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Form, Function, and Justiciability

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In *A Theory of Justiciability*,[1] Professor Jonathan Siegel provides an insightful functional analysis of justiciability doctrines. He well demonstrates that justiciability doctrines are ill suited to serve certain purposes—for example, ensuring that litigants have adverse interests in disputes that federal courts hear. Professor Siegel proceeds to identify what he believes to be one plausible purpose of justiciability doctrines: to enable Congress to decide when individuals with "abstract" (or "undifferentiated")[2] injuries may use federal courts to require that federal law be enforced. Ultimately, he rejects this justification because (1) congressional power to create justiciability where it would not otherwise exist proves that justiciability is not a real limit on federal judicial power, and (2) Congress should not have authority to determine when constitutional provisions are judicially enforceable because Congress could thereby control enforcement of constitutional limitations on its own authority. Thus, he rejects a "private rights" model of federal court adjudication and concludes that federal courts have power to act so long as they are passing on the legality, not the wisdom, of political decisions.

I am delighted to have the opportunity to comment on this characteristically thoughtful and insightful article by Professor Siegel. In this brief Comment, I consider Professor Siegel's argument that congressional power to generate justiciability demonstrates the purposelessness of justiciability doctrines. First, I question whether congressional power to generate justiciability demonstrates that justiciability is an ineffective limit on federal power. Insofar as lawmaking procedures limit congressional power to act, congressional rather than judicial power to generate justiciability where it would not otherwise exist may demonstrate the very limits of justiciability. If indeed justiciability is an effective limit on federal power, I question whether Professor Siegel ultimately should dismiss as a justification for justiciability doctrines the one plausible purpose he identifies: justiciability doctrines afford Congress control over judicial enforcement of federal law, the violation of which, absent congressional action, causes only undifferentiated or abstract injury.

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1. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEXAS L. REV. 73 (2007).

2. In *FEC v. Akins*, 524 U.S. 11 (1998), the Court described a "generalized grievance" insufficient for standing as an "abstract" as opposed to "concrete" injury. *Id.* at 24–25. In dissent, Justice Scalia argued that this characterization of a "generalized grievance" overlooked the requirement that, for standing, a plaintiff must assert a "particularized" as opposed to "undifferentiated" injury. *Id.* at 35–36 (Scalia, J., dissenting).

To begin, it is well worth endorsing Professor Siegel's point that federal courts perform the important function of enforcing federal law. It would be wrong to view the dispute-resolution role of federal courts as inconsistent with their role in enforcing federal law. Given a federal judicial authority to enforce federal laws, one must confront the question of what, if any, limitations exist on that authority. Each branch of the federal government has limits on its authority to act. The central function of Congress is to make federal laws. But, as Professor Siegel highlights, bicameralism and presentment limit, if not define, the ability of Congress to perform that function (as do the enumeration of powers in Article I and the Bill of Rights). If a function of federal courts is to enforce federal laws, does the Constitution limit, if not define, their ability to perform that function?

The Supreme Court has long recognized constitutional limits on the authority of federal courts to enforce federal laws. A federal court generally may not exercise jurisdiction, including "arising under" jurisdiction, unless Congress properly authorizes it to do so. Moreover, a federal court may not exercise jurisdiction, including "arising under" jurisdiction, unless a case is "justiciable"—this, of course, is the limitation that Professor Siegel's article evaluates.

Professor Siegel recognizes that constraining the power of a federal institution to act can be a legitimate constitutional purpose in itself.[3] He argues, however, that one should not discern such a constraint if it is merely "cosmetic or illusory."[4] In other words, one should not find that the Constitution renders government action difficult if "the difficulty would be so easily overcome as to amount to no difficulty at all."[5] For example, he explains that it would be wrong to claim that the Constitution forbids the President from signing bills on Sunday simply because a no-Sunday-signing practice (1) has a textual recognition, (2) comports with preconstitutional practice, (3) would likely have been expected by the Framers to continue in practice after the Constitution was ratified, (4) indeed did so continue, and (5) would act as a constraint on federal power if not merely a practice but a prohibition. One reason it would be wrong, he explains, is that the President could overcome the limit by signing the bill on Monday. A limitation so purposeless can be no limit at all.

Assume that "no Sunday signings" would be a purposeless constitutional limitation. Are justiciability doctrines of the same ilk? Like the no-Sunday-signing practice, the forms and modes of proceeding that limited the ability of courts to hear cases constituted a practice that existed both pre- and post-ratification and that those knowledgeable in law would have expected to continue. This alone, Professor Siegel argues, is insufficient to demonstrate that a historical practice is a constitutionally

3. *See* Siegel, *supra* note 1, at 83.
4. *Id.* at 85.
5. *Id.* at 84.

limiting practice. There may be, however, one salient historical difference between the forms that limited judicial power and the no-Sunday-signing practice. There is specific evidence that persons knowledgeable in law reasonably understood the limitations on judicial power *to function as constitutional limitations*. At the Federal Convention, when William Samuel Johnson moved to extend federal court jurisdiction to cases arising under the Constitution, James Madison apparently expressed concern:

> Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.[6]

Johnson's motion passed on the understanding that federal court jurisdiction was limited to certain kinds of cases:

> The Motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—[7]

In other words, it was "generally supposed" that federal courts would expound the Constitution only in exercising a uniquely judicial function. In a reflective letter to Thomas Jefferson in 1823, Madison explained that a federal court would ensure the enforcement and supremacy of federal law only in "cases resulting to [a federal court] in the exercise of its functions."[8] These statements express an understanding that the nature of cases within the judicial function limited the ability of federal courts to enforce federal law.

The Marshall Court, in recognizing the importance of federal courts in federal law enforcement, also recognized that the words "case" or "controversy" in Article III imported some "justiciability" limitations on federal courts. In *Cohens v. Virginia*,[9] Marshall explained:

> [Article III] does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article.[10]

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6. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed. 1966).

7. *Id.*

8. Letter from James Madison to Thomas Jefferson (June 27, 1823), *in* 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83–84.

9. 19 U.S. (6 Wheat.) 264 (1821).

10. *Id.* at 405.

In *Osborn v. United States*,[11] Marshall explained that the judicial power "is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."[12]

That said, the forms in which federal courts hear "cases" have evolved dramatically since the Constitution was ratified. The enterprise of generalizing limitations on judicial power from the forms that limited the judicial power in the eighteenth century is fraught with difficulties.[13] The point here is simply that there is evidence that those knowledgeable in law and the Constitution specifically understood at the time of ratification and in subsequent decades that certain forms limited the power of federal courts to enforce federal law. In this, it seems, lies a distinction between justiciability and the no-Sunday-signing law.

Professor Siegel, of course, is concerned less with historical considerations than with functional ones. As a functional matter, he concludes that there is only one plausible purpose of justiciability limits: "to empower Congress to control whether courts should entertain public actions to enforce legal constraints in situations that current law does not view as imposing individualized harms."[14] He ultimately rejects this purpose for two reasons.

First, he claims, congressional power to eliminate justiciability demonstrates that justiciability, like a no-Sunday-signing law, is no effective constitutional limit at all. He explains that Congress can fashion new legal rights, the violation of which confers standing that would not otherwise exist.[15] Moreover, he argues, Congress can provide "universal standing" through qui tam actions.[16] Because Congress may create standing where it would not otherwise exist, Professor Siegel contends, justiciability doctrines are not a real limit on judicial action: "the doctrines really do nothing to the extent that they attempt to resist the power of Congress to authorize judicial review, and so to that extent they should be discarded."[17]

One might draw an alternative conclusion from the congressional control that exists over justiciability: rather than demonstrate that justiciability is an illusory limit on judicial power, congressional rather than judicial control demonstrates the very reality of justiciability as a limit on judicial power. The Executive is no less limited in authority to seek

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11. 22 U.S. (9 Wheat.) 738 (1824).

12. *Id.* at 819.

13. *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 817–32 (2004).

14. Siegel, *supra* note 1, at 127.

15. *Id.* at 105. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court explained that its rejection of standing in that case did not "contradict[] the principle that [t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* at 578 (citations and internal quotation marks omitted).

16. Siegel, *supra* note 1, at 105–06.

17. *Id.* at 107.

indictments for crimes that Congress has not enacted by the fact that Congress has power to enact them than courts are in hearing nonjusticiable cases by the fact that Congress might render them justiciable. Congress might enact an omnibus standing bill using either of the devices that Professor Siegel identifies. It is telling, though, that Congress has not. For Congress to act, it must overcome the procedural and political hurdles that stand as a real obstacle to congressional lawmaking. Congressional action is itself difficult, and absent it, justiciability limits are *real* limits on federal judicial power to act.

Professor Siegel's rejection of congressional control over the justiciability of abstract or undifferentiated injuries does not rest simply on the claim that justiciability limits are no limits at all. He rejects congressional control as a purpose for the additional reason "that it would leave enforcement of the affected constitutional provisions in the hands of the very actors whom those provisions constrain, thereby draining those provisions of any purpose."[18] This claim has implications for congressional control of federal courts more generally. Judges and federal courts scholars have long struggled with the question of what power Congress has to limit federal court jurisdiction, especially where constitutional rights are at stake. Judges and scholars have also struggled with the question of what powers Congress and courts respectively have to provide remedies for the violation of constitutional provisions that do not themselves provide them. To the extent that the Bill of Rights constrains Congress, Professor Siegel's thesis may have implications for both of these sets of important questions.

Professor Siegel's claim that Congress should not control judicial enforcement of constitutional limitations on Congress should spawn further scholarship, especially in light of its broad implications. In debates over the merits of functional versus formal legal analysis, an important but fundamental idea is sometimes lost: behind form typically lies function. It is not lost on Professor Siegel, of course, as he recognizes this very point at the outset of this article. He explains that "some constitutional provisions importantly contribute to good governmental structure by limiting the federal government's power and by making that power difficult to exercise."[19] More specifically, Professor Siegel quotes the Supreme Court as explaining that these limits "preserve freedom by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[20] He rejects any such justification for standing because he does not view standing as a real limit on government authority. If one accepts, however, that it is a real limit, one finds oneself at the center of a fundamental separation-of-powers debate over the respective roles of Congress and the federal courts that has played out for decades.

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18. *Id.* at 128.
19. *Id.* at 81.
20. *Id.* at 82 (quoting INS v. Chadha, 462 U.S. 919, 959 (1983)).

Under a functional analysis, the formal rules of standing strike a balance. If a plaintiff demonstrates a concrete and particularized injury, the plaintiff may pursue a remedy. The functional benefit to recovery is that the plaintiff receives redress for a legal violation. The functional detriments are that (1) the Court might overreach and afford a remedy not required by law, and (2) the Court might require Executive action and expenditure in tension or at odds with competing priorities that might also well serve human needs. (If justiciability is a real limit on judicial power, contrary to Professor Siegel's suggestion, these are identifiable detriments.) Notwithstanding these detriments, the Supreme Court has read the Constitution in such a way as to tip the balance in favor of redress where the plaintiff has suffered a concrete injury. If, however, a plaintiff presents only an abstract (or undifferentiated) injury, the plaintiff may not pursue a remedy. The functional detriment is that the Court cannot rule in favor of a law being enforced. The functional benefits are that (1) the Court, since it cannot rule, will not overreach and require enforcement not warranted by law, and (2) the Court will not order Executive action and expenditure in tension or at odds with competing priorities that might well serve other human needs. The Supreme Court has read the Constitution in such a way as to tip the balance against redress where the plaintiff claims to suffer only in an abstract or undifferentiated way.

In either instance, the benefits of enforcing plaintiffs' claims are palpable and, in some measure, quantifiable; the benefits of nonenforcement are more removed from our senses and less easily quantified. In a functional analysis, the question thus arises of who should strike the benefit–detriment balance between enforcement and nonenforcement: Congress or federal courts? Given the circularity of checks and balances, the tension between (1) the benefits of on-demand legal enforcement and (2) the benefits of limited government is evident in this context.

It should come as no surprise that Professor Siegel's work brings us, in the end, to fundamental questions that have defined the field of federal courts. It is a testament to the functional insights of his article.