

ALL RISE! STANDING IN JUDGE BETTY FLETCHER'S COURT

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Abstract: In this essay, based on a talk given at the Washington Law Review's March 2009 symposium in honor of Senior Ninth Circuit Judge Betty Binns Fletcher and her three decades of service on that court, I selectively survey her opinions on justiciability issues: standing, ripeness, mootness, and political questions. A significant starting point for this survey is Professor Richard Pierce's 1999 law review article, *Is Standing Law or Politics?*, arguing that many Supreme Court votes in standing cases generally, and appellate judges' votes in environmental-standing cases specifically, can be explained better on the basis of politics than by reference to supposedly governing doctrine. Based on the findings reported in Pierce's article, one might expect to find Ninth Circuit judges splitting along predictable ideological lines. In this brief survey, I find that some Ninth Circuit panels on which Judge Fletcher has sat do split along ideological lines, but that most are unanimous in their justiciability rulings even when the panels are ideologically mixed—and one finds variations, such as splits among judges appointed by Democratic Presidents and generally regarded as “liberal.” Another possible tendency would be for judges to find justiciability when they might be expected to be favorably disposed to the substantive claim on the merits, and to avoid reaching the merits of what might be unappealing claims. Similarly, in some cases on which Judge Fletcher has sat, some judges' votes could be viewed as fitting such patterns, but counterexamples abound. This essay, which focuses on the work of one judge and does not systematically compare votes of judges from different parts of the political spectrum, cannot claim to disprove the political view; but that view finds little if any support in Judge Fletcher's cases.

INTRODUCTION

Sometimes you think of a title that may be too cute, or is at least catchy enough that you have to come up with an article to go with it. My title, *All Rise! Standing in Judge Betty Fletcher's Court*, may be nifty but could also be somewhat misleading, because I've tried to look at all the cases heard by Senior Ninth Circuit Judge Betty Binns Fletcher that deal with constitutional and prudential justiciability issues.¹ Thus, the

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1. My search in the Ninth Circuit database on Westlaw was extremely broad—“Fletcher & (justiciab! standing moot! ripe! unripe! “political question”)” with a date restriction to exclude years before she went on the bench. The search produced just over 2,000 hits, most of them minor or irrelevant, as of January 2, 2010. I clicked on all. It's fortunate that I don't seem to be subject to

coverage here of this significant and interesting area includes not only standing but also political questions, ripeness, and mootness.² Nonetheless, the majority of cases deal with standing. I concentrate on decisions in which she has written for the court or separately, while also looking at some in which she has just joined others' opinions. Since Judge Fletcher has been on the Ninth Circuit for three decades, coverage is necessarily selective; I have tried to pick out her most important justiciability cases and to identify patterns about which some generalization may be possible, and also areas in which it does not appear that her decisions fit with what might have been a predicted pattern.

Justiciability is not a field in which one might expect a federal appellate judge to develop in a major way her own distinctive jurisprudence. In contrast to some other areas, such as environmental law,³ the Supreme Court has left few if any broad justiciability questions of first impression unaddressed. Thus to a considerable extent this essay looks not at Judge Fletcher's contributions to the field but rather, through the work of one experienced and distinguished intermediate-court judge, at how the Supreme Court's justiciability doctrines work in application. I have taught these doctrines on a top-down basis in Federal Courts class for decades, and so this essay in part reflects a testing of my own impressions and key points that I have been teaching. It discusses not so much what Judge Fletcher has done, but rather what one

carpal-tunnel syndrome.

One somewhat amusing result of my Westlaw search is a candidate for inclusion in that well-known social-science publication—the *Journal of Insignificant Findings*: Judge Fletcher is fond of the expression “standing alone,” in the sense that some factor by itself is not enough to compel thus-and-such a conclusion. See, e.g., *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008) (B. Fletcher, J.) (“[F]ormation of a contract with a nonresident defendant is not, standing alone, sufficient to create jurisdiction.”), *cert. denied*, 555 U.S. ___, 129 S. Ct. 1318 (2009); *Pierce v. County of Orange*, 526 F.3d 1190, 1209 (9th Cir.) (B. Fletcher, J.) (“[A] detainee’s placement in administrative segregation does not, standing alone, justify a complete denial of opportunities to practice religion.”), *cert. denied*, 555 U.S. ___, 129 S. Ct. 597 (2008). That phrase caused a large number of false hits in my database search.

2. Cases on “statutory standing” are excluded from this essay’s coverage because, despite the label, they really tend to be about whether the plaintiff has stated a claim under the relevant statute. See, e.g., *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009) (B. Fletcher, J.) (“[A] dismissal for lack of statutory standing is properly viewed as a dismissal for failure to state a claim rather than a dismissal for lack of subject matter jurisdiction.”). Criminal or habeas cases involving issues of standing to object to allegedly illegal searches, which are usually fairly routine, and ripeness in takings cases, a specialized area, are also excluded.

3. See Kenneth S. Weiner, *The National Environmental Policy Act (NEPA) Jurisprudence of Ninth Circuit Judge Betty B. Fletcher: A Trustee of the Environment and Woman of Substance*, 85 WASH. L. REV. 45 (2010).

experienced Federal Courts teacher has learned on the subject through surveying her justiciability cases.

Part I develops as a point of departure the well-argued thesis from a significant article on standing (which might apply also to other justiciability doctrines): that case outcomes seem to be more determined by judges' apparent political leanings than by articulated doctrines.⁴ Part II looks at Judge Fletcher's record on review and reports finding no reversals of justiciability opinions she has written, and just one reversal of a justiciability opinion that she has joined. Part III returns to the justiciability-as-politics issue, looking for ideological division in panels on which Judge Fletcher has served. It finds some evidence, but not much, of such division, with some non-ideological splits as well. Part IV takes up another aspect of the same issue, hunting for judicial tendencies to find justiciability in cases involving possibly sympathetic merits claims and the reverse. Again, some cases that could fit such a pattern do appear, but there are many counterexamples.

I. STANDING: LAW OR POLITICS?

While Federal Courts professors teach standard justiciability doctrines, many of us also acknowledge that the area is often regarded as a quite politicized and manipulable corner of the law. The Federal Courts casebook that I co-author⁵ reproduces extracts from a significant 1999 article by Professor Richard Pierce of the George Washington law faculty.⁶ Based on several then-recent Supreme Court cases on standing generally, plus a significant number of court of appeals standing decisions in environmental cases, Professor Pierce reluctantly concluded that doctrine was less useful in predicting votes than a political-science view based on ideology, apparently as indicated by the party of the President who had appointed a justice or circuit judge.⁷ In five Supreme Court cases, a "political scientist with no knowledge of the law of standing would have had no difficulty predicting the outcome of each case and predicting thirty-one of the thirty-three votes cast by Justices with clear ideological preferences"⁸

4. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

5. HOWARD P. FINK ET AL., *FEDERAL COURTS IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS* (3d ed. 2007).

6. Pierce, *supra* note 4, *quoted in* FINK ET AL., *supra* note 5, at 102–04.

7. *See* Pierce, *supra* note 4, at 1744 (referring to "Republican judges" and "Democratic judges").

8. *Id.* at 1754–55.

It is not just that liberals generally favored broad standing while conservatives were for narrower approaches: conservatives favored standing for banks while liberals usually did not, and the votes were reversed when it came to standing for prisoners, employees, and environmentalists.⁹ I had sometimes thought, and suggested to my students, that voting patterns would be considerably less ideological in lower courts, which are supposed to be applying the Supreme Court's teachings. But Pierce reports that in thirty-three appellate environmental-standing cases in the middle 1990s, Republican appointees voted against standing 43.5% of the time and Democratic ones only 11.1%.¹⁰ As Pierce summed up, "I can teach the doctrines . . . only as a vocabulary lesson. The doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts."¹¹

II. JUDGE FLETCHER'S RECORD ON REVIEW

To proceed, then, with findings, both some that relate to Pierce's claims and others that do not: First, as best I could find, no court opinion that Judge Fletcher has written on justiciability has been reversed by either the en banc Ninth Circuit or the Supreme Court, nor has a case in which she dissented on a justiciability issue been upheld on further review (which, of course, often did not take place). The Supreme Court has reversed her, of course, including in cases in which she wrote on justiciability issues—but in those cases, it did so on the merits. A prominent recent example is *Natural Resources Defense Council, Inc. v. Winter*,¹² in which the Ninth Circuit found no mootness bar to environmental organizations' challenge to the Navy's use of sonar in ways that might injure marine mammals¹³ and went on to impose conditions on the sonar use.¹⁴ The Supreme Court reversed those conditions that the Navy challenged, but the majority's opinion dealt with the merits and did not mention mootness issues.¹⁵

9. *Id.* at 1755.

10. *Id.* at 1759–60.

11. *Id.* at 1743.

12. 518 F.3d 658 (9th Cir.) (B. Fletcher, J.), *rev'd on other grounds*, 555 U.S. ___, 129 S. Ct. 365 (2008).

13. *Id.* at 678–79.

14. *Id.* at 687–703.

15. *See Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. ___, 129 S. Ct. 365 (2008).

I have found only one case in which Judge Fletcher joined a prevailing opinion on a justiciability matter that the Supreme Court effectively reversed, and that case presents an interesting twist because the panel *denied* standing and the Supreme Court vacated in light of a contrary decision in another case. She and Judge Ferdinand Fernandez¹⁶ joined Judge Warren Ferguson's opinion in *Dias v. Sky Chefs, Inc.*,¹⁷ finding no standing in an employer's challenge to a former female employee's use at trial of peremptory strikes against men to produce an all-female jury.¹⁸ Some months later the Supreme Court decided *Edmonson v. Leesville Concrete Co.*,¹⁹ upholding a civil litigant's third-party standing to raise excluded jurors' claims of race-based peremptory challenges,²⁰ and then vacated and remanded *Dias* for further consideration in light of *Edmonson*.²¹ For someone who has spent thirty years serving in an often-reversed circuit, this single vacation in a justiciability case seems not a bad record.

III. THE IDEOLOGICAL-DIVISION PATTERN IS MIXED

More significant for present purposes than whether Judge Fletcher has a good batting average would be whether any sort of ideological pattern, of the sort Professor Pierce reported, can be found in her justiciability cases. Two major caveats are in order here. First, one sometimes encounters—especially among students—suspicions of hidden agendas in justiciability votes, with judges reaching to find justiciability when they are sympathetic to a claim on its merits and voting against justiciability when they want to avoid decision, or are unsympathetic, on the merits. Such motive-imputing deserves skepticism because it involves rank speculation (and it seems especially questionable at the Supreme Court level because the Court can avoid decision by denying

16. Judges referred to by name only are Ninth Circuit judges.

17. 919 F.2d 1370, 1380 (9th Cir. 1990), *vacated and remanded*, 501 U.S. 1201 (1991). The unanimous panel can be presumed to be somewhat ideologically diverse, with Judges Ferguson and Fletcher being Carter appointees and Judge Fernandez having been appointed by President George H.W. Bush. United States Court of Appeals for the Ninth Circuit, The Judges of this Court in Order of Seniority, http://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 (last visited Dec. 20, 2009); Federal Judicial Center, Ferguson, Warren John, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Dec. 20, 2009). Information on judges sitting on Ninth Circuit panels by designation comes from Googling them, from other courts' websites, or from Westlaw's Almanac of the Federal Judiciary (AFJ) database.

18. *Dias*, 919 F.3d at 1377–80.

19. 500 U.S. 614 (1991).

20. *Id.* at 629–30.

21. *Sky Chefs, Inc. v. Dias*, 501 U.S. 1201 (1991) (mem.).

certiorari). The second caveat is that this essay does not attempt the sort of comparative and statistical analysis that Professor Pierce offered; it focuses on one judge without trying to compare the work of others. So what I can offer are several prominent examples, which seem to present a mixed picture that defies easy generalization, that relate to patterns one might look for in justiciability decisions.

One question would be whether the cases show any tendency toward ideological division. The answer is multifaceted. Of course, some cases involved what could be viewed as ideological splits. Judge Fletcher recently joined fellow Carter appointee Judge Stephen Reinhardt's opinion in *D'Lil v. Best Western Encino Lodge & Suites*,²² upholding the standing of a disabled person who had filed many previous claims under the Americans with Disabilities Act²³ to pursue a particular claim. In this case, the majority found that the plaintiff had shown enough of a likelihood that she would use the specific facility again.²⁴ Judge Pamela Rymer, appointed by the first President Bush, dissented, faulting the majority for giving too little deference to the district judge's findings and too little weight to the plaintiff's pattern of suing other businesses whose facilities she did not go back and use.²⁵ Similarly, in *Hemp Industry Association v. Drug Enforcement Administration*,²⁶ Judge Fletcher wrote for the majority, with fellow Carter appointee Chief Judge Mary Schroeder joining her opinion, and Reagan appointee Judge Alex Kozinski dissenting. The majority upheld the standing of hemp producers to challenge a Drug Enforcement Agency rule that might subject them to enforcement because their products could include traces of the active ingredient in marijuana.²⁷ The majority found the possibility of enforcement great enough for the case not to be moot,²⁸ and then went on to find the rule procedurally invalid.²⁹ Judge Kozinski dissented on mootness, pointing to a new agency regulation that, if upheld, would negate the effect of the rule.³⁰

Although such ideological splits do arise (these were the only two I found), it is important to note that nearly all of the rulings I examined

22. 538 F.3d 1031 (9th Cir. 2008), *cert. denied*, 557 U.S. ___, 129 S. Ct. 2824 (2009).

23. 42 U.S.C. §§ 12101–12213 (2006).

24. *D'Lil*, 518 F.3d at 1037–40.

25. *Id.* at 1041–43 (Rymer, J., dissenting).

26. 333 F.3d 1082 (9th Cir. 2003).

27. *Id.* at 1085 n.3 (mootness), 1086–87 (standing).

28. *Id.*

29. *Id.* at 1091.

30. *Id.* at 1092 (Kozinski, J., dissenting).

are unanimous for or against justiciability, whether the panel has members appointed by Presidents of different parties or all by Democratic Presidents. Further, there are instances of patterns that do not seem to cut along ideological lines: splits on panels with all Democratic appointees, and even one decision in which Judge Fletcher filed a result-only, no-standing concurrence from what may best be characterized as the conservative side in a civil-rights case.

*West v. Secretary of Transportation*³¹ finds Judge Fletcher writing for the panel majority, joined by fellow Carter appointee Judge Reinhardt, with Clinton appointee Judge Sidney Thomas dissenting from their no-mootness holding. For the majority, completion of the first stage of a highway interchange did not moot a challenge that claimed the Federal Highway Administration improperly exempted the stage from review under the National Environmental Policy Act³² and sought a preliminary injunction against construction.³³ Judge Fletcher's opinion viewed some forms of relief, such as use restrictions, structural changes, and even removal or closure of the interchange, as conceivable and reason enough to save the challenge from being moot.³⁴ Judge Thomas's dissent focused on the relief sought—a preliminary injunction against construction in order to prevent environmental damage—and argued that it was mooted by the construction and use of the interchange.³⁵

The decision in which Judge Fletcher seemed to be concurring from the right in a civil-rights case is *Nava v. City of Dublin*,³⁶ a son's suit for his father's death from a police carotid hold.³⁷ Carter appointee Judge Otto Skopil followed Ninth Circuit precedent, with apparent reluctance, to find that the son had standing to seek a permanent injunction restricting use of the hold, and was joined by District Judge John Rhoades of Arizona, a Reagan appointee sitting by designation.³⁸ The majority went on to reverse the issuance of the injunction on the merits.³⁹ Judge Fletcher specially concurred in the result only, writing that she could not reconcile the Ninth Circuit's precedents with the

31. 206 F.3d 920 (9th Cir. 2000).

32. 42 U.S.C. §§ 4321–4347 (2006).

33. *West*, 206 F.3d at 924–26.

34. *Id.*

35. *Id.* at 931–32 (Thomas, J., dissenting).

36. 121 F.3d 453 (9th Cir. 1997).

37. *Id.* at 454.

38. *Id.* at 455–58.

39. *Id.* at 458.

Supreme Court's notorious decision in *City of Los Angeles v. Lyons*,⁴⁰ which denied standing to a chokehold survivor to seek injunctive relief against the practice because of the unlikelihood of his being subjected to it again.⁴¹ She thus agreed that the injunction should be vacated, although for lack of standing rather than on the merits, and called unsuccessfully for en banc review of the post-*Lyons* precedents the majority had followed.⁴² The signs of ideological division left by these significant example cases seem decidedly mixed.

IV. JUDGE FLETCHER'S RECORD ON REACHING "CONGENIAL" SUBSTANTIVE CLAIMS IS ALSO MIXED

Aside from the possibility of an ideological split, another metric one could infer from Pierce's arguments is whether judges tend to find justiciability when they might be expected to be sympathetic to a claim on its merits, and the converse.⁴³ Judge Fletcher, described in a recent newspaper article as "the Ninth Circuit's Lion of Liberalism,"⁴⁴ might, if that label is at least somewhat accurate, be predicted to find justiciability for and uphold civil-rights and environmental claims, for example, and avoid claims such as challenges to affirmative-action programs. If there is any regularity in her decisions and votes in this respect, I have not found it. For every significant example of such tendencies—and there are some—other decisions do not seem to support the hypothesis.

In two affirmative-action cases the challengers lost both times—once on standing, and once on the merits. In *Scott v. Pasadena Unified School District*,⁴⁵ she wrote for a unanimous panel of all-Democratic appointees in finding no standing or ripeness in a challenge by parents to the district's lottery plan for admission to voluntary "magnet" schools.⁴⁶ The plaintiffs pointed to a racial factor in the plan as the basis for their equal-protection claim, but the court found the factor insufficient to find justiciability because it had not been invoked in the actual case and might not be used in the future.⁴⁷ But in *Associated General Contractors*

40. 461 U.S. 95 (1983).

41. *Id.* at 105–06.

42. *Nava*, 121 F.3d at 460 (B. Fletcher, J., specially concurring).

43. Actually, such an articulation seems too crude: a judge so operating, whether consciously or subconsciously, might also be expected to lean toward finding justiciability if he were sympathetic to a defense that he would like to see recognized as valid.

44. SEATTLE WEEKLY, Aug. 19–25, 2009, front cover.

45. 306 F.3d 646 (9th Cir. 2002).

46. *Id.* at 648–49, 663–64.

47. *Id.* at 653–61.

of *California, Inc. v. Coalition for Economic Equity*,⁴⁸ she wrote the majority opinion finding associational standing in a challenge to a municipal minority-business-enterprise ordinance,⁴⁹ and upholding the denial of a preliminary injunction for lack of a showing of likely success on the merits.⁵⁰ Reagan appointee Judge David Thompson joined her opinion, and Reagan appointee Judge Diarmuid O'Scannlain concurred specially on the merits without addressing the standing issue.⁵¹

If "conservative" affirmative-action challengers lost in these two examples, Judge Fletcher has not been a consistent vote for often "liberal" environmentalists in cases involving standing issues. In one significant case, she joined an opinion by Clinton appointee Judge Ronald Gould finding no standing for an environmental group in a challenge to Environmental Protection Agency action on water projects.⁵² By contrast, in a case involving a claim that EPA action was too rigorous rather than too lax, she joined Nixon appointee Judge Alfred Goodwin's opinion upholding standing for a water-conservation district and irrigation districts on their claims against an emission restriction;⁵³ the unanimous panel then upheld the restriction on the merits.⁵⁴

I could give many more examples of the diverse pattern, or lack thereof, that I see, but will limit myself to just a few. *Wasson v. Sonoma County Junior College*⁵⁵ involved a teacher's challenge to her threatened discharge, based on anonymous speech she denied authoring but was found to have written.⁵⁶ The majority opinion, written by Carter appointee Judge Mary Schroeder and joined by Reagan appointee Judge Cynthia Holcomb Hall, viewed the case as involving third-party standing and held that the plaintiff lacked standing to defend the First Amendment rights of the anonymous author.⁵⁷ Judge Fletcher dissented, characterizing the right claimed as the teacher's "right not to be

48. 950 F.2d 1401 (9th Cir. 1991).

49. *Id.* at 1405–09.

50. *Id.* at 1418.

51. *Id.* at 1418–19 (O'Scannlain, J., specially concurring).

52. *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1105 (9th Cir. 2007). The third member of the unanimous panel was George H.W. Bush appointee Judge Andrew Kleinfeld.

53. *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1533 (9th Cir. 1991). The third panel member was Third Circuit Judge Ruggero Aldisert, a Johnson appointee sitting by designation.

54. *Id.*

55. 202 F.3d 659 (9th Cir. 2000).

56. *Id.* at 661.

57. *Id.* at 663.

retaliated against for speech she either made anonymously or did not make at all” and regarding that as sufficient to support standing.⁵⁸ She went on to express views favorable to the plaintiff’s claim, based on Supreme Court anonymous-speech precedents.⁵⁹ Here, then, is a case involving a favorable view on standing coupled with apparent sympathy with the claim on the merits. Similarly, her opinion for an ideologically diverse and (rare) unanimous en banc court in *American Jewish Congress v. City of Beverly Hills*⁶⁰ upheld both standing⁶¹ and an Establishment Clause challenge to a menorah erected by a private group in a city park.⁶²

But there are also cases involving claims by liberals in which Judge Fletcher found no standing. A leading example is *Dellums v. United States*,⁶³ in which she wrote for a unanimous panel of Democratic appointees.⁶⁴ The district court had found standing and ruled on the merits for citizens seeking to compel the Attorney General to investigate whether President Reagan and other federal officials had violated the Neutrality Act⁶⁵ by their actions with respect to the Sandinista government in Nicaragua.⁶⁶ Judge Fletcher’s opinion reversed on standing grounds.⁶⁷ Another case, *Pacific Legal Foundation v. State Energy Resources & Conservation & Development Corp.*,⁶⁸ presents, for those who might be inclined to find pure politics in standing rulings, a backwards picture. Judge Fletcher⁶⁹ found standing for utility companies but not for an employee who claimed to have lost his job as a result of a challenged state regulation imposing a moratorium on the building of new nuclear-power plants.⁷⁰ She went on to find no preemption of the

58. *Id.* at 664 (B. Fletcher, J., dissenting).

59. *Id.*

60. 90 F.3d 379 (9th Cir. 1996) (en banc).

61. *Id.* at 381–82.

62. *Id.* at 386.

63. 797 F.2d 817 (9th Cir. 1986).

64. Joining her opinion were Judge William Canby, a Carter appointee, and Seventh Circuit Judge Thomas Fairchild, a Johnson appointee sitting by designation.

65. See 18 U.S.C. § 960 (2006).

66. *Dellums*, 797 F.2d at 819.

67. *Id.* at 821–23.

68. 659 F.2d 903 (9th Cir. 1981), *aff’d*, 461 U.S. 190 (1983).

69. Ford appointee District Judge James Fitzgerald of Alaska, sitting by designation, joined Judge Fletcher’s opinion. Carter appointee Judge Warren Ferguson agreed with the majority on its standing rulings, *id.* at 928, while concurring separately on the merits, *id.* at 928–31.

70. *Id.* at 914–15.

state regulation by federal law.⁷¹ The finding of standing for the direct target of regulation, but not for those more incidentally and indirectly affected by the regulation, is consistent with what the Supreme Court has since said about standing.⁷²

Further on the subject of reaching or not reaching the merits, two political-question decisions provide a nice final contrast. A finding of political-question nonjusticiability, in contrast to many no-standing rulings, means that no one can bring a challenge to a disputed government action; the subject is off limits for the courts. Standing denials, by contrast, often leave it possible for some other challenger to bring suit against the government position in question: the issue is not whether there can be any challenger, but who that challenger may be.⁷³ Probably Judge Fletcher's most significant political-question opinion is the one she wrote for a unanimous, ideologically diverse panel when sitting by designation in the Eleventh Circuit. *Made in the USA Foundation v. United States*⁷⁴ involved a challenge by unions and a nonprofit group to the constitutionality of the mode of enactment of the North American Free Trade Agreement (NAFTA),⁷⁵ which had not gone through the treaty-ratification process with its requirement of a two-thirds vote in the Senate but had been adopted instead by majority vote in both Houses of Congress.⁷⁶ The district court found standing and no political-question barrier and upheld NAFTA's adoption on the merits.⁷⁷ Judge Fletcher's opinion agreed that the plaintiffs had standing⁷⁸ but found several reasons for political-question nonjusticiability: a strong

71. *Id.* at 919–28.

72. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992) (Scalia, J.):

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed.

Id.

73. Some rulings against standing, however, do have the effect of eliminating all possible challengers and leaving the matter to the political process. "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

74. 242 F.3d 1300 (11th Cir. 2001). The other panel members were Ford appointee Judge Gerald Tjoflat and Clinton appointee Judge Charles Wilson.

75. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 107 Stat. 2057.

76. *Made in the USA Found.*, 242 F.3d at 1303 & n.4.

77. *Id.* at 1302.

78. *Id.*

textual commitment to the political branches of the conduct of foreign affairs, judicial unsuitability for making the kind of political judgments that would be involved, and strong prudential reasons for judicial non-involvement.⁷⁹ One can imagine the judges' relief at not having to decide whether NAFTA had been constitutionally adopted, but the case does seem like a strong one for application of the political-question doctrine.

Judge Fletcher's other significant political-question decision went the other way on a challenge to revenue legislation under the Constitution's clause requiring that bills to raise revenue must originate in the House of Representatives.⁸⁰ In *Armstrong v. United States*,⁸¹ she wrote for herself and fellow Carter appointee Judge Stephen Reinhardt⁸² that a taxpayer seeking a refund of an excise tax imposed by the Tax Equity and Fiscal Responsibility Act of 1982⁸³ was not barred on political-question grounds from doing so,⁸⁴ but that the Senate's complete replacement of all but the enacting clause of the House bill did not violate the origination clause.⁸⁵ Five years later the Supreme Court, in a decision unanimous as to outcome, upheld her position on the justiciability of origination-clause claims.⁸⁶

CONCLUSION

The very mixed picture on justiciability decisions that emerges from this survey cannot by itself be taken as disproving Professor Pierce's findings about relative political predictability of judges' leanings on such issues.⁸⁷ Again, it would take comparative work of the sort not done here to test his findings in a different group of cases. But to the extent that someone might be tempted to make fairly crude political predictions about Judge Fletcher's likely positions in justiciability cases, one would be justified in asking, "How many counterexamples do you want?"

79. *Id.* at 1311–20.

80. "All Bills for raising Revenue shall originate in the House of Representatives . . ." U.S. CONST. art. I, § 7, cl.1.

81. 759 F.2d 1378 (9th Cir. 1985).

82. The third judge died after argument. *Id.* at 1379.

83. Pub. L. No. 97-248, 96 Stat. 324 (1982) (codified as amended in scattered sections of 26 U.S.C.).

84. *Armstrong*, 759 F.2d at 1380.

85. *Id.* at 1380–82.

86. *See United States v. Munoz-Flores*, 495 U.S. 385, 387 (1990).

87. *See supra* text accompanying notes 5–11.

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I have saved for last a development with special Fletcher family overtones. Earlier this essay described *Nava v. City of Dublin*, in which Judge Fletcher concurred specially on the ground that she could not reconcile a Supreme Court case limiting standing with Ninth Circuit precedent that had interpreted that case as allowing standing in limited circumstances.⁸⁸ Her call for en banc consideration went unheeded at the time, but within three years the court took an en banc case raising the same issue.⁸⁹ In the meantime, Judge Fletcher had assumed senior status (although she remains fully active over ten years later); and her son Willy Fletcher, nominated by President Clinton, had taken a seat on the court in late 1998. Not only did the court vindicate her position and overrule *Nava* and its predecessors,⁹⁰ but it did so in a virtually unanimous opinion⁹¹ for an ideologically diverse eleven-judge panel—with a reference to her *Nava* concurrence⁹² and with Judge Willy Fletcher, author of the lead article in this symposium,⁹³ writing his maiden en banc opinion for the court.⁹⁴

88. 121 F.3d 453 (9th Cir. 1997). *See supra* text accompanying notes 36–42.

89. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc).

90. *Id.* at 1040 n.1.

91. *See id.* at 1045 (Reinhardt, J., specially concurring) (“I . . . concur in the court’s opinion. I write separately, however, in order to disassociate myself from some of the opinion’s dicta . . .”).

92. *Id.* at 1040 n.1.

93. William A. Fletcher, *Tribute to Judge Betty Binns Fletcher*, 85 WASH. L. REV. 1 (2010).

94. *See Hodgers-Durgin*, 199 F.3d at 1038.

