he said, involved a purported invasion of the separation of powers, unlike this case. Were *Sheward* interpreted to mean that the public right exception applies to any constitutional challenge, "then virtually any legislative enactment affecting the public [could] be short-circuited to this court for immediate constitutional review," and the exception would "engulf traditional standing rules." [70]

B. Federal and State Models of Standing

None of the opinions in *Sheward* or *OBWC* purport to depart from or eviscerate the core standing requirements in Ohio courts, explicitly drawn from federal cases. The departure from the federal model of standing comes with the existence and scope of the public issue or public rights exception. That exception is not drawn from and has no counterpart in federal courts jurisprudence. Should that exception exist in Ohio and, if so, how should it be interpreted or applied?

The starting point to answer this question is the observation in the majority opinion in *Sheward* that Ohio is not bound by federal jurisprudence on standing.[71] That point is virtually undisputed,[72] but it is a slender reed on which to build an alternative model of jurisprudence. It is true, as one court has observed, that Ohio "has no constitutional counterpart to Section 2, Article III" of the U.S. Constitution,[73] but Ohio courts have long adopted, voluntarily, federal standing requirements. As a matter of an originalist interpretation of the Ohio Constitution, this is no shock. The Ohio Constitution does not have the "cases" or "controversies" language of Section 2 of Article III, but it *does* vest "judicial power" in the courts,[74] a term also found in

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[69] *Id.* at 517, 780 N.E.2d at 993-94.

[70] *Id.* at 518, 780 N.E.2d at 994.

[71] *See supra* note 51 and accompanying text.

[72] The U.S. Supreme Court has so held, even with respect to *federal* issues raised in state court litigation. *See* Virginia v. Hicks, 123 S. Ct. 2191, 2197 (2003); ASARCO v. Kadish, 490 U.S. 605, 617-18 (1989). *See generally* FALLON, *supra* note 18, at 138-40; Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003 (2001).

It is worth noting that the presence of federal issues in state court decisions does not guarantee that the decision is reviewable by the United States Supreme Court. If the case is decided on *both* federal and state law grounds, then the decision is not reviewable by the latter Court if the former court clearly states that the result is compelled by state law. Michigan v. Long, 463 U.S. 1032, 1038-41 (1983). For example, the *OBWC* decision is not reviewable by the U.S. Supreme Court, since it plainly states that it rests on both federal *and* state law. In contrast, *ASARCO* held that the litigant seeking review of a state court decision in the U.S. Supreme Court must have a "direct, specific, and concrete injury," 490 U.S. at 624, i.e., must satisfy standing requirements, even if the litigant did not or need not in state court. It would seem that the state defendants in *OBWC*, had they pursued the case in the U.S. Supreme Court, would have met this requirement. *But cf.* Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2558 (2003) (Stevens, J., concurring in dismissal of certiorari) (*ASARCO* should not be applied to "an interlocutory ruling that merely allows a trial to proceed") (footnote omitted).

[73] James A. Keller, Inc. v. Flaherty, 74 Ohio App. 3d 788, 791, 600 N.E.2d 736, 738 (1991).

[74] The term appears in both the 1802 (art. III, § 1) and 1851, as amended (art. IV, § 1), versions of the Ohio Constitution. The language is presumably borrowed from the federal document, but I am unaware of any cases or scholarly commentary that directly addresses the

Article III. The phrase, to be sure, does not enjoy a precise definition in American jurisprudence,[75] but the historical and contemporary understanding of the term would seem to presumptively implicate the private rights model–that a plaintiff must meet the traditional standing criteria. Moreover, as we saw, federal courts standing jurisprudence heavily draws on the separation of powers doctrine. The majority in *Sheward* vociferously trumpeted separation of powers concerns in striking down the tort reform legislation at issue on the merits. It would be odd if that case were the genesis of a *relaxing* of standing requirements based on separation of powers. In short, the Ohio Supreme Court has for many years voluntarily followed federal standing doctrine, and there ought to be a persuasive case made for abandoning those standards.[76]

Departure from federal standing norms might nonetheless be justified on various historical, institutional, or policy grounds.[77] The majority opinions in *Sheward* and *OBWC* advanced few such grounds. Indeed, they paid fidelity[78] to federal standing doctrine but nonetheless utilized the public issue or rights exception to circumvent that doctrine. The existence and scope of that exception could considerably undermine standing requirements. The exception does not seem to be particularly well grounded in Ohio jurisprudence. It is true, as reviewed by the majority in

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intent of the framers of the Ohio constitutions on the point. *See, e.g.*, F.R. Aumann, *The Development of the Judicial System in Ohio*, 41 OHIO ARCH. & HIST. SOC'Y PUB. 195, 201, 215 (1932) (discussing in passing the vesting of the judicial power in the 1802 and 1851 Ohio Constitutions). *But cf.* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1879-81 (2001) (discussing how state constitutions departed from Article III in the late 18th and early 19th century, and giving weight to the absence of the "case" or "controversy" language).

[75]YACKLE, *supra* note 2, at 3-6; Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357.

[76]Here and elsewhere in this Essay, I am not suggesting that Ohio courts *must* follow federal standing doctrine. Nor am I necessarily suggesting that Ohio courts should always presumptively follow federal constitutional law, with respect to standing or other issues. *Cf.* Richard A. Saphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437 (2003) (arguing against such a presumption). Instead, I am advancing the narrower point that good judicial practice is for courts to convincingly explain why they are abandoning, in whole or in part, an earlier, adopted body of law to resolve a particular issue (here, standing). Otherwise, the use of the exception will be regarded as little more than an unprincipled departure from precedent by the court.

[77]Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 60 (1998).

[78]As previously observed, *see supra* note 51 and accompanying text, the majority in *Sheward* referred in a seemingly critical manner to the "complexities and technicalities" of federal standing doctrine. *Sheward*, 86 Ohio St. 3d at 470, 715 N.E.2d at 1081. *See also id.* at 470 n.10, 715 N.E.2d at 1081 n.10 (further characterizing federal standing doctrine as "amorphous," "complicated," and "confus[ing]") (citations omitted). Scholars often agree with these characterizations. *E.g.*, YACKLE, *supra* note 2, at 278 (standing doctrine is "unruly, even incoherent, and by some accounts manipulable"). That said, this line of criticism does not provide a sound basis to depart from federal standing doctrine. One must ask, "complex" and "complicated," as compared to what? The public rights exception developed by the Ohio Supreme Court seems to deserve some of that characterization, as well.

Sheward,[79] that there are prior cases, all original actions in the court, which permit suits to proceed by claimants who at first blush appear not to satisfy traditional standing criteria. But until 1954 only one of the cases referred to a "public right,"[80] and in any event the cases are not legion. Nor do they make convincing efforts to justify why there should be such an exception.[81] The opinions use, with little discussion, vague terms such as the "importance" of an issue,[82] or that there would be a "public injury"[83] if suit could not proceed. Moreover, in *Sheward* the court took pains to emphasize how narrow the exception was.[84]

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[79]*Sheward*, 86 Ohio St. 3d at 470-74, 715 N.E.2d at 1082-84.

[80]Blake, *supra* note 32, at 469.

[81]The majority and dissenting opinions in *Sheward* discuss the cases at some length, and a full exposition is unnecessary here. Suffice it to say, however, that the cases do not engage in lengthy analysis of the supposed departure from normal standing principles, or even explicitly acknowledge that a departure is occurring. *E.g.*, State *ex rel*. Trauger v. Nash, 66 Ohio St. 612, 615, 64 N.E. 558, 558 (1902) (in suit regarding the failure of the governor to fill a vacancy in the office of lieutenant governor, relator described as an elector, citizen, and taxpayer); State *ex rel*. Newell v. Brown, 162 Ohio St. 147, 150-51, 122 N.E.2d 105, 107 (1954) ("as a matter of public policy, a citizen of a community" has an interest to enforce a "public right" involving the placement of names on an election ballot). On the other hand, some of the cases are capable of being read as providing a litigant with standing, or at least suggesting an exception to standing doctrine short of a "public rights" exception. *E.g.*, *In re* Assignment of Judges to Hold Dist. Courts, 34 Ohio St. 431, 433 (1878) (statute apparently designated Court as government body to resolve controversy); State v. Brown, 38 Ohio St. 344, 346-47 (1882) (relator "would be entitled to vote at the election, if an election were proper, and would be himself eligible to the office"); State *ex rel*. Meyer v. Henderson, 38 Ohio St. 644, 645 (1883) (relator owned property near proposed street railroad line, the subject of the challenged city ordinance).

[82]*In re* Assignment of Judges to Hold Dist. Courts, 34 Ohio St. 431, 432 (1878).

[83]State *ex rel*. Trauger v. Nash, 66 Ohio St. 612, 616, 64 N.E. 558, 559 (1902).

[84]In a later part of the opinion, the majority in *Sheward* reiterated its position on standing in responding to the dissent on that point. *Sheward*, 86 Ohio St. 3d at 502-04, 715 N.E.2d at 1103-04. There, the majority agreed that the "public-right doctrine is, indeed, an exception to the personal-injury requirement of standing." *Id.* at 503, 715 N.E.2d at 1103. It went on to emphasize that the exception would not permit citizens to "have standing as such to challenge the constitutionality of every legislative enactment," and would only operate in the "rare and extraordinary case," to review "the constitutionality of a legislative enactment [that] is of a magnitude and scope comparable to that of [the tort reform] law." *Id.* at 503-04, 715 N.E.2d at 1104.

Despite this language, the majority in *Sheward* never made clear how the exception, whether characterized as broad or narrow, could be squared with federal standing doctrine, which it claims to otherwise follow. The court did state that the public rights exception was "nothing new," *id.*, in Ohio jurisprudence, and cited cases from other states that seemed to use a similar public rights exception. *Id.* at 503, 715 N.E.2d at 1103-04 (citing cases from Michigan, New Mexico, and Utah). The majority did not explicitly attempt to tie the exception to federal law. However, it did allude, albeit implicitly, to the public rights model of adjudication, *id.* at 503, 715 N.E.2d at 1103, citing a law review article (Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961)), which is one of the scholarly pillars of that model. *See* FALLON, *supra* note 18, at 69 n.3 (citing Jaffe, *supra*). And while not discussed by *Sheward*, two of the prior Ohio cases did rely on federal

It seems a doctrinal stretch, then, to convert these cases into a broad public rights exception.[85] Despite the disclaimers of the majority opinions in *Sheward* and *OBWC*, the exception does indeed have the potential to swallow standing rules. Consider *OBWC*, where the court stated that the workers' compensation statute under consideration "affects virtually everyone who works in Ohio [and] has sweeping applicability and affects a core right."[86] So defined, the exception has a broad ambit. Many (most? all?) statutes passed by the Ohio legislature "affect" most Ohioans. Even assuming a "core" right is limited to constitutional issues, that would presumably include both state and federal issues, as was true in *OBWC*. So the dissent in that case seems on solid ground when characterizing the exception as encompassing "virtually any legislative enactment affecting the public." The exception, if widely applied, is well on its way to "engulf[ing]" traditional standing rules.[87]

A more promising argument might be to develop functional justifications for the exception, undertaken by Justice Paul Pfeifer in his concurring opinion in *Sheward*. There, he argued that the legal issues involved needed prompt attention, since the Tort Reform Act would affect thousands of lawsuits. Moreover, he argued, the traditional path of litigation (brought, presumably, by a claimant with standing to raise the issues) was unnecessary:

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law. State *ex rel.* Meyer v. Henderson, 38 Ohio St. at 649 (citing Union Pac. R.R. Co. v. Hall, 91 U.S. 343 (1875)); State *ex rel.* Trauger v. Nash, 66 Ohio St. at 616, 64 N.E. at 558 (citing *Hall*).

Perhaps the *Sheward* court was wise not to dwell on these points, because they are not persuasive anchors to federal law. As discussed earlier, Part II *supra*, the United States Supreme Court has never fully embraced the public rights model of standing. Moreover, the public rights model is largely a Twentieth Century phenomenon, FALLON, *supra* note 18, at 69; Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757, 779-81 (2002), and it is anachronistic to characterize older cases as being part of that model. *Cf.* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 469-73 (1995) (discussing cases and scholarly literature, and concluding that some aspects of both public and private rights model are found in 19th century standing cases). The one federal case cited by earlier Ohio cases did indeed have language suggesting that litigants can enforce "a public duty" in a mandamus action. *Hall*, 91 U.S. at 355. But the precedential force of *Hall* is considerably mitigated by two factors. First, there was a statute at issue in *Hall* that authorized a mandamus action to be brought, apparently irrespective of standing issues. *Id.* at 354-55. Second, federal courts have interpreted the modern statute authorizing mandamus actions, 28 U.S.C. § 1651(a), such that "[j]usticiability requirements must be met." 16B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4005, at 97 (2d ed. 1996) (footnote omitted).

[85]For scholarly criticism of the exception, see Blake, *supra* note 32, at 470-72; Loeb, *supra* note 47, at 506-07. *See also Sheward*, 86 Ohio St. 3d at 522-23, 715 N.E.2d at 1117 (Moyer, C.J., dissenting) (suggesting that the pre-*Sheward* cases are best read as creating an exception when "the specific duty" of a public official "at issue is imposed by the challenged statute").

[86]*See supra* note 66 and accompanying text.

[87]*See supra* 70 and accompanying text. In addition to potentially expanding standing at the trial level, the exception could increase the number of original actions in the Ohio Supreme Court. The latter development seems undesirable, since presumably the court lacks the institutional capacity, or desire, to develop a factual record in each case, as would a trial court.

> Certainly, on specific and limited issues, a delay caused by the thoughtful consideration of trial and appellate courts, allowing facts to play themselves out in unimagined ways, has great merit. However, today's decision regarding the constitutionality of H.B. 350 is not fact-driven.[88]

He added that "the vagaries and vicissitudes of the justice system can lead to the needless extension of obvious injustice."[89] He gave as an example a decision where the court struck down a prior, more limited tort reform statute involving statutory limits on damages in medical malpractice cases.[90] Pointing out that fifteen years passed between passage of the law and the court's decision, Justice Pfeifer lamented that "such is the ordinary, unpredictable course of justice. It sometimes needs shepherding, and this court must provide that guidance."[91] As previously noted, the *OBWC* decision, authored by Pfeifer, cited his *Sheward* concurrence with approval,[92] perhaps elevating his functional reasoning to a holding.

Without an exhaustive analysis of the facts, legal issues, and briefing in *Sheward*, beyond the scope of this Essay, it is difficult to evaluate Justice Pfeifer's assertion that the issues in *Sheward* were "not fact-driven." Certainly, some cases on a variety of topics will present virtually pure issues of law, because the facts are simple, or have been stipulated, or are undisputed. In those situations, relaxation of traditional standing requirements might be justified,[93] and appellate courts would not especially benefit from the shaping of issues and the development of a record at the trial level. Whether *Sheward* was one of those cases is another matter. Perhaps adjudication of the validity of the various provisions of the tort reform law would have benefitted from their presence in an actual case, with a plaintiff who possessed standing. Then, the court might have been in a better position to evaluate the purpose and effect of the law, and how it impacted a plaintiff in an actual tort action.[94]

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[88] *Sheward*, 86 Ohio St. 3d at 515, 715 N.E.2d at 1112 (Pfeifer, J., concurring).

Though not referenced by Justice Pfeifer, his analysis is similar to the criteria federal courts have developed to determine if a case is ripe for adjudication. The ripeness doctrine rests on both constitutional (i.e., Article III) and prudential concerns. Nat'l Park Hospitality Assoc. v. Dep't of the Interior, 123 S. Ct. 2026, 2030 (2003). It requires an analysis of "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* But an inquiry into ripeness seems to assume that a litigant has standing (i.e., a personal injury) in the first instance. *Id.* at 2033-34 (Stevens, J., concurring); Airlines Professional Local 1224 v. Airborne, Inc., 332 F.3d 983, 988 (6th Cir. 2003). The latter point makes the federal doctrine less than helpful for Justice Pfeifer.

[89] *Sheward*, 86 Ohio St. 3d at 515, 715 N.E.2d at 1112 (Pfeifer, J., concurring).

[90] *Id.* (discussing Morris v. Savoy, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991)) (Pfeifer, J., concurring).

[91] *Id.* (Pfeifer, J., concurring).

[92] *See supra* note 65 and accompanying text.

[93] *Cf.* FALLON, *supra* note 18, at 224-25 (discussing ripeness as a requirement of standing).

[94] *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 12 RUTGERS L.J. 907, 934-35 (2001) (critical of lack of development of record in *Sheward*).

But let's give Justice Pfeifer the benefit of the doubt on the "fact-driven" issue. It does not follow that standing and normal appellate practice requirements should be lifted, for his functional analysis is not capable of easy application. It will often (though not always) be difficult to characterize a case, ex ante, as "fact-driven," or not. As for delays, all cases and all parties are affected by the passage of time. In the abstract, prompt judicial resolution of cases is better than not, but that is always true.[95] Less drastic means of dealing with this concern, other than revising standing requirements, and the original jurisdiction of the Ohio Supreme Court, are to provide for expedited discovery, briefing, trial, and appellate review of a normally situated case, or provide for interlocutory review of legal issues.

In this regard, it is useful to compare how the U.S. Supreme Court has dealt with the constitutionality of federal statutes. Those issues, too, are "important," arguably are "public rights" under a broad definition of that term, and affect many people in this country. Yet that Court has not relaxed standing requirements or permitted original actions to be filed in such cases.[96] Rather, the Court has followed normal jurisdictional and appellate procedures in such cases. The problems of delay have been resolved, on occasion by interlocutory appeals, and other expedited proceedings at both the trial and appellate levels.[97]

Most recently, Professor Helen Hershkoff has advanced a different set of arguments in favor of a relaxed doctrine of standing by state courts.[98] She focuses on institutional differences between federal and state courts. In brief, her argument is as follows: She observes that state courts are not bound by federal standing requirements,[99] and that the history and application of separation of powers models in each state may differ, in various ways, from federal doctrine.[100] More than that, state courts differ from their federal counterparts in ways relevant to the constraints posed by federal standing doctrine. The latter doctrine is premised, in part, on

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[95]In April 2003, a new law in Ohio went into effect that regulates and places various limits on what plaintiffs can recover in medical malpractice litigation. Am. Sub. S.B. 281, 124th Gen. Assembly, 2002 Session. No doubt, the law will in some way be subject to litigation on its constitutionality. Echoing Justice Pfeifer, the current head of the OATL (one of the claimants in *Sheward*) lamented that "it will probably take four years just to get [that] question ... up to the Supreme Court ... and that's unfair." Edward F. Cohn, *Plaintiffs' Bar Girds for Challenge to Med-Mal Caps*, OHIO LAWYERS WEEKLY, Feb. 17, 2003, at 1.

[96]Indeed, in 1988 Congress, with the Court's approval, repealed a statute, 28 U.S.C.§ 1252, which provided for direct appeals to the Court of decisions of U.S. district courts holding federal statutes to be unconstitutional. For discussion, see 17 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4037.1 (1988 & 2003 Supp.).

[97]Another method is for Congress to provide that certain constitutional questions be resolved by a single district judge, or a three-judge district court, with direct review to the Supreme Court. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REF. 79 (1996); Joshua Panas, Note, *Out of Control?: Congressional Power to Shape Judicial Review of New Legislation*, 1 GEO. J.L. & PUB. POL'Y 151 (2002). Presumably similar procedures could be used at the state level.

[98]Hershkoff, *supra* note 74. My brief summary and discussion of Professor Hershkoff's work can only do partial justice to the breadth and depth of her excellent article.

[99]*Id.* at 1836.

[100]*Id.* at 1884-85.

unelected and independent federal courts largely deferring on making policy to the Executive and Congress, the politically accountable branches of the federal government.[101]

Professor Hershkoff argues that those premises do not necessarily apply to state governments. First, most state courts rely on some form of periodic election, which dilutes the countermajoritarian concerns associated with federal courts—though the same factor, she acknowledges, may make state courts "more politically dependent than their Article III peers."[102] Relatedly, the common use of initiative and referenda make state constitutions much more likely to be amended than the federal Constitution, further blunting the finality of state judicial decisions.[103] Second, she argues that federal "justiciability doctrine also reflects judgments about the comparative advantage" in policymaking capacity that Congress and the Executive branch enjoy compared to federal courts.[104] This advantage is not necessarily present at the state level. Many state legislatures, for example, simply lack the institutional resources of Congress, or only meet part-time, or are constrained in various ways by state constitutions, far more than the federal Constitution constrains the workings of Congress.[105]

Finally, she argues, federal court power is limited by the concerns of federal governmental bodies (the courts included) encroaching on the prerogatives of state governments. These federalism constraints are not present at the state level: A state court's decision "binds only the people of that state," thus enjoying "a greater perception of democratic legitimacy and local responsiveness than that of an unelected Article III 'outsider.'"[106]

The upshot of these differences, she argues, is that a state court can legitimately take a different approach to standing:

> [W]hether a state court should help to resolve a particular dispute–or instead remit the matter to politics, to the market, or to other institutions–ought to turn on an independent assessment of whether state judicial review can contribute to democratic life, weighing the interests at stake and the comparative abilities of alternative decisionmakers.[107]

Among the benefits that will flow from this different approach are said to be increased judicial participation in the resolution of a broad array of issues governed by state constitutions, facilitation of the political expression of interest groups and

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[101] *Id.* at 1883.

[102] *Id.* at 1887 (footnote omitted).

[103] *Id.* at 1888.

[104] *Id.* at 1891.

[105] *Id.* at 1892-94.

[106] *Id.* at 1902 (footnote omitted) (quoting Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 732 (1981)).

[107] *Id.* at 1907 (footnote omitted). She emphasizes that she is not suggesting "that state courts are without institutional limit or that they are the same as the other branches of government[.]" *Id.*

individuals shut out of other avenues of government, and limiting or countering the role of special interest groups in other branches of government.[108]

Professor Hershkoff's trenchant analysis could well provide a more convincing basis for a relaxed approach to standing by Ohio courts. Or to put the same point a different way, it could justify an expansive public rights exception to traditional rules of standing. While much of her analysis is compelling, there are at least three reasons why I cannot fully embrace her thesis for Ohio.

The first concerns the role of judicial elections. Professor Hershkoff acknowledged that some might argue that her "suggested approach rests on too sanguine a view of state court competence and of the ability of an elected judiciary to remain independent of majoritarian pressure."[109] She is right to express caution. I believe state courts in Ohio are competent, but in many instances judicial elections cannot effectively perform the role envisioned by Professor Hershkoff. On the one hand, there is ample evidence that judicial elections simply do not perform the posited check on the authority of Ohio courts. As I have discussed elsewhere, the vast majority of voters in elections for the Ohio Supreme Court know virtually nothing about the issues before or the decisions of the court, and rely heavily on cues such as incumbency, party affiliation, and name recognition.[110] And on top of that, the majority of elections for lower court judges, for various reasons, go uncontested.[111] Nor has the constitutional amendment process in Ohio constituted much of a check on the decisions of the supreme court.[112]

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[108]*Id.* at 1915-27. Professor Hershkoff also addresses various potential criticisms of her model, including that it would open the floodgates of litigation (that assumes, she says, the present level of litigation is optimal), or that it might undermine individual rights by permitting less than zealous outside observers to bring suits to vindicate such rights (judges can use amicus briefs and expert witnesses to keep themselves fully informed in such instances). *Id.* at 1931-37.

[109]*Id.* at 1980-09.

[110]Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559, 563-66 (2002). *See also* Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 18-26 (2003) (discussing studies of information available to voters in judicial races); David Owsiany, *The General Assembly v. The Supreme Court: Who Makes Public Policy in Ohio?*, 32 U. TOL. L. REV. 549, 560 (2001) (judicial elections in Ohio do not provide check to decisions on separation of powers by the Ohio Supreme Court).

[111]Solimine, *supra* note 110, at 467-71.

[112]Data indicates that Ohio is average among the states when it comes to frequency of amendment. For example, from Ohio's last (1851) constitution, to 1991, there were 145 amendments, compared to a mean of 117 for all of the states from their latest constitution. *See* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 367 (1994)(tbl. A-1). Ohio has an amendment rate of 1.04 (the number of amendments divided by the age of the constitution), as compared to a mean for all of the states of 1.23. *Id.* Giving significance to these numbers for present purposes would require a number of inquiries beyond the scope of this Essay, including examining how many of the Ohio amendments were responsive to Ohio Supreme Court decisions, and how many amendments were proposed but never were enacted. For some discussion of these points, see Terzian, *supra* note 2. With regard to the matters addressed in the present Essay, it is worth noting that some suggestions were made to pass a constitutional amendment to overturn the result in the *DeRolph* school

On the other hand, perhaps elections, at least for the Ohio Supreme Court, work too well. In the last few election cycles, races for that court have been extraordinarily competitive by historical standards in this state. That is, both political parties, and various interest groups (inside and outside of Ohio), have raised large amounts of money and run vigorous campaigns to elect or defeat a favored candidate.[113] In this climate, judges "possess something of a political constituency ... and the stamp of public legitimacy that comes with election may just as easily embolden courts as enfeeble them."[114]

Second, it is not clear that relaxed standing rules will facilitate the power of outsider interest groups. It might do that, but it seems just as (if not more) likely to aid *any* special interest groups.[115] Consider the parties in the *Sheward* case. Relaxed notions of standing permitted two currently powerful interest groups in Ohio (plaintiffs' lawyers, and the AFL-CIO)[116] to litigate a case, and advance policy objectives, in a favorable venue. The *OBWC* litigation could be characterized in the same way.

Finally, relaxed standing doctrines will likely permit courts to play a frankly more assertive role in policymaking. Whatever else might be said about that, it will no doubt lead to increased tensions with the other branches of government.[117] The

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finance litigation, e.g., Owsiany, *supra* note 110, but no formal effort to achieve that result took place.

[113]*See generally Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary* 21-33 (2003); David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws and the First Amendment*, 72 U. CIN. L. REV. 1 (2003). In Ohio, Chief Justice Thomas Moyer convened a conference in March 2003 to discuss revisiting the system of judicial selection. For further information on this ongoing project, see www.thenextsteps.org (last visited March 23, 2004).

[114]Vermeule, *supra* note 75, at 427. *But see* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1452-54 (1999) (expressing skepticism with this theory).

[115]Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 364-65 (1999).

[116]These interest groups might dispute the characterization, arguing that they *represent* less powerful individuals in our society. Putting that to one side, the development of standing doctrine in *Sheward* and *OBWC* would seem to permit interest groups on the other side (say, the Ohio Manufacturers' Association, which filed amicus briefs in both cases, see *Sheward*, 86 Ohio St. 3d at 455, 715 N.E.2d at 1071; *OBWC*, 97 Ohio St. 3d at 523, 780 N.E.2d at 983) to file original actions in the Supreme Court (or lower courts) requesting a declaration that the legislation in question is constitutional. If that is so, it undercuts the argument that standing doctrine can or should aid only a subset of interest groups. For further discussion of the role of interest groups in litigation in state supreme courts, see SCOTT A. COMPARATO, AMICI CURIAE AND STRATEGIC BEHAVIOR IN STATE SUPREME COURTS (2003).

[117]Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601 (2001). On the more general point of interbranch tension, see Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175 (1990); Peter M. Shane, *Legal Disagreement in a Government of Laws: The Case of Executive Privilege Against Congress*, 71 MINN. L. REV. 461 (1987).

Ohio decisions discussed in this Essay provide examples of such tension. Of course some level of interbranch tension is an implicit and even desirable aspect of the separation of powers. Nor am I suggesting that courts should reflexively render decisions that defer to the policy decisions of the other branches. But it would be disingenuous not to acknowledge that relaxing standing doctrines will have the potential of increasing that tension.[118]

Still, perhaps we could or should overlook the weak jurisprudential grounding of a public rights exception to standing requirements in Ohio, if we were convinced that federal standing doctrine was worth replacing or modifying. I am not willing to reach that conclusion. Current federal standing doctrine is concededly no panacea, but in my view it adequately serves the goals of restricting the ambit of federal court power, which in turn serves separation of powers and functional goals.[119] And I see no compelling reasons for Ohio courts to abandon their voluntary use of that doctrine.

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[118]Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 L. & CONTEMP. PROB. 21, 34-35 (Summer 1998).

It also should be noted that Professor Hershkoff is speaking generally about adjudication in state courts, and does not particularly focus in an evaluative fashion on Ohio or any other state. Thus, her analysis may be more persuasive with respect to states other than Ohio. For example, she observes that a number of states, unlike the federal system, permit or authorize courts to answer advisory opinions. Hershkoff, *supra* note 74, at 1844-52. But Ohio is not one of those states. State *ex rel*. State v. Lewis, 99 Ohio St. 3d 97, 103, 789 N.E.2d 195, 202 (2003). On the other hand, she observes that "[t]axpayers in almost every state, however, can challenge the expenditure of public funds, without any individual or particularized showing of injury in fact...." Hershkoff, *supra* note 74, at 1854. Ohio is one of those states. *See, e.g.*, State *ex rel*. White v. Cleveland, 34 Ohio St. 2d 37, 295 N.E.2d 665 (1973) (applying OHIO REV. CODE § 733.59). Courts from other states have addressed Professor Hershkoff's analysis and, in some cases, followed it. *See* Utsey v. Coos Cty., 32 P.3d 933, 939 n.6 (Or. App. 2001) (citing Hershkoff, *supra* note 74, but holding that suit brought by interest group was non-justiciable); State v. Campbell Cty. School Dist., 32 P.3d 325, 335 (Wyo. 2001) (citing Hershkoff, *supra* note 74, in course of holding that political question doctrine didn't apply in school funding case). *Cf.* United Pub. Workers v. Yogi, 62 P.3d 189, 203 (Haw. 2002) (Acoba, J., concurring) (citing Hershkoff, *supra* note 74, for proposition that mootness exception under state law should be broader than that found in federal law).

[119]*See supra* Part II (discussing various rationales for federal standing doctrine). Here and elsewhere in this Essay, either explicitly or implicitly, I am normatively defending most if not all of the content of federal standing doctrine. A full-blown discussion and defense of that point would take many pages and is beyond the scope of the present Essay. While there is a large literature critical, in various ways and degrees, of federal standing doctrine, that body of law does not lack for its defenders, either. *See, e.g.*, Stearns, *supra* note 16; Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993). *Cf.* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996). Even if I was normatively skeptical of federal standing doctrine, it would still behoove state courts to justify departures from that doctrine, especially when they have been using that doctrine with no great apparent distress to that state's judicial system.

IV. THE POLITICAL QUESTION DOCTRINE IN OHIO COURTS

A. The Cases

For decades Ohio courts have applied the political question doctrine, sometimes drawing on federal precedents in doing so.[120] A full survey of those cases is beyond the scope of this Essay. What is worth addressing is that the doctrine was addressed in recent, high-profile litigation before the supreme court on school funding issues.

The first instance was *Cincinnati School District Board of Education v. Walter*.[121] There, a school district challenged Ohio's system of funding local schools as being violative of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and the Thorough and Efficient Clause of the Ohio Constitution. The *Walter* court eventually rejected both challenges, but before doing so the court considered the argument that the suit was nonjusticiable as a political question. The majority found the matter not to be such a question, in part because it apparently believed that the doctrine was moribund on the U.S. Supreme Court itself. The *Walter* majority stated that *Baker v. Carr*, relied upon the defendants, was not the U.S. Supreme Court's most recent pronouncement, and that the "viability" of the doctrine had been "dampened" by a later decision in that Court.[122]

The second instance, as I noted in the Introduction, is the more recent *DeRolph* school funding litigation. There, the Ohio Supreme Court considered another challenge to the Ohio system for financing elementary and secondary education, which at the time relied heavily on local revenue raised by property taxes. The majority, like *Walter*, found the matter justiciable but, unlike *Walter*, held for the plaintiff school districts on the merits. In so holding, the majority gave short shrift to arguments premised on the political question doctrine:

> In reaching this conclusion, we dismiss as unfounded any suggestion that the problems presented by this case should be left for the General Assembly to resolve. This case involves questions of public or great general interest over which this court has jurisdiction.
>
> Under the long-standing doctrine of judicial review, it is our sworn duty to determine whether the General Assembly has enacted legislation that is constitutional. *Marbury v. Madison*, [5 U.S. (1 Cranch) 137 (1803)]. We are aware that the General Assembly has the responsibility to enact legislation and that such legislation is presumptively valid. However, this does not mean that we may turn a deaf ear to any challenge to laws passed by the General Assembly. The presumption that laws are constitutional is rebuttable. The judiciary was created as part of a system

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[120] *E.g.*, State *ex rel*. Meshel v. Keip, 66 Ohio St. 2d 379, 383, 423 N.E.2d 60, 64 (1981) (citing *Baker v. Carr*); State *ex rel*. Ford v. Board of Elections, 167 Ohio St. 449, 451, 150 N.E.2d 43, 45 (1958); Geauga Lake Improv. Ass'n v. Lazier, 125 Ohio St. 565, 570-76, 182 N.E. 489, 491-93 (1932); Emery v. Toledo, 121 Ohio St. 2d 257, 263-64, 167 N.E. 889, 891 (1929) (citing federal cases).

[121] 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

[122] *Id.* at 384, 390 N.E.2d at 823 (referring to Powell v. McCormack, 395 U.S. 486 (1969)). For a discussion of Baker v. Carr, 369 U.S. 186 (1962), see *supra* notes 27-28 and accompanying text.

> of checks and balances. We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We refuse to undermine our role as judicial arbiters and to pass our responsibilities onto the lap of the General Assembly.[123]

The dissenting opinion by Chief Justice Moyer, joined by Justices Cook and Lundberg Stratton, gave more extended treatment to the political question doctrine. There, the Chief Justice concluded that "defining a 'thorough and efficient' system of education financing is a nonjusticiable question."[124] In reaching that conclusion the dissent first canvassed and discussed the federal political question doctrine, including the famous *Baker v. Carr* criteria[125] and post-*Baker* cases in the U.S. Supreme Court.[126] In summary, the dissent explained,

> The fact that this lawsuit implicates other branches of government, or has political overtones, does not automatically invoke the political question doctrine. A political question is one that requires policy choices and value judgments that have been expressly delegated to, and are more appropriately made by, the legislative branch of government.[127]

Applying these criteria, the dissent observed that the Thorough and Efficient Clause begins with language that states that the "*general assembly shall make such provisions*, by taxation or otherwise, as ... will secure a thorough and efficient system of common schools throughout the state ...."[128] Then, the dissent canvassed the drafting history of the 1851 Constitution, which Chief Justice Moyer interpreted as demonstrating that the framers intended to leave the content of "thorough and efficient" entirely for legislative discretion.[129] Finally, the dissent observed that neither the plaintiffs nor the majority opinion had precisely defined what is meant by the clause, suggesting that there was a "lack of judicially demonstrable or manageable standards."[130] Pointing to education funding litigation in other states, the dissent lamented:

> Each of these cases from other states represents the grim reality of a state supreme court involving itself in setting minimum educational standards,

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[123]78 Ohio St. 3d 193, 198, 677 N.E.2d 733, 737 (1997).

[124]*Id.* at 265-66, 677 N.E.2d at 783 (Moyer, C.J., dissenting).

[125]*See supra* note 28 and accompanying text.

[126]78 Ohio St. 3d at 265-68, 677 N.E.2d at 783-84 (Moyer, C.J., dissenting) (citing and discussing, in addition to *Baker v. Carr*, Japan Whaling Assn. v. Am. Cetacean Soc., 478 U.S. 221 (1986) and Nixon v. United States, 506 U.S. 224 (1993)).

The dissent also observed that, in light of recent cases, the *Walter* court had greatly overstated the supposed abandonment of the political question doctrine by the U.S. Supreme Court. 78 Ohio St. 3d at 267 n.15, 677 N.E.2d at 783 n.15.

[127]*Id.* at 267, 677 N.E.2d at 784 (Moyer, C.J., dissenting).

[128]*Id.* at 268, 677 N.E.2d at 784 (quoting OHIO CONST. art. VI, § 2) (Moyer, C.J., dissenting) (emphasis added by the dissent).

[129]*Id.* at 267, 677 N.E.2d at 784-85 (Moyer, C.J., dissenting).

[130]*Id.* at 268, 677 N.E.2d at 785 (Moyer, C.J., dissenting).

> which has resulted in years of protracted litigation, ultimately placing the courts in the position of determining state taxation methods, budgetary priorities, and educational policy.[131]

Despite the justiciability hurdle, the dissent proceeded to address the merits of the case, and determined that the Ohio Legislature had constitutionally satisfied its responsibilities under the Thorough and Efficient Clause.[132]

B. The Status of the Political Question Doctrine

Much like with standing doctrines, Ohio courts are not constitutionally obliged to follow the political question doctrine from federal courts jurisprudence (or any other source).[133] Indeed, as has been observed, the doctrine has played a less robust role at the state, as opposed to federal, court level.[134] This is due, in part, to the fact that state constitutions are typically much more detailed than the U.S. Constitution, and thus seem to call for more judicial interpretation and intervention on a variety of obligations placed on state government.[135]

That said, the Ohio Supreme Court has considered arguments that a case is a non-justiciable political question—sometimes accepting the argument, sometimes not. Though not discussed at length in the majority opinions in *Walter* or *DeRolph*, the political question doctrine was not expressly or, by my reading, implicitly, repudiated. Normatively this is a good thing, for some of the same reasons outlined earlier in this Essay. The political question doctrine is grounded primarily in separation-of-powers concerns, which in my view are viable at both state court and federal court levels.

This does not mean, however, that it was appropriate to dismiss the *DeRolph* litigation on such grounds. First, as discussed earlier,[136] the status of the doctrine in federal courts jurisprudence is a matter of some dispute. The weight of authority is that the constitutional prong is on the firmest footing, as a matter of the framers' intent, constitutional interpretation, and the case law. That prong is embodied in the first of the *Baker v. Carr* factors, that there be a text-based commitment of the issue to another branch of government. Recall that Chief Justice Moyer relied on this prong in his dissent in *DeRolph I*. His analysis of the point, though the majority did

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[131]*Id.* at 271, 677 N.E.2d at 787 (Moyer, C.J., dissenting).

[132]*Id.* at 271-82, 677 N.E.2d at 787-94 (Moyer, C.J., dissenting).

While the political question doctrine issue has essentially dropped out of the court's subsequent opinions in the *DeRolph* litigation, Justice Deborah Cook continued to argue that the case ought to be dismissed on those grounds. *E.g.*, DeRolph v. State, 93 Ohio St. 3d 309, 380-82, 754 N.E.2d 1184, 1244-46 (2001) (*DeRolph II*) (Cook, J., dissenting); DeRolph v. State, 97 Ohio St. 3d 434, 450, 780 N.E.2d 529, 542-43 (2002) (*DeRolph IV*) (Cook, J., dissenting).

[133]Dorf, *supra* note 77, at 60-61.

[134]G. ALAN TARR & MARY C.A. PORTER, STATE SUPREME COURTS IN STATE AND NATION 44-45 (1988); Hershkoff, *supra* note 74, at 1863.

[135]Hershkoff, *supra* note 74, at 1862-65; G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 329-30 (2003).

[136]Part II *supra.*

not deign to respond to it, is upon reflection not convincing.[137] It is true that the Thorough and Efficient Clause begins with a reference to a mandate upon the Ohio legislature. But that fact alone should not satisfy the first *Baker* factor, since many provisions of the Ohio Constitution place mandates on government—i.e., create positive rights of various sorts.[138] A mandate to regulate a certain area is not the same as delegating the exclusive power to resolve that issue to another branch.[139]

Second, Chief Justice Moyer relied on the second listed factor in the *Baker v. Carr* criteria, the lack of judicially discoverable and manageable standards for resolving the legal issue presented.[140] But that factor has come in for the most criticism of the *Baker* criteria, particularly for its difficulty in consistent and coherent application.[141] Most argue that this factor, unlike the first, is merely prudential in nature, and for that reason and others ought to be abandoned by the court.[142]

These problems are illustrated by the *DeRolph* dissent. In the course of contending that the Thorough and Efficient Clause cannot be judicially managed, the dissent undertook to interpret the clause on originalist and textualist grounds.[143] The Chief Justice also there discussed, albeit briefly, the failure of the majority and the plaintiffs to, in his view, define in any meaningful way how the legislature can satisfy the clause.[144] It was essentially a preview and outline of a discussion of the merits, which the dissent then explicitly addressed. In other words, deciding whether the second *Baker* factor (or the first factor, or both factors) is satisfied often seems to

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[137]Although it is worth noting that, as the Chief Justice did, the state supreme courts of Illinois and Rhode Island found that school finance litigation called for political questions to be resolved under their state constitutions. *DeRolph I*, 78 Ohio St. 3d at 269, 677 N.E.2d at 785 (Moyer, C.J., dissenting).

[138]For example, many provisions of Article II of the Ohio Constitution mandate or empower the legislature to regulate certain activities. *E.g.*, OHIO CONST. art. II, § 33 (mechanics' liens), § 34 (various labor laws), § 35 (workers' compensation), § 36 (natural resources).

[139]Of course the issue in the political question doctrine is *not* whether the Constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, *e.g.*, Art. I, § 8, and it is not thought that disputes implicating these provisions are nonjusticiable. Rather, the issue is whether Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.

Nixon v. United States, 506 U.S. 224, 240 (1993) (White, J., concurring) (emphasis in original).

[140]As the Chief Justice correctly observed, more recent cases have tended to blend the first two *Baker* criteria. That is, "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *DeRolph I*, 78 Ohio St. 3d at 267, 677 N.E.2d at 784 (Moyer, C.J., dissenting) (quoting *Nixon*, 506 U.S. at 228).

[141]*E.g.*, FALLON, *supra* note 18, at 255-56.

[142]*E.g.*, Barkow, *supra* note 26, at 330-335.

[143]*DeRolph I*, 78 Ohio St. 3d at 267-70, 677 N.E.2d at 784-86 (Moyer, C.J., dissenting).

[144]*Id.* at 267-69, 677 N.E.2d at 784-85 (Moyer, C.J., dissenting).

implicitly collapse into an argument on the merits.[145] In these circumstances, it would be preferable to drop any pretense of claiming to identify a political question and simply proceed to the merits. Of course, the deference to the other branches can be embodied in the standard of review on the merits, or on the scope of any remedy.[146] This, too, is reflected in the discussion of the merits in the *DeRolph* dissent.[147]

V. CONCLUSION

In the burgeoning case law and academic literature on the development of state constitutional law, there has until recently been relatively little extended discussion of justiciability issues. Just as state courts are generally free, within limits, not to walk in lockstep with federal law in interpreting state constitutional provisions on substantive issues, so they are free to develop their own justiciability doctrines. Ohio courts have generally chosen to voluntarily follow justiciability doctrines developed by federal courts. Given that default position, Ohio courts should proceed cautiously when departing from federal law. In my view, that necessary degree of caution was not exemplified by the majority opinions in *Sheward* and *OBWC*. The public rights exception developed in those cases should be abandoned or considerably limited. On the other hand, the majority opinion in *DeRolph I* did correctly apply federal justiciability standards, even if the rationale was not fully articulated as it could have been. The constitutional prong of the political question doctrine, properly understood and applied, can still play a constructive role in Ohio courts.

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[145]FALLON, *supra* note 18, at 255.

[146]For a discussion of this point with respect to school funding cases, see Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73 (2000). For an excellent overview of the many school funding cases and commentary thereon, see Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1342-51 (2004).

[147]*E.g.*, *DeRolph I*, 78 Ohio St. 3d at 272-79, 677 N.E.2d at 788-92 (Moyer, C.J., dissenting) (employing originalist methodology to give content to Clause); *id.* at 281-82, 677 N.E.2d at 794 (suggesting ways in which remedy should be limited, even if a constitutional violation is found).

In addressing the use of the political question doctrine in *DeRolph I*, I am not necessarily taking a position on the merits of the case (to the extent one can disentangle the political question doctrine from the merits), or on the remedy imposed by the majority.