1992

Deconstitutionalizing Justiciability: The Example of Mootness

Evan Tsen Lee

UC Hastings College of the Law, lee@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Part of the [Constitutional Law Commons](#)

Recommended Citation

Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 *Harv. L. Rev.* 603 (1992).

Available at: http://repository.uchastings.edu/faculty_scholarship/347

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.

Faculty Publications

UC Hastings College of the Law Library

Author: Evan Tsen Lee

Source: Harvard Law Review

Citation: 105 Harv. L. Rev. 603 (1992).

Title: *Deconstitutionalizing Justiciability: The Example of Mootness*

Originally published in HARVARD LAW REVIEW. This article is reprinted with permission from HARVARD LAW REVIEW and Harvard Law School .

HARVARD LAW REVIEW

DECONSTITUTIONALIZING JUSTICIABILITY: THE EXAMPLE OF MOOTNESS

Evan Tsen Lee

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	605
II. ARTICLE III AND MOOTNESS DOCTRINE: DOCTRINAL RUDIMENTS	610
III. THE AFFIRMATIVE CASE FOR DECONSTITUTIONALIZING MOOTNESS	612
A. <i>The Presumption in Favor of Congressional Control of Federal Jurisdiction</i> ...	612
B. <i>Methods of Restricting Jurisdiction: Maintaining Legislative-Judicial</i> <i>Colloquy</i>	615
1. <i>Restriction by Prudential Measures</i>	616
2. <i>Restriction by Explicit Statute</i>	617
3. <i>Restrictive Interpretation of Jurisdictional Grant</i>	618
C. <i>Previous Incursions into the Constitutional Core of Mootness Jurisprudence</i> ..	623
1. <i>The Elusive Concept of "Personal Stake"</i>	623
2. <i>Two Models of Adjudication</i>	625
(a) <i>The "Dispute Resolution" Model</i>	626
(b) <i>The "Public Values" Model</i>	627
3. <i>Square Pegs and Round Holes</i>	628
4. <i>Squaring the Circle: A Normative Justification for the Public</i> <i>Values Model</i>	631
IV. REBUTTING THE CASE AGAINST REMOVING ARTICLE III FROM MOOTNESS JURISPRUDENCE	636
A. <i>Interpretation of "Cases" and "Controversies"</i>	636
1. <i>History and Tradition</i>	637
2. <i>Structure of Article III</i>	641
B. <i>The Prohibition Against Advisory Opinions</i>	643
1. <i>Post-Judgment Review by Another Branch</i>	645
2. <i>Pre-Enactment Review</i>	647
3. <i>Adequate and Independent State Grounds</i>	647
4. <i>Dicta</i>	648
5. <i>Mootness, Ripeness, and Standing</i>	649
C. <i>The Due Process Defense of the Justiciability Doctrines</i>	651

V. MOOTNESS AS A PURELY PRUDENTIAL DOCTRINE	654
A. <i>General Considerations</i>	656
B. <i>Examples</i>	657
1. <i>The ROTC Requirement Case</i>	657
2. <i>The Anti-Abortion Protesters Case</i>	660
3. <i>The Firefighters Hiring Case</i>	663
VI. CONCLUSION	668

ARTICLE

DECONSTITUTIONALIZING JUSTICIABILITY:
THE EXAMPLE OF MOOTNESS*Evan Tsen Lee**

Federal courts often invoke the justiciability doctrines — standing, ripeness, and mootness — to bring potentially important public litigation to frustratingly anticlimactic conclusions. According to orthodox understandings, the doctrines, rooted in Article III of the Constitution, disempower federal courts from deciding certain kinds of cases. In this Article, Professor Lee proposes that mootness doctrine be freed from its constitutional moorings. He argues that our constitutional scheme creates a presumption in favor of preserving a degree of legislative control over federal court jurisdiction and that the justiciability doctrines must be deconstitutionalized for Congress to have such control. Limiting his discussion to mootness, Professor Lee argues that the Court should transform mootness from a constitutional doctrine into a prudential doctrine that would enable federal courts to decide technically moot cases whenever a decision on the merits would help give true and concrete meaning to important “public values.” Professor Lee then rebuts objections to his proposal: he argues that the historical evidence on the original meaning of “cases” and “controversies” does not adequately justify the view that those terms exclude moot cases; on the contrary, the structure of Article III points to a meaning of “cases” and “controversies” unrelated to justiciability. He contends further that neither the constitutional prohibition on rendering advisory opinions nor concerns about faithfulness to the adversary process undermine the argument for deconstitutionalization. Finally, Professor Lee explores how a prudential approach to mootness might have been applied in three recent cases that were dismissed by federal courts on mootness grounds.

I. INTRODUCTION

ONE of the major impediments to the judicial protection of collective rights¹ is the group of doctrines falling under the rubric

* Associate Professor, University of California, Hastings College of the Law. I benefited from comments by Larry Alexander, Akhil Amar, Lea Brilmayer, Willy Fletcher, Mary Kay Kane, John Makin, Henry Monaghan, Keith Wingate, and Chris Wonnell. Rick Costello provided excellent research assistance. I gratefully acknowledge receipt of the Roger Traynor Scholarly Publication Award in conjunction with this work, which is dedicated to the memory of my mother, Juana Tankhoan Lee.

¹ By collective rights, I mean rights that we normally think of as belonging more to identifiable groups than to individuals. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (recognizing the Establishment Clause right of taxpayers to challenge federal funding of instruction in religious schools); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (establishing the Fourteenth Amendment right of public school children to attend nonsegregated schools). My proposal for

of "justiciability" — standing, ripeness, and mootness.² These are the gatekeeper doctrines; each regulates a different dimension of entrance to the federal courts. The law of standing considers whether the plaintiff is the proper person to assert the claim, the law of ripeness ensures that the plaintiff has not asserted the claim too early,³ and the law of mootness seeks to prevent the plaintiff from asserting the claim too late.⁴ By keeping certain public-minded plaintiffs and public-law claims out of federal court, these doctrines have shifted much of the battle for collective rights to the more steeply pitched fields of state courts or the political process.⁵ In particular, defendants in public law litigation have had considerable success keeping such cases out of the federal courts by invoking the "case or controversy" re-

a new mootness doctrine would apply to the vindication of individual rights as well as collective rights. However, I emphasize collective rights because deconstitutionalization would have a more profound effect in public interest litigation than in any other area.

² I omit consideration of a fourth justiciability doctrine — the political question doctrine — because it raises different concerns. Cf. Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 644 (1985) ("At the jurisdictional stage, separation of powers interests have long been considered the bailiwick of the political question doctrine."). To borrow Professor Henry Monaghan's shorthand expressions for the justiciability doctrines, standing, mootness, and ripeness concern themselves with the "who" and "when" of adjudication in federal court, see Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973); the political question doctrine concerns itself with "what" is being adjudicated, see, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (plurality opinion) (holding that a challenge to presidential termination of a defense treaty was a nonjusticiable political question).

³ See DAVID P. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 61 (4th ed. 1990) (explaining that standing is concerned with "*who* is a proper party to litigate" and that ripeness is concerned with "*when* a proper party may litigate" (emphasis in original)).

⁴ See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.4.1, at 98-99 (1989).

⁵ Historically, the broad perception among practitioners has been that state courts are less favorable forums than federal courts for the adjudication of public-law claims. This perception is so lasting that a veritable cottage industry of scholars has emerged to challenge or defend it. Compare, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106 (1977) (arguing that federal courts are superior in adjudicating federal rights) and Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333-38 (1988) (arguing that life tenure and salary protections for federal judges make them more independent and therefore preferable for constitutional adjudication) with Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 637 (1981) (arguing that federal and state courts are essentially identical in their competence and enthusiasm for enforcement of constitutional rights) and Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214-15 (1983) (asserting that state courts are as likely as federal courts to vindicate constitutional rights). As more conservative appointments are made to the federal bench, federal courts may lose some of their perceived superiority in adjudicating public law claims. See Neuborne, *supra*, at 1121 n.59, 1125 n.74 (noting that a contraction of constitutional rights at the Supreme Court level would be reflected at the district court level). However, the federal courts will never lose their institutional advantages — life tenure and salary protection for judges. See Redish, *supra*, at 333-38.

quirement of Article III.⁶ Under current Supreme Court precedent, if a plaintiff cannot demonstrate that she possesses an ongoing "personal stake" in the outcome of the litigation, a federal court has no jurisdiction to adjudicate the claim on the merits.⁷ No amount of judicial discretion can overcome this jurisdictional defect, because Article III demarcates the outer limit of federal court power.⁸ As a result, many attempts to establish entitlements to important collective rights fail before courts can give them full consideration.

Of the three doctrines, standing has received the most scholarly attention,⁹ perhaps because the case law on standing is so internally inconsistent.¹⁰ But the mootness doctrine also constitutes a substantial barrier to the adjudication of collective rights claims. Consider the following examples:

* A student at a public high school challenges the school's requirement of ROTC instruction on the grounds that it violates his First Amendment rights. While the action is pending, he graduates. The action is dismissed.¹¹

* A women's hospital (including staff members and a patient) challenges a prosecutor's stated policy of refusing to prosecute anti-abortion protesters who violate various criminal trespass statutes. The plaintiffs argue that the non-prosecution policy violates the Equal Protection Clause. On appeal, the district attorney represents that he has discontinued the policy. The action is dismissed.¹²

* A major metropolitan fire department draws up a hiring list based on an examination that has a disparate adverse impact on blacks and Chicanos. A group of applicants files a class action raising the previously undecided question whether 42 U.S.C. § 1981 prohibits the

⁶ See *Allen v. Wright*, 468 U.S. 737, 751 (1984) ("The requirement of standing . . . has a core component derived directly from the Constitution."); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978) (holding that the constitutional component of the ripeness requirement was satisfied); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (asserting that the "inability of federal [courts] 'to [adjudicate] moot cases derives from the requirement of Art. III'" (quoting *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964))).

⁷ See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 752-55 (1976).

⁸ My colleague Calvin Massey has recently likened Article III to a "hard outer shell" beyond which federal court jurisdiction may not be extended. Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 B.Y.U. L. REV. 811, 820.

⁹ See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 n.4 (1988) (listing law review articles critical of standing doctrine).

¹⁰ Compare, e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683-90 (1973) (upholding law students' standing to challenge a railroad surcharge that might increase consumption of natural resources and ultimately spoil their recreational areas) with *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (finding that a club had no standing to challenge the development of a ski resort in a national forest).

¹¹ See *Sapp v. Renfro*, 511 F.2d 172, 174-75 (5th Cir. 1975).

¹² See *Northern Va. Women's Medical Ctr. v. Balch*, 617 F.2d 1045, 1049 (4th Cir. 1980).

use of employment criteria that create an adverse impact on racial minorities when no discriminatory intent can be proven. While the case is pending, the department abandons its plan to use the hiring list. The action is dismissed.¹³

Each of these cases presented the courts with an opportunity, as Professor Owen Fiss would say, "to give concrete meaning and application to our constitutional values."¹⁴ Decisions on the merits of these cases would have given people a far clearer idea of what they could do without fear of state-sanctioned punishment, and what others could do that they would constitutionally be forced to tolerate. By clarifying critically important areas of the law, decisions on the merits of these cases would have served the public interest.

The barrier to federal court adjudication of these claims is the Article III "case or controversy" requirement and the normative concerns thought to underlie it. The Supreme Court has adhered to an interpretation of Article III that forbids federal adjudication of cases in which the plaintiff has no ongoing personal stake. Contributing to the Court's interpretation has been the concern that the adjudication of such cases would require federal courts to render advisory opinions.¹⁵ Another factor may be the belief that the constitutionalization of the justiciability doctrines provides a form of "due process" protection for the interests of future litigants who find themselves in situations similar to that of the plaintiff in a mooted case.¹⁶

This Article presents two basic arguments. After Part II briefly describes the origins of the mootness doctrine, Part III.A argues that imparting constitutional status on the justiciability doctrines is inconsistent with the venerable principle that the federal courts should reserve for Congress a significant role in overseeing the contours of their jurisdiction and that operation of the justiciability doctrines therefore should be purely prudential.¹⁷ Part III.B argues that none

¹³ See *County of Los Angeles v. Davis*, 440 U.S. 625, 627-30 (1979).

¹⁴ Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979).

¹⁵ See *infra* Part IV.B.

¹⁶ See *infra* Part IV.C.

¹⁷ The argument that Congress should have primary control over federal jurisdiction has previously been made in several other doctrinal contexts. See Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038-41 (1981) (contending that Congress has nearly plenary power to strip the lower courts of subject matter jurisdiction); Donald L. Doernberg, "You Can Lead a Horse to Water . . .": *The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 999, 1020 (1989) (arguing that the Supreme Court has wrongly limited the reach of the general federal question statute); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114-15 (1984) (criticizing abstention doctrines as usurpation of the congressional prerogative to define federal jurisdiction); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965)

of the traditional concerns relating to Article III — the text, history, and structure of the provision,¹⁸ the concern about advisory opinions,¹⁹ and the “due process” rationale²⁰ — sufficiently rebuts the argument for deconstitutionalizing justiciability.

This Article’s conclusion is limited to the proposition that the mootness doctrine should operate on a prudential basis. The reasons for this narrow scope are simple. First, the Supreme Court has come closer in mootness cases than in standing or ripeness cases to reexamining the supposed constitutional underpinnings of justiciability.²¹ The Court has also hinted that it might be willing to make incursions into the orthodox view that Article III lies at the core of justiciability.²² More recently, Chief Justice Rehnquist openly questioned whether the nexus between Article III and mootness is logical.²³ Al-

(arguing that Congress has plenary power to strip the Supreme Court of appellate jurisdiction). The congressional control argument has also been discussed in the justiciability context, albeit in somewhat piecemeal fashion. See David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 62–63 (arguing that the congressional control principle counsels recognition of standing to assert federal statutory causes of action); Monaghan, *supra* note 2, at 1376–79 (contending that federal courts should secure congressional authorization before entertaining “public actions”). For my response to Monaghan’s argument, see note 59 below.

¹⁸ Although this essay is the first systematic attempt to show why the justiciability doctrines should not be seen as compelled by the “cases” and “controversies” language of Article III, see *infra* Part IV.A, others have foreshadowed the argument. See Fiss, *supra* note 14, at 36 (characterizing the use of the terms “cases” and “controversies” as “rather incidental”); Monaghan, *supra* note 2, at 1364 (“Article III’s ‘limitation’ of the ‘judicial power’ to ‘cases and controversies’ has little necessary meaning; like most provisions of the Constitution, those words bear several interpretations.”).

¹⁹ My argument that the advisory opinion doctrine should be viewed as having an Article III core with a large prudential curtilage, see *infra* Part IV.B, has not previously appeared in the literature. However, the best comprehensive treatment of the subject, see 13 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3529.1, at 293–308 (2d ed. 1984), might be read as suggesting a similar approach.

²⁰ I am not the first to differ with the due process rationale. See MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 101–02 (1991); Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1699 (1980).

²¹ See *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 406 n.11 (1980). *Geraghty* presented the issue whether a plaintiff whose claim had become moot nonetheless could appeal the denial of class certification. The Court openly admitted that “the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions” motivated by “practicalities and prudential considerations.” *Id.*

²² For example, in *Geraghty*, the Court said:

The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction “upon the bare existence of a sharply presented issue in a concrete and vigorously argued case.” Each case must be decided on its own facts.

Id. (quoting *id.* at 421 (Powell, J., dissenting)).

²³ See *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring); see also Gene R. Nichol, Jr., *Moot Cases, Chief Justice Rehnquist, and the Supreme Court*, 22 CONN. L. REV. 703, 705–06 (1990) (commenting on Chief Justice Rehnquist’s opinion).

though he did not call for the outright deconstitutionalization of the mootness doctrine, his excursus provoked a sharp rebuttal from an alarmed Justice Scalia.²⁴

The second reason for limiting the argument to the mootness doctrine is that anyone who makes a proposal with potentially far-reaching effects should demonstrate why the new approach would be normatively attractive in disparate factual contexts. Thus, Part VI applies the deconstitutionalized version of mootness doctrine to the concrete factual settings described above. But it would be impossible in a single article to examine a sufficient number of factual permutations involving standing and ripeness without unduly dilating the focus of the argument. This is not at all to say that the arguments for deconstitutionalizing mootness fail to reach the rationales that underlie standing and ripeness; on the contrary, they probably would have similar force in those contexts. It is simply preferable to use mootness doctrine as a laboratory for the present moment and save the application of lessons learned to analogous doctrines for the later stages of a continuing project.²⁵

II. ARTICLE III AND MOOTNESS: DOCTRINAL RUDIMENTS

The Supreme Court has remarked that mootness can be thought of as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."²⁶ Thus, because "[a]n actual controversy must exist at all stages of federal court proceedings, both at the trial and appellate levels,"²⁷ "a case is moot when the issues presented are no longer 'live.'"²⁸

The doctrine has both constitutional and prudential components.²⁹ As with standing, unless each case can surmount a certain Article III

²⁴ See *Honig*, 484 U.S. at 339-42 (Scalia, J., dissenting).

²⁵ Others have previously argued for the deconstitutionalization of standing and ripeness, but on quite different grounds. See Fletcher, *supra* note 9, at 223 ("[S]tanding should simply be a question on the merits of plaintiff's claim."); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 180-83 (1987) (asserting that the rigidity of Article III jurisprudence cannot be reconciled with the flexibility needed in ripeness analysis).

²⁶ *Geraghty*, 445 U.S. at 397 (quoting Monaghan, *supra* note 2, at 1384).

²⁷ CHEMERINSKY, *supra* note 4, § 2.5.1, at 109; see also *Honig*, 484 U.S. at 317 ("That the dispute . . . was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires.").

²⁸ *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

²⁹ See *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 465 (S.D. Fla. 1980), *modified sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982); 13A WRIGHT, MILLER & COOPER, *supra* note 19, § 3533.1, at 225-26.

threshold, it must be dismissed for want of jurisdiction.³⁰ It is not clear exactly what qualities a case must possess to avoid Article III mootness; the cases are not free of contradictions.³¹ In general terms, the plaintiff must maintain a certain "live" personal stake in the outcome. The Court has held that neither demonstratedly vigorous advocacy by the parties³² nor "great public interest in the continuing issues raised"³³ is sufficient to save a case from Article III mootness.

The marriage of Article III to the mootness doctrine was remarkably casual.³⁴ The Supreme Court's first mention of Article III in connection with mootness came in a 1964 case found not to be moot at all. In *Liner v. Jafco, Inc.*,³⁵ a general contractor had employed non-union construction workers to build a shopping center in Cleveland, Tennessee.³⁶ The Chattanooga Building Trades Council sent a lone picketer out to the construction site.³⁷ When the employees stopped working, the general contractor obtained an ex parte injunction in state court against continued picketing.³⁸ In refusing to dissolve the injunction, the state court held that the contractor's claim was not preempted by federal law because there was no bona fide labor dispute between the union and the contractor.³⁹ While the case was on appeal, construction at the Cleveland site was completed.⁴⁰

The Supreme Court rejected the contractor's suggestion that the completion of construction had made the case moot.⁴¹ Although the lawfulness of the picketing at the Cleveland site was no longer a live issue, the contractor had posted bond upon issuance of the injunction to protect the union in case the relief had been wrongfully granted.⁴² Consequently, a decision on the merits was necessary to determine whether the union was entitled to the bond proceeds. Thus, the Court concluded, "[t]his is not a case where this Court's decision on the merits . . . 'cannot affect the rights of the litigants in the case before it.'"⁴³

³⁰ See *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (holding that federal courts are "without power to decide questions that cannot affect the rights of litigants" at bar).

³¹ See *infra* pp. 623-25.

³² See *Kremens v. Bartley*, 431 U.S. 119, 134 n.15 (1977); *Richardson v. Ramirez*, 418 U.S. 24, 35-36 (1974).

³³ *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (quoting *DeFunis v. Odegaard*, 507 P.2d 1169, 1177 n.6 (Wash. 1973)).

³⁴ The nuptial metaphor is Gene Nichol's. See Nichol, *supra* note 25, at 156 (maintaining that the "marriage of ripeness and article III is flawed").

³⁵ 375 U.S. 301 (1964).

³⁶ See *id.* at 302.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *Jafco, Inc. v. Liner*, 49 L.R.R.M. (BNA) 2585, 2586 (1962).

⁴⁰ See *Liner*, 375 U.S. at 303.

⁴¹ See *id.* at 304.

⁴² See *id.* at 305.

⁴³ *Id.* at 306 (quoting *St. Pierre v. United States*, 319 U.S. 41, 42 (1943)).

In holding that it could review the state court judgment on the merits, the Court dropped a footnote stating, "our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."⁴⁴ Why the Court ventured an opinion about the roots of the mootness doctrine is not apparent. Perhaps the Court thought that noting the jurisdictional nature of mootness would explain why it was necessary to undertake such careful consideration of a seemingly clear issue. Yet the footnote did more than simply tie mootness to jurisdiction — the Court had done this some seventy years earlier.⁴⁵ Instead, it specifically linked the mootness prohibition to the "cases" and "controversies" language of Article III. As support for the Article III linkage, the Court cited two law review articles.⁴⁶ One of these articles was quite equivocal about the Article III linkage,⁴⁷ and the other was content to rely entirely on the proposition that a moot case is "neither a case nor a controversy in the constitutional sense"⁴⁸ — a claim that is far from self-evident. Despite its dubious quality as a piece of legal scholarship, the *Liner v. Jafco* footnote was broadly accepted in subsequent Supreme Court opinions.⁴⁹

III. THE AFFIRMATIVE CASE FOR DECONSTITUTIONALIZING MOOTNESS

A. *The Presumption in Favor of Congressional Control of Federal Jurisdiction*

One of the canons of federal courts law is the principle that Congress enjoys substantial control over the scope of federal court

⁴⁴ *Id.* at 306 n.3.

⁴⁵ See *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893) ("[T]he Court is not empowered to decide moot questions.").

⁴⁶ See *Liner*, 375 U.S. at 306 n.3 (citing Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1946); and Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955)).

⁴⁷ The Note stated:

Under the Federal Constitution, the courts of the United States can render decisions only in "cases" and "controversies." However, these terms inherently are capable of many varying interpretations and have never been defined authoritatively. Hence, any restriction of judicial power created by construction of such terms may properly be termed self-imposed.

Note, *supra* note 46, at 772 (footnote omitted) (emphasis added).

⁴⁸ Diamond, *supra* note 46, at 125–26. As noted above, other scholars have rejected this unsupported assertion. See *supra* note 18.

⁴⁹ See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

jurisdiction.⁵⁰ The principle finds its genesis in three distinct passages of the Constitution. First, Article III subjects the Supreme Court's appellate jurisdiction to "such Exceptions" and "Regulations" as Congress shall make.⁵¹ Second, Article I grants Congress the power to "constitute Tribunals inferior to the supreme Court."⁵² Third, Article III vests the judicial power of the United States in the Supreme Court and in "such inferior Courts as the Congress may from time to time ordain and establish."⁵³ Viewed in conjunction, the latter two clauses appear to give Congress complete discretion whether or not to create lower federal courts. Several Supreme Court decisions have recognized that the discretion *not* to create courts implies that Congress also has a substantial discretion not to vest the courts with certain types of jurisdiction and to strip them of jurisdiction already granted.⁵⁴ Even scholars who believe that Congress is constitutionally

⁵⁰ See REDISH, *supra* note 20, at 17; Wechsler, *supra* note 17, at 1005-06. A recent dissenting voice is that of Professor Barry Friedman, who argues that "[t]he congressional control approach is inconsistent with two hundred years of judicial and congressional action, and ought to be reassessed." Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2 (1990). He proposes that it be replaced with a model under which "the contours of federal jurisdiction are resolved as the result of an interactive process between Congress and the Court on the appropriate uses and bounds of the federal judicial power." *Id.* at 2-3. I agree with Friedman's general proposition in favor of maintaining a dialogue between Congress and the courts. See *infra* pp. 614-15; see also Logan, *supra* note 17, at 41 ("In the context of evaluating standing when a plaintiff asserts a claim based upon the Constitution, . . . the Court has not been sensitive to the need for dialog and should be."). However, the dialogic approach and the congressional control approach (as properly understood) are not necessarily inconsistent. The presumption in favor of congressional control reserves an oversight role for Congress whenever the Constitution does not require otherwise. It allows federal appellate courts to act as "corporate officers" to manage the business of federal jurisdiction. See *infra* p. 615. This approach maintains the primacy of congressional oversight through a process of delegation and dialogue. Friedman's mistake is to assume that, because "officers" (that is, the courts) make more decisions than "directors" (that is, Congress), they are in charge. In reality, the directors do and should maintain the ultimate say.

⁵¹ U.S. CONST. art. III, § 2.

⁵² *Id.* art. I, § 8, cl. 9.

⁵³ *Id.* art. III, § 1.

⁵⁴ See *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (holding that Congress may restrict lower federal courts' jurisdiction "at its discretion"); *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 449 (1850) ("The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress" (quoting *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799))). It is generally accepted, however, that Congress may not restrict or strip jurisdiction in a way that violates constitutional provisions such as the Due Process Clause or the Equal Protection Clause. See *CHEMERINSKY*, *supra* note 4, § 3.3, at 165 n.4.

It might be argued that the Framers' rejection of an explicit provision for congressional control of lower federal court jurisdiction proves that the Framers' intent was not to have congressional control. On August 27, 1787, at the end of a day in which many changes pertaining to the judiciary were made, the Convention (apparently without discussion) unani-

required to vest certain types of subject matter jurisdiction in the federal courts acknowledge that Congress has substantial discretion regarding *which* federal courts receive such jurisdiction.⁵⁵

The principle of congressional control over federal court jurisdiction derives from more than the text of the Constitution. The principle represents a logical inference from the structure of the tripartite government the Constitution creates, in which the coordinate branches are arranged to "check" and "balance" one another.⁵⁶ If jurisdiction equates roughly to judicial power, some institution other than the courts must control the scope of their jurisdiction, lest the courts be given *carte blanche* for self-empowerment.

But if the coordinate branches of government are responsible for checking and balancing one another, they must also *cooperate* with each other to run the affairs of government and the nation. The relationship among the branches is collegial as well as adversarial. This observation applies with greatest force to the relationship between the legislative and executive branches, which are on the cutting edge of current affairs. But it also applies to the relationship between the legislature and the judiciary. To control federal jurisdiction is to set the agenda of the federal courts — Congress determines the general subject matter categories of the federal courts' dockets. But even though we are committed to congressional control over jurisdiction, Congress needs help in setting the courts' agenda, because the most valuable input on that subject comes from the courts themselves. Congress is not, and cannot be, an expert on the business of the

mously struck the following sentence from what would eventually become Article III: "The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 187, 431 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND]. This vote might be interpreted in either of two diametrically opposed ways. It might mean that the Convention did not want Congress to have control over the lower courts' jurisdiction, if indeed Congress should decide to create any. It could also mean that the Convention, having already settled on broad congressional discretion to create lower federal courts, simply thought the provision superfluous. The almost casual manner in which the Convention struck this sentence suggests a stylistic concern, which tends to support the latter interpretation. However, in the absence of other evidence, I doubt that this particular action by the Convention can legitimately be used to support any proposition at all.

⁵⁵ Professor Eisenberg has argued that Congress is required to vest the federal courts with jurisdiction to hear all constitutional claims, but he would not make any distinction between the Supreme Court or lower courts. See Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 504-09 (1974). Professor Amar has argued that Congress must vest the federal courts with the full Article III complement of federal question, admiralty, and ambassadorial jurisdiction, but he too insists on no particular allocation among the federal courts. See Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985).

⁵⁶ See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7-8 (1969).

federal courts.⁵⁷ It can be sensitive only to egregious episodes of judicial self-aggrandizement or faithless interpretation of statutes. For the rest, it must rely on the courts to adopt housekeeping measures designed to keep things running smoothly.⁵⁸ Congress needs the courts to manage their own jurisdictional arrangements while Congress exercises its oversight function. To use a corporate metaphor, the courts should act as officers and Congress as a board of directors. The goal should be to allow the greatest amount of judicial adjustment of the contours of federal jurisdiction that is consistent with legislative supremacy in the field. Any more adjustment would violate the Constitution; any less would needlessly diminish or eliminate Congress's greatest resource in the exercise of its supremacy.⁵⁹

*B. Methods of Restricting Jurisdiction:
Maintaining the Legislative-Judicial Colloquy*

Control of jurisdiction consists of two basic elements: the power to broaden and the power to restrict. The use of judicial power to broaden its own jurisdiction under certain circumstances — for example, pendent and ancillary jurisdiction — is a fascinating topic,⁶⁰ but it is beyond the scope of this Article. Mootness (as well as standing and ripeness) must be viewed as a judicially-developed means of whittling down jurisdictional grants.⁶¹ There are four methods of

⁵⁷ See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 580-87 (1985).

⁵⁸ Professor Shapiro refers to this as "fine tuning." *Id.* at 574.

⁵⁹ To the extent that I argue for the primacy of congressional control over the conditions under which the federal courts may exercise jurisdiction, I agree with Professor Monaghan. See Monaghan, *supra* note 2, at 1376-79. However, we differ on the ground rules governing the judicial-legislative dialogue. Monaghan would have the courts refuse to adjudicate cases brought by ideological plaintiffs absent congressional authorization. See *id.* at 1376 (citing *Flast v. Cohen*, 392 U.S. 83, 116 (1968) (Harlan, J., dissenting)). I would reverse the presumption; federal courts should proceed to the merits of any claim falling within a congressional grant of jurisdiction (subject to the usual prudential caveats) unless Congress has withdrawn jurisdiction over that particular class of cases. The presumption should be in favor of proceeding because it is logical that, in the abstract, Congress would want the courts' input on the shaping of their own agenda. The burden is always on those who would assert that Congress abjures the courts' participation in the shaping of any particular facet of their agenda. This is equally true whether or not the cases are brought by ideological plaintiffs.

⁶⁰ See, e.g., Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 36-37 (offering a theoretical justification for pendent and ancillary jurisdiction despite the absence of explicit congressional authorization).

⁶¹ That the justiciability doctrines are *judicially invented* methods of narrowing jurisdictional grants does not at all mean that Congress should be denied control over their scope. Compare, for example, the broad power that Congress enjoys to create causes of action to challenge administrative agency action — and, therefore, to create "injury-in-fact" when it would not otherwise exist. A classic example is *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in which a lawsuit was filed against realtors who were alleged to have "steered" racial minorities away from white neighborhoods. See *id.* at 373-74. One of the black plaintiffs was a "tester"

restricting the federal courts' ability to adjudicate claims on the merits. The first is for courts to decline as a matter of prudence to exercise their jurisdiction in particular classes of cases. Another method is for Congress to effect such a restriction explicitly by statute. A third is for the courts to interpret narrowly a congressional grant of jurisdiction. The fourth method is for the courts to interpret the Constitution as disabling them from hearing certain types of cases. To the degree that mootness (along with the other justiciability doctrines) is held to be compelled by Article III, it falls within this last type of restriction.

Some of these methods are less open to reexamination and revision than others. The first and third methods preserve the possibility of congressional supervision over the development of the contours of federal jurisdiction. These methods most greatly enhance the legislative-judicial colloquy regarding the business of the courts. The second method maximizes congressional input into the development of the agenda, but it impoverishes the dialogue through overmanagement by Congress. Still, because courts will be called on to interpret jurisdictional statutes, some exchange will continue to take place. The last method, which completely freezes Congress out of participation in the development of an entire area of federal jurisdiction, requires the most compelling justification.

1. *Restriction by Prudential Measures.* — The doctrine of forum non conveniens provides a good illustration of how the courts' refusal to exercise jurisdiction leaves room for legislative oversight. In *Gulf Oil Corp. v. Gilbert*,⁶² the Court affirmed a New York federal district court's dismissal on the ground that the case should be tried in federal court in Virginia.⁶³ The Court made no claim that the doctrine of forum non conveniens was required by any statute or constitutional

(that is, she had no intention of renting or buying in the neighborhood but rather was there only to collect evidence of discriminatory behavior). In the absence of section 804 of the Fair Housing Act of 1968, 42 U.S.C. § 3604 (Supp. 1991), the tester would have suffered no cognizable injury-in-fact from the discriminatory steering. Section 804(d), however, created an enforceable right to be told the truth about housing availability. Because she had been lied to, the tester suffered cognizable injury to her statutorily-created rights. See *Havens Realty*, 455 U.S. at 373-74; see also *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Brandon v. Eckard*, 569 F.2d 683, 687-88 (D.C. Cir. 1977) (holding that, in the Freedom of Information Act, 5 U.S.C. § 552 (Supp. 1991), Congress created standing in "any person" to challenge denial of access to information, irrespective of personal interest in the requested information); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1474-80 (1988) ("[T]he best view is that article III permits Congress to create standing as it chooses."). It should be noted, however, that the Court may be ready to cut back on this broad power. See *Gollust v. Mendell*, 111 S. Ct. 2173, 2180 (1991) (expressing "serious constitutional doubt" whether Congress may create standing in the absence of "distinct and palpable injury" to the plaintiff).

⁶² 330 U.S. 501 (1947).

⁶³ See *id.* at 512.

provision. Rather, it cited precedents in state, English, and French courts.⁶⁴ Congress thought *Gulf Oil* represented too sharp a restriction on diversity jurisdiction,⁶⁵ and in 1948 it adopted Judicial Code provisions to cover transfer from proper⁶⁶ and improper⁶⁷ venues. Under these statutory provisions, federal courts may generally dismiss on a *forum non conveniens* rationale only when the more appropriate forum is a state or foreign court.⁶⁸ If the Court had rested its decision in *Gulf Oil* on constitutional grounds instead of prudential ones — for example, that the exercise of jurisdiction violates a defendant's right to due process in the rare case in which she is forced to defend in a forum that has no logical nexus to the cause of action and is extremely inconvenient for the defendant — Congress never could have exercised its prerogative over the scope of the diversity jurisdiction.

One could quibble with the proposition that a doctrine whose roots are as "ancient and honorable"⁶⁹ as those of *forum non conveniens* can be aptly described as "prudential." Instead, one might argue that such traditional doctrine must be followed unless good cause to the contrary is demonstrated. But it is doubtful that Justice Jackson and the other members of the *Gulf Oil* majority felt much constrained by prior practice. Nor should they have. Because the Supreme Court itself had never approved the practice of dismissing for reasons of convenience, the force of *stare decisis* was absent.⁷⁰ The Court merely looked upon prior practice as evidence of the doctrine's normative appeal; combined with policy considerations, such evidence was persuasive.

2. *Restriction by Explicit Statute.* — If Congress explicitly restricts federal court jurisdiction through a statute, it guarantees itself a major, if not predominant, role in controlling an area of jurisdiction. This is desirable from the perspective of democratic political philosophy. The institution more reflective of majoritarian sentiment is permitted an important part in setting the agenda of a powerful but unrepresentative judiciary. The downside risk is that the explicit statutory restriction will exert a preemptive force on judicial efforts to "fine tune" that particular area of jurisdiction.⁷¹

⁶⁴ See *id.* at 507 & n.6.

⁶⁵ See Shapiro, *supra* note 57, at 557.

⁶⁶ See 28 U.S.C. § 1404(a) (1988).

⁶⁷ See *id.* § 1406(a).

⁶⁸ See Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 377 (1980).

⁶⁹ Shapiro, *supra* note 57, at 545 ("[Judicial discretion] has ancient and honorable roots at common law as well as in equity.").

⁷⁰ For my views on precedential constraint and its implications for vertical allocation of power among federal courts, see Evan T. Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts*, 64 S. CAL. L. REV. 235 (1991).

⁷¹ See Shapiro, *supra* note 57, at 574-77.

An explicit statutory restriction, however, does not always end the legislative-judicial dialogue concerning the area of jurisdiction at stake. The classic case is *Ex Parte McCordle* (*McCordle II*).⁷² There, a southern newspaper editor during Reconstruction filed a petition for a writ of habeas corpus to challenge the legality of his confinement and prosecution by federal officials.⁷³ His petition pleaded federal court jurisdiction through an 1867 statute granting federal courts power to issue habeas relief under certain circumstances.⁷⁴ Congress, fearful that the Supreme Court would declare the Reconstruction Acts unconstitutional, explicitly repealed the 1867 grant of jurisdiction.⁷⁵ The Court held that, under the Exceptions and Regulations Clause of Article III,⁷⁶ Congress undoubtedly had the authority to restrict the Supreme Court's appellate jurisdiction.⁷⁷ The Court then dismissed the case⁷⁸ — Congress had left it no room to do anything else.

But the legislative-judicial colloquy regarding Supreme Court appellate jurisdiction over habeas did not end there. Even as the Court dismissed McCordle's petition because of the repeal of the 1867 grant of appellate jurisdiction over habeas, it suggested that it retained jurisdiction to review habeas decisions under the Judiciary Act of 1789.⁷⁹ The next Term, in *Ex Parte Yerger*,⁸⁰ the Court held that it did indeed retain appellate jurisdiction over habeas petitions by virtue of the Act of 1789. Rather than repeal the 1789 grant as well, and rather than allow the Court to pass on the constitutionality of the Reconstruction Acts, the government dropped the charges against Yerger.⁸¹ By considering the grants of jurisdiction one at a time, the Court may have effectively imposed a "cooling off" period on Congress during which Congress thought better of its original idea that the highest court in the land should have no jurisdiction to review a lower court ruling on the legality of a prisoner's conviction or confinement. Despite an initial explicit statutory restriction on jurisdiction, the ensuing legislative-judicial dialogue led to a better result.

3. *Restrictive Interpretation of Jurisdictional Grant.* — The best illustration of how the courts can preserve the opportunity for legis-

⁷² 74 U.S. (7 Wall.) 506 (1869). The facts of the case are set forth in *Ex Parte McCordle* (*McCordle I*), 73 U.S. (6 Wall.) 318, 320-21 (1868) (denying a motion to dismiss McCordle's appeal).

⁷³ See *McCordle I*, 73 U.S. (6 Wall.) at 318.

⁷⁴ See *id.*

⁷⁵ See *McCordle II*, 74 U.S. (7 Wall.) at 508.

⁷⁶ U.S. CONST. art. III, § 2.

⁷⁷ See *McCordle II*, 74 U.S. (7 Wall.) at 512-14.

⁷⁸ See *id.*

⁷⁹ See *id.* at 515. McCordle had failed to plead the 1789 Act as a basis for jurisdiction. See *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 104 (1869).

⁸⁰ 75 U.S. (8 Wall.) 85 (1869).

⁸¹ See 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 496-97 (revised ed. 1937).

lative oversight is the Supreme Court's interpretation of the phrase "arising under" in the general federal question statute, which states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."⁸² This language parrots the constitutional grant of authority to vest federal question jurisdiction in the courts: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"⁸³ Despite the similarity in the language of the statute and the Constitution, the Court has consistently interpreted the statutory grant of federal question jurisdiction far more narrowly than the constitutional grant.⁸⁴ The Court has thought it necessary to restrict the grant of federal question jurisdiction, but it has resisted using the Constitution to freeze in those restrictions. Instead, it has made the restrictions at the statutory level and left Congress free to exercise oversight. The result has been to preserve maximum flexibility between Congress and the courts in the development of federal question jurisdiction.

The Court's broad reading of the constitutional grant of federal question jurisdiction can be traced back to Chief Justice Marshall's famous opinion in *Osborn v. Bank of the United States*.⁸⁵ The Bank of the United States brought an action in federal court against Ohio state officers who had raided the bank and seized more than \$100,000 in federal bank money.⁸⁶ The bank stated a state common law claim for conversion; the issue was whether the court had subject matter jurisdiction.⁸⁷ After concluding that Congress had purported to authorize jurisdiction over lawsuits by the bank, the Court turned to the question whether Article III empowered Congress to do so.⁸⁸

Chief Justice Marshall adopted a remarkably broad interpretation of the "arising under" clause of Article III. For purposes of that provision, he held, a case arises under federal law whenever federal law "forms an ingredient of the original cause," even though "other questions of fact or law may be involved in it."⁸⁹ Because the bank had been created by federal law, any case in which it was a plaintiff would be deemed as "arising under" federal law for purposes of Article III.⁹⁰ Justice Johnson's dissent wryly asked whether every naturalized

⁸² 28 U.S.C. § 1331 (1988).

⁸³ U.S. CONST. art. III, § 2.

⁸⁴ See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983).

⁸⁵ 22 U.S. (9 Wheat.) 738 (1824).

⁸⁶ See *id.* at 741. The Ohio officers were trying to enforce a tax against the bank, see *id.*, contrary to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁸⁷ See *Osborn*, 22 U.S. (9 Wheat.) at 816, 819.

⁸⁸ See *id.* at 818.

⁸⁹ *Id.* at 823.

⁹⁰ See *id.* at 828.

citizen could now bring any action in federal court simply because his citizenship had been granted by virtue of federal statute.⁹¹ *Osborn* has generally been interpreted as recognizing constitutional authorization for federal question jurisdiction whenever federal law is a potential ingredient in a case.⁹²

In contrast to this broad interpretation of Article III, the Court has read two major limitations into the general federal question statute. The first limitation, known as the "well-pleaded complaint" rule, is that the federal question must appear on the face of the plaintiff's complaint; it is not enough for the plaintiff to anticipate that the defendant will assert a defense raising a federal question.⁹³ In other words, whether a case contains a federal question is judged only on the character of the plaintiff's cause of action.⁹⁴ The second limitation is that the federal question cannot have merely a remote logical connection to the plaintiff's claim. To qualify as a federal question for purposes of the statute, either the plaintiff's cause of action must be created by federal law, or if it is created by state law, a federal cause of action must be an essential component of the state law claim.⁹⁵ If the cause of action is created by state law, it is not enough that its adjudication will require analysis of some federal question. Rather, the federal statute implicated by the state law claim must *itself* create a cause of action — even though the plaintiff is not relying directly on the federal statute.⁹⁶

Was the broad interpretation in *Osborn* a fair inference from the text, history, and structure of the "arising under" clause of Article III?⁹⁷ Are the "well-pleaded complaint" rule and the other restrictions on the statute fairly inferable from its text, history, and structure?⁹⁸ If the answer to either of these questions is no, the Court should not have adopted the positions it did. I make no claim that the value of preserving the legislative-judicial colloquy justifies a failure to recognize constitutional limits on jurisdiction when the Constitution plainly

⁹¹ See *id.* at 875 (Johnson, J., dissenting).

⁹² See CHEMERINSKY, *supra* note 4, § 5.2, at 226.

⁹³ See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

⁹⁴ Nor may the plaintiff sidestep this limitation by requesting a judicial declaration of the invalidity of a federal statute that could provide a defense. See, e.g., *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672–74 (1950).

⁹⁵ See CHEMERINSKY, *supra* note 4, § 5.2, at 231, 237–41.

⁹⁶ See *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813–17 (1986).

⁹⁷ For an affirmative answer, see Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 160 (1953).

⁹⁸ The rule has been savaged, see Donald D. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 662–63 (1987) (stressing the importance of federal courts' ability to decide questions of federal law), as well as praised, see JACK H. FRIEDENTHAL, MARY K. KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE*, § 2.4, at 23 (1985) (stressing the limited nature of federal subject matter jurisdiction).

requires such limits, or that it ever justifies the imposition of prudential limits on jurisdiction when the statutory grant plainly rejects such limits. Much depends on a conscientious examination of the text, history, and structure of each grant, whether constitutional or statutory. The point is simply this: if the text, history, and structure of a constitutional grant can plausibly be read either to require or not to require a particular limitation, the virtue of preserving a legislative-judicial dialogue should be a strong factor against recognizing the limit as a matter of constitutional law. Moreover, if the text, history, and structure of a congressional grant can plausibly be read *not* to reject a particular prudential limit, the value of the institutional dialogue should be an even stronger factor against subsequently transforming the restriction into a constitutional one.⁹⁹

One might object that, after paying lip service to the distinction between enlargement and restriction of jurisdiction, the congressional control argument proceeds to lump the two together for separation of powers analysis. This objection rejects the idea that judicial "preemption" of the congressional prerogative to *restrict* jurisdiction offends the principles of majoritarian self-determination or of separation of powers. If the courts want to cede some of their power, one might argue, let them — it can result only in the reservation of more power to the majoritarian branches.

The fallacy of this objection lies in its oversimplification of the distinction between action and inaction. It erroneously supposes that a calculated bit of judicial inaction cannot be as obnoxious as an affirmative judicial act. To take an extreme example, suppose that the federal courts decided on prudential grounds that no section 1983 action could be brought in federal court unless the plaintiff could demonstrate that her remedy in state court would be inadequate.¹⁰⁰ It is scarcely possible to imagine a more aggravated case of judicial nullification of majoritarian sentiment or of judicial review of the general wisdom and desirability of legislation. By enacting section 1983, Congress made a considered judgment that aggrieved individuals should be able to sue in *federal* court persons who violate their constitutional rights under color of state law.¹⁰¹ Unless the courts can

⁹⁹ See Mishkin, *supra* note 97, at 160–63. Professor Mishkin notes that if the courts were to read the general federal question statute as broadly as the constitutional grant, they would be flooded with litigation only tangentially related to federal initiatives. *See id.* at 162. Thus, the narrow construction of the federal question statute is justifiable. Mishkin insists, however, that the narrow construction should not be frozen into the constitutional grant: "If Congress, in full awareness of the situation, had unequivocally called for such a result, then it would be the duty of the courts to obey." *Id.*

¹⁰⁰ This was the argument rejected so decisively in *Monroe v. Pape*, 365 U.S. 167, 173–74 (1961). The Court recently reiterated its rejection of the argument. *See Zinnermon v. Burch*, 110 S. Ct. 975, 982–83 (1990).

¹⁰¹ *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

fairly say that the Constitution somehow prohibits Congress from permitting plaintiffs such a choice of forum, the courts have as great a duty to uphold jurisdiction in section 1983 actions as they do to refrain from accepting jurisdiction when none has been granted.¹⁰² It is simply wrong to believe that judicial abdication somehow represents little or no threat to the values underlying the principle of congressional control over federal jurisdiction.¹⁰³

Another objection that can be made against the congressional control argument is that it is valid only insofar as there is no clear constitutional command not to hear moot cases, and there *does* exist such a clear constitutional command — the “case or controversy” requirement of Article III. In reality, however, the command is anything but clear; the best interpretation of the words “case” and “controversy” as used in Article III is that they have nothing to do with mootness or even justiciability. I defer full consideration of this objection until Part IV, which argues that the “case or controversy” requirement should not be read to prevent the removal of Article III from mootness jurisprudence.¹⁰⁴

¹⁰² In fact, one need not resort to the extreme example given above. The Supreme Court has, under the aegis of “Our Federalism” abstention, held that the federal courts may not interfere with ongoing state judicial and certain administrative proceedings absent exceptional circumstances. See *Younger v. Harris*, 401 U.S. 37, 53–54 (1971). Professor Redish has forcefully argued that such abstention violates separation of powers principles. See REDISH, *supra* note 20, at 71–74.

¹⁰³ One might argue that Congress always has the power simply to order the courts not to abstain in any particular area. This is certainly true, but the force of the argument is diminished by two factors. First, courts will always have the last word, in the sense that they can construe anti-abstention statutes narrowly. Second, courts do not always make it clear whether abstention is prudentially or constitutionally driven. For example, whether the *Younger* doctrine is federal common law or constitutional law is an open question. See CHEMERINSKY, *supra* note 4, § 13.2, at 627–28. But see Massey, *supra* note 8, at 812–13 (arguing that all the abstention doctrines should be considered constitutionally compelled).

¹⁰⁴ How might Congress react if the Court were to deconstitutionalize justiciability? First, Congress might reaffirm the justiciability doctrines as they are presently constituted — that is, Congress might inject a “personal stake” requirement or reasonable facsimile into each of its jurisdictional grants. For example, Congress could limit the general federal question statute to “Hohfeldian” plaintiffs — those who have “personal and proprietary” interests, as opposed to ideological ones. See *Flast v. Cohen*, 392 U.S. 83, 119 n.5 (1968) (Harlan, J., dissenting). Indeed, Congress might restrict access to federal courts for public interest litigation even more than at present by defining “personal stake” in an especially narrow way — for example, by decreeing that an injured plaintiff lacks a “personal stake” in a controversy unless she can make a threshold showing that no other potential plaintiff’s injury is as severe as hers.

A second possibility is that Congress might write a “personal stake” requirement into the general federal question statute, 28 U.S.C. § 1331 (1989), but not into the civil rights jurisdictional statute, 28 U.S.C. § 1343(a)(3) (1989). A third possibility is that Congress might do nothing for the present and leave the courts to deal with public values litigation on a prudential basis until Congress became dissatisfied with their approach. Full examination of these options must await another occasion. All three options are permissible and tolerable but not equally desirable — the third option would be the wisest.

*C. Previous Incursions into the Constitutional Core
of Mootness Jurisprudence*

1. *The Elusive Concept of "Personal Stake."* — The Supreme Court has generally held that a case drops out of Article III cognizance if, at any time during the pendency of the litigation, a party loses her personal stake in the outcome.¹⁰⁵ After all, if mootness truly is the "doctrine of standing set in a time frame,"¹⁰⁶ and if the Article III requisite of standing is a personal stake,¹⁰⁷ then in the mootness context Article III must demand that the personal stake abide throughout the life of the litigation. However, two prominent Supreme Court decisions cast doubt on the accuracy of this general rule.

First, it is difficult to reconcile the personal stake requirement with the Court's decision in *Roe v. Wade*.¹⁰⁸ There, it was not at all clear that, by the time the Court was ready to decide the case, the plaintiff Norma McCorvey still had a personal stake in the outcome. She had been pregnant in March 1970, when she filed her suit;¹⁰⁹ obviously that pregnancy had ended by the time the Supreme Court handed down its opinion in January 1973. There was no record in the Supreme Court that she had become pregnant again.¹¹⁰ Responding to the argument that the case was moot, Justice Blackmun's majority opinion explained that "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete."¹¹¹ If the termination of the pregnancy were allowed to deprive the Court of jurisdiction, Justice Blackmun reasoned, there could never be any appellate review of trial court decisions on abortion laws.¹¹²

Justice Blackmun's observations provided the Court with a compelling justification for reaching the merits of the case. They did not, however, explain how plaintiff McCorvey retained a personal stake in the outcome even after the termination of her pregnancy. Her personal stake could not have been the vindication of her right to control her own body, because the Court has repeatedly held this sort of interest to be too general to satisfy Article III.¹¹³ Similarly, her

¹⁰⁵ See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 & n.6 (1980); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

¹⁰⁶ Monaghan, *supra* note 2, at 1384.

¹⁰⁷ See *Flast*, 392 U.S. at 100-01.

¹⁰⁸ 410 U.S. 113 (1973).

¹⁰⁹ See *id.* at 120.

¹¹⁰ See *id.* at 124-25.

¹¹¹ *Id.* at 125.

¹¹² See *id.*

¹¹³ Cf., e.g., *Allen v. Wright*, 468 U.S. 737, 755 (1984) (holding that mere membership in a racial group at which stigmatizing conduct is targeted is insufficient to confer standing); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464,

personal stake could not have been the protection of her right to obtain an abortion in the future, because this stake ultimately collapses into a generalized grievance: all women of childbearing age have some stake in preserving their right to obtain abortions in the future. Once her pregnancy had ended, McCorvey had no more of a personal stake in review of the statute than any other woman of childbearing age in the jurisdiction.¹¹⁴ By allowing the prospect of recurrence to stave off concerns about mootness, the Court in effect made an exception to the personal stake requirement.

*United States Parole Commissioner v. Geraghty*¹¹⁵ casts further doubt on the relationship between the personal stake requirement and the Article III mootness doctrine. John Geraghty, a convict, wished to challenge the constitutionality of parole guidelines.¹¹⁶ After his petition for class certification was denied, he was released from prison before the Court of Appeals could hear his appeal.¹¹⁷ The Supreme Court held that Geraghty could continue to represent the class for the purpose of appealing the denial of class certification.¹¹⁸

Justice Blackmun asserted that even after his release from prison, Geraghty retained a personal stake.¹¹⁹ The Court explained that a plaintiff who brings a class action presents two separate issues — a claim on the merits, and a “claim” that she is entitled to represent the stated class.¹²⁰ In determining whether it had jurisdiction to review the denial of class certification, the Court said that it would look not to Geraghty’s personal stake in the outcome on the merits (of which he had none), but rather to his stake in the decision about class certification.¹²¹

Clearly, the Court was straining to find a way to review the denial of certification. It is not impossible to imagine a person having a personal stake in a procedural decision when she has no stake in the outcome of the litigation.¹²² Consider, for example, a non-party witness who wishes to assert her Fifth Amendment privilege against self-

488–90 (1982) (holding that neither citizenship nor status as a taxpayer in itself confers standing to challenge illegal government conduct); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226–27 (1974) (same).

¹¹⁴ She might have had a personal stake in review of the statute if she had been faced with criminal prosecution, but the Court’s opinion makes no mention of any such threat.

¹¹⁵ 445 U.S. 388 (1980).

¹¹⁶ *See id.* at 393.

¹¹⁷ *See id.* at 393–94.

¹¹⁸ *See id.* at 407.

¹¹⁹ *See id.* at 401–04.

¹²⁰ *See id.* at 402.

¹²¹ *See id.*

¹²² *Cf. International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1704–05 (1991) (holding that the plaintiffs’ right to sue in state court rather than in federal court conferred standing to challenge allegedly improper removal).

incrimination: her personal stake is preserving her individual dignity and perhaps also avoiding prosecution. But what stake could Geraghty have had in class certification, other than the satisfaction of inflicting a wound on the "system" that wounded him? He was out of prison and needed no parole. Whether the constitutional challenge to the guidelines thrived or died on the vine would have made no tangible difference to him.

Geraghty, then, is another instance in which the Court in effect suspended the personal stake requirement. In a lengthy footnote, the Court expressed little remorse for its deviation.¹²³ Characterizing the personal stake requirement as part of a "rigidly formalistic approach to Art. III,"¹²⁴ the Court asserted that this approach had been eroded by previous decisions and replaced with a "flexible" Article III jurisprudence.¹²⁵ The Court did not specify exactly what it meant by "flexible." Presumably, it meant that the requirements of Article III ought to be recognized as varying from case to case.¹²⁶ If that meant dispensing with the personal stake requirement in any particular case, then so be it. The Court seemed to concede (as Justice Powell's dissent charged) that it had taken a step down the road to premising jurisdiction "upon the bare existence of a sharply presented issue in a concrete and vigorously argued case,"¹²⁷ but it declined to say how much farther it might be willing to travel in future cases.

Thus, the solidity of the doctrine linking Article III and its personal stake requirement to mootness jurisprudence is dubious, at best. Perhaps this is what led one commentator to remark:

Despite the clear separation in received theory between mootness principles mandated by Article III, and principles merely of remedy or judicial administration, most decisions do not undertake any explanation of the sources drawn upon. . . .

The core of both Article III and remedial doctrines, in short, is a search for the possibility that granting a present determination of the issues offered, and perhaps the entry of more specific orders, will have some effect in the real world. Resort to Article III language does not advance the search, and there is little prospect that clear lines will be drawn between constitutional and prudential doctrines.¹²⁸

Put simply, the Supreme Court's insistence that some mootness considerations are grounded in Article III has led to confusion.

2. *Two Models of Adjudication.* — Many of the doctrines and subdoctrines falling under the aegis of justiciability reflect the cross-

¹²³ See *Geraghty*, 445 U.S. at 404 n.11.

¹²⁴ *Id.* at 404 n.11.

¹²⁵ See *id.* at 404-05 n.11 (citing *Flast v. Cohen*, 392 U.S. 83 (1968)).

¹²⁶ See *id.* at 406 n.11 ("Each case must be decided on its own facts.").

¹²⁷ *Id.* at 421 (Powell, J., dissenting).

¹²⁸ 13A WRIGHT, MILLER & COOPER, *supra* note 19, § 3533.1, at 225-26 (footnotes omitted).

wise pull of two opposed visions about the proper role of courts and, in particular, federal courts. One group of Justices (most prominently Justices Frankfurter, Stewart, Powell, and Scalia) has wanted to confine courts to their purportedly traditional role of resolving disputes. Another group (most prominently Chief Justice Warren and Justice Blackmun, and usually Justices Brennan and Marshall) has wanted to recognize the unique role that federal courts must play in shaping our public values. The problem is not that one vision has failed to predominate over the other — neither vision could ever fully occupy the field. Instead, the problem is that the first group has used Article III to enshrine the dispute resolution vision in the Constitution. As a result, Justices who embrace the public values vision are forced by the principles of stare decisis and constitutional supremacy to couch their own endeavor in dispute resolution terms — an intellectually disastrous enterprise.

(a) *The “Dispute Resolution” Model.* — This model envisions that the primary purpose of courts is to provide as true a proxy for private ordering as possible when such ordering irretrievably breaks down.¹²⁹ The paradigm is a lawsuit between two neighbors over the placement of a fence between their adjoining properties. The neighbors reach an impasse in negotiations and then turn to a disinterested third party — the judge — for a solution.¹³⁰ The parties, pursuing their own bipolar interests and no others, have a crisply defined, neatly cabined difference¹³¹ that is immediately intelligible as an alleged violation of a common law right. If the right is shown to have been violated, the court will mechanically provide an appropriate,¹³² winner-take-all remedy.

According to the dispute resolution theory, judicial involvement is most warranted in this type of situation. The less a lawsuit resembles the bickering neighbors, the less judicial intervention is justifiable. Adjudication may serve goals other than dispute resolution, such as

¹²⁹ See PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 79–80 (3d ed. 1988) [hereinafter *HART & WECHSLER* (3d ed.)]. The dispute resolution model has also been referred to as the “private rights” model. See Susan Bandes, *The Idea of a Case*, 42 *STAN. L. REV.* 227, 276–81 (1990); cf. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 109 (1977) (“The function of law . . . is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.”).

¹³⁰ See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1981) (“So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it.”).

¹³¹ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1282 (1976) (observing that in the “received tradition” of civil adjudication, litigation is a contest between diametrically opposed unitary interests).

¹³² See *id.* at 1282–83 (describing the scope of relief as “derived more or less logically from the substantive violation”).

uniformity in the application of public norms and the rejection of unconstitutional acts, but these ends are always incidental to the core function of resolving disputes. The legitimacy of judicial action depends upon the existence of a genuine dispute.¹³³

In the realm of constitutional adjudication, at least,¹³⁴ the dispute resolution theory claims to derive support from *Marbury v. Madison*.¹³⁵ There, Chief Justice Marshall sought to justify judicial review as a necessary incident to deciding individual cases in which the Constitution conflicts with a statute.¹³⁶ Because the Constitution must prevail over a statute, and because in such a case of conflict one or the other must be used as the rule of decision, the Court simply could not avert its eyes from the constitutional text.¹³⁷ To discharge its primary duty of resolving disputes, it was forced to engage in constitutional exposition.

(b) *The "Public Values" Model.* — According to this model,¹³⁸ the primary task of a judge is not to resolve the dispute at bar, but rather

¹³³ The mere existence of a genuine dispute, however, may be insufficient to confer legitimacy on judicial action. Those who embrace the dispute resolution theory would say that such a dispute is a necessary but not sufficient precondition to the legitimate exercise of judicial power. *But cf.* REDISH, *supra* note 20, at 93 ("[I]t makes perfect sense to employ injury-in-fact . . . as a sufficient condition for the exercise of federal judicial power." (emphasis in original)). Redish rejects the dispute resolution model as an *exclusive* source of legitimacy in the exercise of judicial power.

¹³⁴ *Cf.* PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 81 (2d ed. 1973) [hereinafter HART & WECHSLER (2d ed.)] (suggesting that the case-specific justification for adjudication in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), extends to nonconstitutional cases as well).

¹³⁵ 5 U.S. (1 Cranch) 137 (1803).

¹³⁶ *See id.* at 177-79.

¹³⁷ *See id.*

¹³⁸ The "public values" model is also referred to as the "public law litigation" model, Chayes, *supra* note 131, at 1204; the "special function" model, Monaghan, *supra* note 2, at 1368-71; the "judicial-political" model, REDISH, *supra* note 20, at 88, 103-06, and the "public action" model, Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1267 (1961). I use the phrase "public values," Fiss, *supra* note 14, at 5, because it most directly links the structural characteristics of this type of litigation to its underlying justification, which is the function of giving meaning to public values.

I do not mean to minimize the differences among these theories. For example, I read Fiss's theory as embracing the public values justification for adjudication *to the exclusion* of the dispute resolution model — a position that I believe goes too far. *See* Fiss, *supra* note 14, at 30-31. For a similar interpretation of Fiss's argument, see Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 78 (1991), in which Fiss is labeled a "reductionist." In contrast, the others clearly do not deny that dispute resolution continues to provide a justification for adjudication. *See* REDISH, *supra* note 20, at 93 ("No one could doubt that a fundamental purpose of the exercise of judicial jurisdiction is to vindicate individual rights and claims."); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034 (1968) (conceding that the "central function of the courts is the determination of the individual's claim to 'just' treatment"); Monaghan, *supra* note 2, at 1392 n.176 (agreeing with Jaffe).

to give concrete meaning to our public values,¹³⁹ to illustrate how our public and constitutional values play out in the real world. Adjudication, therefore, is the process through which the meaning of our public values is revealed or elaborated.¹⁴⁰

But issues about the meaning of our public values are hardly confined to the close-cabined dispute between individuals. The most profound questions about these values arise in the context of tensions between representative associations or entities. Typically, the alleged antagonist ("defendant") is the government. This assures several "layers" of representation on the defendant's side, because government both constitutes a representative (of the people) and can act only through representatives (elected and appointed officials, who in turn must hire mid-level and low-level employees). In the typical scenario, government has imposed an unwanted and objectionable way of life on some group of people. These people might be patients at a state-run mental hospital, inmates at a state-run prison, state welfare recipients, or public schoolchildren. They are all somehow incapacitated, which often means that they cannot litigate on their own behalf. Thus, there are likely to be layers of representation on the "plaintiff's" side as well — family members suing as "next friends," or "writ writers" suing on behalf of less sophisticated inmates, or "public interest" organizations acting as advocates for all of the above. Commonly other people or organizations who are also involved claim to be affected by the litigation and seek to intervene. The resulting party structure is "sprawling and amorphous."¹⁴¹ The subject matter of the litigation rarely involves a discrete instance of offending state action. It is usually a seamless web of acts and omissions — some sinister, but most well-meaning, misguided, or inadvertent — that combine to create an antagonistic universe for the aggrieved persons.

3. *Square Pegs and Round Holes*. — The foregoing models of adjudication are, of course, overdrawn. No case conforms entirely to either description. No justiciability doctrine absolutely reflects either set of ideals. But the baseline doctrines of standing and mootness are generally predicated on the dispute resolution model, whereas many of the exceptions reflect the public values vision or, at least, the inevitability of public law litigation. Put another way, the basic notions of justiciability as a limit on federal court power are driven by a conception resembling the neighbors metaphor. Exceptions to the general rules can be seen as stretch marks attributable to the growth

¹³⁹ See Fiss, *supra* note 14, at 2. Fiss appears to use the terms "public values" and "constitutional values" interchangeably, but equating the two concepts may not be entirely accurate. Although the vast majority of our most important public values are embodied in the Constitution, a few are not (protection of the environment, for example).

¹⁴⁰ See *id.* at 14.

¹⁴¹ Chayes, *supra* note 131, at 1284.

of litigation that, try as we might, cannot be corseted into the metaphor.

In the area of standing, for example, one of the basic (albeit prudential) rules is the prohibition against third-party standing.¹⁴² A litigant generally lacks standing to assert the rights of others. This prohibition stems from the same conviction about the proper role of adjudication as the injury-in-fact requirement¹⁴³ — namely, that judicial intervention into private ordering is justified only when such ordering has broken down and a concrete disagreement between individuals has arisen. The existence of “legally cognizable injury” is taken as competent evidence to show that private ordering has in fact failed; it thus serves as the trigger for judicial involvement. However, the Court has consistently recognized exceptions to the prohibition against third party standing, one of which concerns the inability of the third party to assert her own rights.¹⁴⁴

The most important cases concerning this exception are *Barrows v. Jackson*¹⁴⁵ and *Eisenstadt v. Baird*.¹⁴⁶ In *Barrows*, a white person owned property encumbered by a racially restrictive covenant.¹⁴⁷ The owner sold the property to black persons, who took possession of the premises.¹⁴⁸ White property owners then sued the seller for damages caused by the breach of the covenant.¹⁴⁹ The seller defended the

¹⁴² Arguably, if the Court continues to insist that injury is required for a plaintiff to have standing under Article III, it should also hold that the prohibition against third-party standing is constitutionally compelled. But this prospect bumps up against the currently existing exception for First Amendment overbreadth. See, e.g., *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980). This difficulty might be circumvented by adopting Monaghan's reasoning that the overbreadth doctrine is not truly an exception to the prohibition against third-party standing. Rather, because the litigant is challenging a statute as facially unconstitutional, she is actually asserting her own rights. See Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282–85 (1984). But see Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 874 (1991) (arguing that the primary rationale underlying overbreadth doctrine is the Court's desire to lessen the chilling effect of broad statutes on First Amendment values, not its concern for an individual's entitlement “not to be sanctioned under an unconstitutional rule of law”).

¹⁴³ See CHEMERINSKY, *supra* note 4, § 2.3.4, at 72 & n.130.

¹⁴⁴ See, e.g., *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087–88 (1991) (citing *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991)); CHEMERINSKY, *supra* note 4, § 2.3.4, at 73–77. The other two exceptions to the prohibition against third-party standing are when the litigant and the third party are in a close relationship and when the litigant challenges a statute on the grounds that it “substantially abridges the First Amendment rights of other parties not before the court.” *Schaumburg*, 444 U.S. at 634. Chemerinsky suggests that a fourth exception might be the doctrine allowing organizations to assert the rights of their members. See CHEMERINSKY, *supra* note 4, § 2.3.4, at 73 n.134, § 2.3.7, at 88–90.

¹⁴⁵ 346 U.S. 249 (1953).

¹⁴⁶ 405 U.S. 438 (1972).

¹⁴⁷ See *Barrows*, 346 U.S. at 251.

¹⁴⁸ See *id.* at 252.

¹⁴⁹ See *id.* at 251.

action on the strength of the buyers' rights not to be discriminated against on the basis of race.¹⁵⁰ Noting that the black persons involved in this breach of contract suit could not assert their own rights because they were not parties to the covenant, the Court allowed the third-party standing.¹⁵¹ In *Eisenstadt*, a contraceptive vendor was permitted to assert the privacy rights of unmarried individuals in challenging a Massachusetts statute criminalizing the distribution of contraceptives to unmarried persons.¹⁵² Because the statute did not subject users to the threat of prosecution, they lacked a forum in which to assert their privacy rights.¹⁵³

Barrows and *Eisenstadt* can be understood as cases in which the prohibition against third-party standing could not be permitted to prevent adjudication on the merits because the constitutional questions at stake were too important.¹⁵⁴ These decisions are easily understood if the third-party prohibition is thought to be a purely prudential doctrine. But suppose that the Court had opined that the prohibition against third-party standing was mandated by Article III. How then could the Court have explained the results in *Barrows* and *Eisenstadt*? The Court probably would have had to reason that the white seller in *Barrows* had been sued for substantial money damages that would come out of her own pocket, that the vendor in *Eisenstadt* was losing revenue from sales of contraceptives to unmarried persons, and therefore that each should be permitted to litigate the question at stake.

The difficulty with such opinions, if the Court had been forced to write them, would have been their equation of "violation of rights" with "cognizable injury." No one would deny that the white seller in *Barrows* had a personal stake in the outcome — a legally cognizable injury. But the seller could not point to any source of law intended to protect her from the consequences of breaking her own immoral promise not to sell to non-whites. Strictly speaking, she had no Fourteenth Amendment right not to be penalized for refusing to discriminate against the black purchasers. Furthermore, awarding damages against her would have posed no threat to the black purchasers, who had already moved in. The white neighbors obviously pursued the damages claim to deter any future breaches of restrictive covenants, perhaps not only in their own neighborhood, but also in other

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 256–59.

¹⁵² See *Eisenstadt*, 405 U.S. at 443–46.

¹⁵³ See *id.* at 446.

¹⁵⁴ The Court has upheld the assertion of rights on behalf of others in three recent cases. See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087–88 (1991) (permitting a civil litigant to assert the rights of wrongfully excluded jurors); *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991) (same for a criminal defendant); *United States Dep't of Labor v. Triplett*, 110 S. Ct. 1428, 1431–32 (1990) (permitting an attorney to assert his client's due process right to challenge restriction on attorney's fee awards).

all-white neighborhoods throughout the state and the nation. Preventing this result and making it absolutely clear that racial discrimination in housing has no place in our constitutional order were valid reasons to adjudicate the case on the merits of claims asserting the *black purchasers'* Fourteenth Amendment equal protection rights.¹⁵⁵ That is precisely what the Court did, and it made little or no attempt to obscure its purpose. But, if the prohibition against third-party standing had been constitutionalized, the Court would have been forced to obscure its reasoning.

In the mootness context, the Court has sometimes obscured its reasoning about the personal stake requirement in precisely this manner. In neither *Roe v. Wade* nor *Geraghty* was Justice Blackmun at liberty to admit that the Court was suspending the Article III requirement of a continuing personal stake. He could not simply note the urgency and importance of the questions about the meaning of our constitutional and public values concerning reproductive rights and fairness in the treatment of inmates and conclude that, under the circumstances, the Court ought to reach the merits. Both opinions purported to reaffirm the personal stake requirement — a necessity, in light of the prior cases.¹⁵⁶ Arguably, the Court's opinion in *Roe v. Wade* misleadingly implied that the plaintiff McCorvey had somehow satisfied the requirement.¹⁵⁷ In *Geraghty*, Justice Blackmun engaged in an extended discussion, the upshot of which seems to be that, if the decision was intellectually unsatisfying, it would not be the first justiciability decision with that characteristic.¹⁵⁸ It is unfortunate that the majority was forced to this kind of rationalization merely because it had the good sense not to deny the importance of the merits of those cases and because previous cases had frozen the personal stake requirement into Article III. The personal stake requirement thus remains unclear, and it has been muddled all the more by a revisionist history of Article III cases that attempts to distinguish between "flexible" and "rigidly formalistic" treatments.

4. *Squaring the Circle: A Normative Justification for the Public Values Model.* — At one time, Chief Justice Marshall's view of the adjudicative function was unquestioned. It remains valid but is no longer unchallenged. A graphic illustration of how the consensus has eroded can be seen in the changes between the second and third

¹⁵⁵ The Equal Protection Clause applied to the case because judicial enforcement of the covenant by a state court would constitute state action under the Fourteenth Amendment. See *Shelley v. Kraemer*, 334 U.S. 1, 18–23 (1948).

¹⁵⁶ See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396–97 (1980); *Roe v. Wade*, 410 U.S. 113, 123 (1973) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

¹⁵⁷ See *Roe*, 410 U.S. at 123–25.

¹⁵⁸ See *Geraghty*, 445 U.S. at 406 n.11 ("Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions.").

editions of *Hart & Wechsler's The Federal Courts and the Federal System* — the “bible” of federal courts law.¹⁵⁹ In each edition, after noting that Marshall’s justification for adjudication turns exclusively on the power to decide cases, the casebook editors ask, “Is there any other basis for attributing a law-declaring function of any kind to courts?”¹⁶⁰ In the second edition (published in 1973), no answer is suggested; the editors proceed directly to another subject. The question seems rhetorical, as if inviting some unsuspecting student to play the foil for an instructor’s triumphant reiteration of the received wisdom.

By 1981, in the only supplement ever published for the second edition, the editors acknowledged the emergence of an alternative, “widely diffused conception of courts.”¹⁶¹ As evidence of this new trend, they quoted at some length from Professor Fiss’s *Foreword* in the Supreme Court issue of Volume 93 of the *Harvard Law Review*.¹⁶² However, the casebook editors followed this excerpt with a seemingly devastating battery of questions and statements:

On this view, are advisory opinions acceptable? Indeed, is there any reason why a court must wait to be asked for its opinion?

Is this conception consistent with the rationale of *Marbury v. Madison*? If not supported by *Marbury*, what is the source of the constitutional warrant for this position?

It should be noted that the Supreme Court has never embraced such a conception of the judicial role. Indeed, its explicit pronouncements have been consistently to the contrary.¹⁶³

Finally, the third edition (published in 1988) follows the editors’ original question with three full pages exploring the possible limits of both the public values and dispute resolution models.¹⁶⁴ The original hostile stance toward the public values theory has dissipated into genuine intellectual curiosity about what ramifications might follow from its adoption. Some hard questions for public values theorists remain,¹⁶⁵ and the editors continue to insist that the Court has never abandoned the dispute resolution model.¹⁶⁶ But the editors do allow

¹⁵⁹ For a sample of the superlatives showered on the book over the years, see Akhil R. Amar, *Law Story*, 102 HARV. L. REV. 688, 688, 689, 714 (1989).

¹⁶⁰ HART & WECHSLER (3d ed.), *supra* note 129, at 79; HART & WECHSLER (2d ed.), *supra* note 134, at 81.

¹⁶¹ HART & WECHSLER (2d ed.), *supra* note 134, at 14 (Supp. 1981).

¹⁶² See *id.* (quoting Fiss, *supra* note 14, at 29–30).

¹⁶³ *Id.* at 15 (citing *Williams v. Zbaraz*, 448 U.S. 358, 367–68 (1980); and *Ellis v. Dyson*, 421 U.S. 426, 434 (1975)).

¹⁶⁴ See HART & WECHSLER (3d ed.), *supra* note 129, at 79–82.

¹⁶⁵ One such question is whether “there [is] a danger . . . that [courts] will act on the basis of inadequate information or without adequate sensitivity to the particular situation.” *Id.* at 81.

¹⁶⁶ See *id.* at 82.

that "some holdings . . . may be seen as reflecting . . . a shift in conception of the judicial role."¹⁶⁷

The public values theory thus appears to be winning acceptance among some academics and, to a lesser degree, Supreme Court Justices. Still, before one can form an opinion about whether the justiciability doctrines should be regarded as a matter of constitutional compulsion, the proposition must be tested normatively. How should the editors of *Hart & Wechsler* be answered when they ask whether there is any justification for adjudication other than the decision of cases? The response must be firmly, if circumspectly, affirmative. In a society that embraces popular sovereignty and whose elected government has traditionally propagated certain public values, it is perfectly logical that courts (among others) should be charged with the power and the duty to explicate and enforce those values.¹⁶⁸ It is difficult to catalogue all such values — racial and gender equality, the ownership of one's own labor, and environmental protection come to mind — and we may well differ in our precise descriptions of each.¹⁶⁹ And yet American government has committed itself not only to identifying these values, but also to convincing its citizens of the enlightenment of these values.¹⁷⁰ Courts are an integral part of this pedagogical effort.

One might object that American courts cannot be used to indoctrinate the citizenry. Courts may be lackeys for the prevailing regime in other countries,¹⁷¹ but not here; the American judiciary is independent. This objection is at best only partially correct. American courts are independent from government in the sense that they exercise judicial review and in the sense that they generally refuse to accept marching orders with respect to the decision of any particular case.¹⁷² For example, if Congress and state legislatures attempted to use courts

¹⁶⁷ *Id.* (citing developments in class actions and in mootness and overbreadth doctrine).

¹⁶⁸ This matter deserves fuller development, which I hope to provide in an article tentatively titled "The Contemporary Social and Political Logic of Adjudication."

¹⁶⁹ This difficulty in cataloguing would have to be resolved at a practical level, and I hope to do so in the future in the article mentioned in note 168.

¹⁷⁰ It is not clear whether Congress may regulate private activities that, if engaged in by the government, would violate due process or equal protection principles. See JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, *CONSTITUTIONAL LAW* § 12.1, at 425 & n.20 (3d ed. 1986) (citing *United States v. Guest*, 383 U.S. 745 (1966)). But that is really beside the point. For example, when Congress prohibits federal government entities from racial discrimination in hiring, it does much more than commit *itself* to "living by" the value of racial equality — it sends a clear message that racial discrimination in employment is morally unacceptable. When courts adjudicate under the antidiscrimination statute, they reinforce and give operational content to the moral lesson.

¹⁷¹ See, e.g., INGO MÜLLER, *HITLER'S JUSTICE* 219–30 (1991) (describing how the legal positivism of German judges during the Nazi regime led them to carry out Hitler's worst policies).

¹⁷² See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–47 (1872).

to spread the values of racial inequality or of a particular religious denomination, the courts would refuse. They may not propagate values inconsistent with the Constitution.

But American courts *do* and *should* — within constitutional bounds — explicate and enforce the public values to which government has committed itself and its citizenry. This function of the courts is a natural consequence of popular sovereignty. After all, on what grounds may courts refuse affirmation of a majoritarian initiative in any particular class of cases? If the legislature enacted a statute that, for example, called on courts to entertain broad-ranging injunctive actions aimed at protecting the environment, what non-constitutional justification could there be for refusing to exercise this jurisdiction?¹⁷³

Indeed, even the courts' judicial review function is not really an exception to the notion that courts generally enforce majoritarian value choices. The primary source of many of these public values (such as racial equality and free labor) is the Constitution itself. The enshrinement of these values in the Thirteenth, Fourteenth, and Fifteenth Amendments is the product of supermajorities of the past. Thus, when courts invalidate present-day majoritarian value choices in the course of vindicating constitutional rights, their acts are not so much *countermajoritarian* as they are *retromajoritarian* — they elevate past supermajorities on broad principles over current simple majorities on specific issues.¹⁷⁴ This is quite consistent with popular sovereignty and with Madisonian democracy.¹⁷⁵

One might ask why the congressional control and public values arguments do not apply to standing and ripeness as well. The answer is simple — they do. Surely if the policy of maintaining legislative control over jurisdiction is a reason to liberate the mootness doctrine from the constraints of Article III, it also favors deconstitutionalizing standing and ripeness. In the context of standing, the congressional control principle manifests itself in Congress's broad power to create

¹⁷³ At least, there would be no justification for the courts to decline the jurisdiction *in gross*. They might refuse to issue injunctive relief in any particular case because of, for example, a failure to show irreparable injury. *But cf.* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 694–722 (1990) (arguing that the traditional notion of irreparable injury rarely affects the outcome of contemporary cases).

¹⁷⁴ This idea is suggested by the work of Bruce Ackerman. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051 (1984) (“[T]he Supreme Court does not act undemocratically when it looks backward to the legal principles enacted into our higher law by successful constitutional movements of the past.”).

¹⁷⁵ For a different, and perhaps mutually exclusive, reason to downplay the importance of the so-called “countermajoritarian difficulty,” see Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74–77 (1989) (arguing that judicial review may be irreconcilable with majority rule but is an integral part of democracy). The phrase “countermajoritarian difficulty” was coined in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1986).

standing by enacting statutory causes of action.¹⁷⁶ Similarly, if the public-values model of adjudication calls for a focus on what makes a case a good candidate for the establishment of precedent to decide questions of standing (rather than a focus on the relatively formalistic criterion of "personal stake"), it should support the softening of all justiciability doctrines, not just mootness. In the context of ripeness doctrine, this focus is already partially reflected in the Court's use of "fitness for judicial review" as a criterion for determining whether to reach the merits.¹⁷⁷

But if these arguments radiate beyond mootness, why stop short of calling for the deconstitutionalization of standing and ripeness? As Part I noted,¹⁷⁸ it would be impossible in one article to project how the standing, mootness, and ripeness doctrines — once returned to a purely prudential status — would play out in real cases.¹⁷⁹ In any event, to date the Court seems to have had its most far-reaching insights concerning deconstitutionalization in the mootness setting.¹⁸⁰ The Court may be inclined to move "one step at a time" in the reform of justiciability law.¹⁸¹ Although I would not advocate such an approach, I do not foresee that it would cause problems.

Suppose, for example, that the Court were to deconstitutionalize mootness but not standing or ripeness. To maintain an action in federal court, a plaintiff would (as at present) be required to demonstrate "injury in fact" and thereby demonstrate a personal stake in the controversy. Once she established standing, however, the plaintiff would face no subsequent constitutional barrier to obtaining an adjudication on the merits. Should she later lose her personal stake in the controversy — whether because of unilateral acts by the defendant, natural events or something else — the federal court would continue to hear the case, provided that the precedential value of adjudicating the merits outweighed the costs.¹⁸² There should be little concern with this state of affairs, even for those who insist upon

¹⁷⁶ See *supra* note 61.

¹⁷⁷ See *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 71, 75 (1974) (ruling that a Fifth Amendment privilege claim was "premature"); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 587 (1972) (finding the record too "skimpy" to support adjudication on the merits). See generally *CHEMERINSKY*, *supra* note 4, § 2.4.3, at 107-09 (explaining how the "fitness" of a case for judicial review relates to the ripeness inquiry as a whole).

¹⁷⁸ See *supra* pp. 609-10.

¹⁷⁹ For example, Professor Currie seems inclined to extend standing doctrine beyond present constitutional parameters, but not ripeness or mootness. See David P. Currie, *Judicial Review Under Federal Pollution Laws*, 62 *IOWA L. REV.* 1221, 1277-78 (1977).

¹⁸⁰ See *Honig v. Doe*, 484 U.S. 305, 329-32 (1988) (Rehnquist, C.J., concurring); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980).

¹⁸¹ Cf. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955) (noting that legislative reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute").

¹⁸² See *infra* Part V.A.

personal stake as a prerequisite to adjudication. The plaintiff *once had* a personal stake, which means that the parties were true adversaries and developed their arguments as fully and as vigorously as possible.¹⁸³ There should be even less concern about the fitness of the record for adjudication. After all, virtually every moot case is ripe.¹⁸⁴ Thus, even those who believe personal stake is indispensable to adjudication should not find the deconstitutionalization of mootness alone objectionable.

IV. REBUTTING THE CASE AGAINST REMOVING ARTICLE III FROM MOOTNESS JURISPRUDENCE

A. Interpretation of "Cases" and "Controversies"

When Chief Justice Rehnquist suggested in *Honig v. Doe*¹⁸⁵ that Article III has nothing to do with mootness,¹⁸⁶ Justice Scalia's reaction was to profess disbelief.¹⁸⁷ Article III extends the judicial power only to "cases" and "controversies." A moot dispute is not a case or controversy; therefore, the federal courts cannot possibly have jurisdiction to decide them. The Supreme Court has endorsed this syllogism on several occasions.¹⁸⁸

Federal court jurisdiction unquestionably extends only to "cases" and "controversies." The language of Article III is too clear to admit of any other interpretation. Whether "cases" and "controversies" exclude moot cases, however, is another matter. Consistent with his textualist philosophy of constitutional interpretation,¹⁸⁹ Justice Scalia in *Honig v. Doe* searched for the plain meaning of these words. He was forced to concede that the words have "virtually no meaning" except by reference to the "traditional, fundamental limitations upon the powers of common-law courts."¹⁹⁰ What Justice Scalia failed to mention was that even resort to history and tradition does not reveal a plain meaning of "cases" and "controversies." In fact, the plain

¹⁸³ Of course, this would not be true if the case were mooted prior to the submission of any briefing of substance.

¹⁸⁴ For a rare exception, see note 269 below.

¹⁸⁵ 484 U.S. 305 (1988).

¹⁸⁶ *Id.* at 330 (Rehnquist, C.J., concurring).

¹⁸⁷ *Id.* at 339 (Scalia, J., dissenting).

¹⁸⁸ See, e.g., *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Williams v. Simons*, 355 U.S. 49, 57-58 (1957) (per curiam) (memorandum of Douglas, J.).

¹⁸⁹ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) ("I am more inclined to adhere closely to the plain meaning of a text [than some other judges]."). See generally George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1307 (1990) (labeling Justice Scalia a textualist).

¹⁹⁰ *Honig*, 484 U.S. at 340 (Scalia, J., dissenting).

meaning of the words is revealed not by an historical analysis, but by a structural analysis of Article III. This structural analysis shows that "cases" and "controversies" merely categorize the various types of jurisdiction granted by Article III — federal question, diversity, United States as a party, and so on. The purpose of grouping these types of jurisdiction is to separate those Congress must vest in the federal courts from those it has discretion not to vest. Although the existence of this plain meaning does not necessarily foreclose other interpretations, it places a heavy burden of persuasion on those who would insist upon another meaning of "cases" and "controversies." Those who argue that the words were meant to exclude what we have come to know as "nonjusticiable" cases have failed to meet this burden. Therefore, the case or controversy requirement poses no obstacle to the deconstitutionalization of mootness.

1. *History and Tradition.* — In his *Honig v. Doe* dissent, Justice Scalia asserted that mootness has "deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition."¹⁹¹ Although Justice Scalia did not cite Justice Frankfurter's opinion in *Coleman v. Miller*,¹⁹² the arguments are almost perfectly parallel:

In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move — however far-reaching the consequences of action within that area — by extending "judicial Power" only to "Cases" and "Controversies." . . . Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies."¹⁹³

Despite his insistence that history and tradition define the contours of "cases" and "controversies," Justice Scalia offered no evidence that English practice in fact conformed to the dispute resolution model he exalted.¹⁹⁴ Apparently, English practice was not at all uniform on

¹⁹¹ *Id.* at 339 (citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

¹⁹² 307 U.S. 433 (1939).

¹⁹³ *Id.* at 460 (opinion of Frankfurter, J.). I assume that Justice Frankfurter surmised the relevance of English practice at Westminster by analogy to the Court's treatment of the right to jury trial "at common law" under the Seventh Amendment. The courts decided early that the "common law" referred to in the Seventh Amendment was that of England in 1791 (the date of the amendment's ratification), and not the common law of the several states. See FRIEDENTHAL, KANE & MILLER, *supra* note 98, § 11.4, at 483.

¹⁹⁴ Justice Frankfurter's *Coleman v. Miller* opinion cited an early English analogue to the political question doctrine, see 307 U.S. at 433, 460 n.1, but nothing analogous to standing, mootness, or ripeness.

the point. Articles by Raoul Berger and Professor Louis Jaffe demonstrate that English practice permitted "strangers" to bring actions vindicating the public interest in the enforcement of public obligations.¹⁹⁵ Thus, history and tradition do not conclusively support the interpretation of "cases" and "controversies" as imposing requirements of justiciability.

Berger, an adamant "original intent" theorist,¹⁹⁶ found that "attacks by strangers on action in excess of jurisdiction were a traditional concern of the courts in Westminster."¹⁹⁷ In the late sixteenth century, judges of the King's Bench regularly issued writs of prohibition to stop the ecclesiastical courts from exceeding their jurisdiction. When the clergy complained to the king, the judges explained the frequency of the practice by noting that prohibition could issue at the behest of "any stranger."¹⁹⁸ Berger concluded from this practice that, "at the time of the Revolution, the 'courts in Westminster' afforded to a stranger a means of attack on jurisdictional excesses without requiring a showing of injury to his personal interest."¹⁹⁹

Professor Jaffe also found that the prerogative writs "were used primarily to control authorities below the level of the central government."²⁰⁰ The objective was to maintain some institutional control over these far-flung local authorities, whether their excesses caused general or individual injuries.²⁰¹ The rule permitting strangers to apply for such writs achieved this objective.²⁰² Jaffe concluded that

¹⁹⁵ See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819-27 (1969); Jaffe, *supra* note 138, at 1269-75. Each of these articles appears to have been at least partially in response to Justice Frankfurter's views on justiciability. See Berger, *supra*, at 816 & n.5; Jaffe, *supra* note 138, at 1267-69.

¹⁹⁶ See, e.g., RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 18-19 (1987). For a critique of Berger's "original intent" jurisprudence, see H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987).

¹⁹⁷ Berger, *supra* note 195, at 819.

¹⁹⁸ *Id.* Prohibition was not the only prerogative writ by which a stranger could challenge the actions of judicial, quasi-judicial, or administrative functionaries. The writ of certiorari would issue to review "proceedings of all jurisdictions erected by Act of Parliament . . . to the end that this court may see that they keep themselves within their jurisdiction." *Id.* at 820 (quoting *Rex v. Inhabitants in Glamorganshire*, 91 Eng. Rep. 1287, 1288 (K.B. 1702)). The functionaries subject to writs of certiorari were generally justices of the peace, who in addition to their judicial duties acted as local county administrators. They supervised road construction and maintenance, licensed alehouses, set wage-scales for laborers and apprentices, and administered the Poor Laws. See *id.* at 821. In one case, for example, certiorari was held a proper vehicle to review rate-setting for the repair of a county bridge. See *id.* at 820 n.28.

¹⁹⁹ *Id.* at 819-20.

²⁰⁰ Jaffe, *supra* note 138, at 1269.

²⁰¹ See *id.* at 1270.

²⁰² The rationale was that a usurpation of jurisdiction constituted an encroachment on royal prerogative, and therefore "it made little difference who raised the question." *Id.* at 1274. Unlike prerogative writ applications made by parties to the underlying action, however, a stranger was subject to the court's discretion whether to proceed on the merits. See *id.*

"the public action — an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations — has long been a feature of our English and American law."²⁰³

Do Berger's and Jaffe's research show that the "common-law understanding" in 1789 England in fact was quite the opposite of what Justices Frankfurter and Scalia supposed?²⁰⁴ In view of the prerogative writ practice, *must* "cases" and "controversies" be held to include litigation in which the plaintiff had no personal stake? I would not go so far. These practices establish that the common law was familiar with the concept of the public action to vindicate public obligations.²⁰⁵ The idea of allowing private individuals who have suffered no peculiar harm to maintain actions against ultra vires official acts would not have startled eighteenth-century English lawyers in the least. Berger's and Jaffe's historical works thus disprove Justice Scalia's assertion that the common-law understanding dispositively favors reading "cases" and "controversies" to impose a personal stake requirement. But these works do not prove the opposite proposition, either. Like so much history, they really say quite little about how present arrangements should be made.²⁰⁶

Justice Scalia, however, does not rely exclusively on the common-law understanding to find the plain meaning of "cases" and "controversies." He also claims that the debates at the constitutional convention provide evidence that "cases" and "controversies" were meant to exclude traditionally nonjusticiable cases such as cases that are moot or unripe and cases in which a party lacks standing. The precursor to Article III defined federal question jurisdiction as including only cases "arising under laws passed by the Legislature of the United States."²⁰⁷ William Samuel Johnson of Connecticut moved to amend the federal question jurisdiction to include cases arising under

²⁰³ Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961).

²⁰⁴ Historical English practice appears to have been quite familiar with advisory opinions. In 1575, for example, the government summoned judges to court to advise as to the execution of penal statutes. See 4 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 75 n.4 (2d ed. 1937). Judges also gave instructions regarding the administration of the Poor Laws. See *id.* at 76 n.3. In 1601, the government called on the Chief Justice of the Queen's Bench and the Judge of Admiralty to enact rules for the trial of cases of assurance. See *id.* at 69 n.1; see also E.C.S. Wade, *Consultation of the Judiciary by the Executive*, 46 L.Q. REV. 169, 181 (1930) (describing the same practices). Thus, the advisory opinions practice seems fairly well established as of the early seventeenth century. Later in that century, Lord Coke remonstrated against governmental requests for advisory opinions, but apparently only because the Crown was then using the device to delay or otherwise subvert judicial decisions likely to be unfavorable to the government. See *id.* at 181-82.

²⁰⁵ See Jaffe, *supra* note 138, at 1269-75.

²⁰⁶ See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 691 (1987) ("History never obviates the necessity of choice.").

²⁰⁷ 2 FARRAND, *supra* note 54, at 186.

the Constitution as well. In response to this motion, James Madison wondered aloud 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.²⁰⁸

The convention then passed Johnson's motion unanimously. Madison, in his report on the convention debates, explained that Johnson's amendment passed because "it [was] generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature."²⁰⁹

Justice Scalia seeks to parlay the passage of Johnson's amendment into conclusive evidence that "cases" or "controversies" exclude non-justiciable cases.²¹⁰ In reality, however, the evidence is anything but conclusive. The affirmative vote on Johnson's amendment does not show that the federal courts were to have jurisdiction only over cases of a "judiciary nature." An affirmative vote on any parliamentary proposal can never be evidence that the parliamentary body *agreed* with an objection to the proposal; the most that can be said is that it might not constitute evidence that the body *disagreed* with any particular objection. All Justice Scalia has to support his position is Madison's opinion that the structure of Article III confers jurisdiction only with respect to cases of a "judiciary nature." Although Madison's opinion is not to be taken lightly, it is not conclusive evidence.

Even if there were conclusive evidence that Article III was intended to limit the federal courts to cases of a "judiciary nature," what evidence is there that this limitation excludes moot cases? Madison might have meant merely to distinguish cases of a "judiciary nature" from executive or legislative requests for judicial opinions based on hypothetical or assumed facts. In 1793, Secretary of State Thomas Jefferson wrote a letter to the Supreme Court Justices asking for their opinion regarding a series of hypothetical questions about American relations with France.²¹¹ Moreover, there had already been four distinct attempts during the convention to create a "council of revision" pursuant to which federal judges would have participated in the veto of unwise or unconstitutional legislation before it took

²⁰⁸ *Id.* at 430.

²⁰⁹ *Id.*

²¹⁰ See *Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting).

²¹¹ See Letter from Thomas Jefferson to Chief Justice John Jay and Associate Justices (July 18, 1793), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 486, 486-87 (Henry P. Johnston ed., 1891) [hereinafter CORRESPONDENCE OF JOHN JAY]. The Justices declined to answer. See Letter from Chief Justice Jay to President Washington (Aug. 8, 1793), in 3 *id.* at 488-89.

effect.²¹² Madison might well have meant only that Article III should not be construed to authorize hypothetical opinions or any kind of judicial participation in pre-enactment review of legislation. This seems far more plausible than the possibility that Madison was alluding to justiciability, a concept whose earliest manifestations came in the mid-nineteenth century.²¹³ Thus, the historical evidence that the words "cases" and "controversies" were meant to exclude moot cases is distinctly underwhelming.

2. *Structure of Article III.* — The structure of the first paragraph of Article III, Section 2, cannot be overemphasized. The provision consists of seriatim affirmative grants of jurisdiction, which by their specificity imply that no other jurisdiction is granted. In other words, the limited nature of the grants inheres in the provision's structure. No additional textual restrictions on jurisdiction are necessary to establish the limited nature of the grants. Congress is authorized to vest the enumerated nine categories of jurisdiction, and no others, in the federal courts.

Equally important, but perhaps less obvious, is the two-tiered structure of this paragraph. Professor Akhil Amar has attributed great significance to the provision's reference to three categories of "cases" and six categories of "controversies."²¹⁴ Professor Amar argues that there are three textual reasons for distinguishing the first three categories from the remaining six. The most obvious, of course, is that the first three are labelled "cases" and the last six "controversies." Canons of legal interpretation require an attempt to find some significance in this difference.

A second reason is that the first three categories of jurisdiction are roughly based on the *subject matter* of the litigation: federal question, diplomatic relations, and admiralty. The remaining six are roughly based on the *parties* involved: the United States, the several states, states and citizens of different states, citizens of different states, citizens claiming lands under grants of different states, and states or their citizens and foreign states or their citizens. The groupings are not airtight. Arguably, the diplomats clause was meant to cover only cases to which diplomats were parties and not cases merely having some indirect effect on diplomats.²¹⁵ This potential loose end is un-

²¹² See HART & WECHSLER (2d ed.), *supra* note 134, at 7 & nn.26–29.

²¹³ Justice Scalia has traced justiciability to *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893). See *Honig*, 484 U.S. at 339–40 (Scalia, J., dissenting). For other examples of nineteenth century cases that address the issue of justiciability, see *Chamberlain v. Cleveland*, 66 U.S. (1 Black) 419, 425–26, (1862); and *Lord v. Veazie*, 49 U.S. (8 How.) 251, 254–56 (1850).

²¹⁴ See Amar, *supra* note 55, at 240–46.

²¹⁵ At least, it must be admitted that the text is ambiguous on this point. Amar has responded to this concern by citing Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), in which Marshall referred to the ambassadorial jurisdiction as being based on the character of the cause and not the character of the parties,

important. That the grants seem to be divided into two logical groups by their content is important.

The third reason to distinguish the two groups is the word "all." Article III extends the judicial power to *all* federal question cases, *all* diplomatic cases, and *all* admiralty cases. The word "all" is not used in conjunction with any of the remaining six categories of jurisdiction.

Professor Amar has argued that Article III requires Congress to vest jurisdiction in some federal court in the first three categories of cases but gives Congress discretion to vest or withhold jurisdiction over cases falling within the last six categories.²¹⁶ The combined use of "all" and "cases" for the first three categories, contrasted with "controversies" alone for the other six, suggests that the Framers intended the first group to be treated differently than the second. A sensible inference is that this difference involves mandatory vesting versus discretionary vesting.

Let us now pick up where Professor Amar has left off. If his most basic argument — that there is a significant difference between the first three categories and the last six²¹⁷ — is correct, we have discerned one plain meaning of the terms "cases" and "controversies."²¹⁸ "Cases"

see id. at 855. *See* Akhil R. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 491 n.216 (1989). It is difficult to assess how much weight should be given to Chief Justice Marshall's dictum. As evidence of the Framers' original intent, its value is diminished by the fact that it was written well after ratification. As an exercise in textual exegesis, it fails to explain why the text should be read that way.

²¹⁶ *See* Amar, *supra* note 55, at 240.

²¹⁷ Amar's theory may be slightly overdrawn. Congress enacted no enduring general federal question statute until 1875 (it first enacted such a statute in 1801, but the statute was almost immediately repealed). *See* FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 25 & n.69, 28 & n.79, 65 (1928). Yet under section 25 of the Judiciary Act of 1789, 1 Stat. 73, 85–87, the Supreme Court's appellate jurisdiction over state court judgments covered only cases in which the federal claim was denied, and therefore that provision left no federal court with jurisdiction over federal question cases brought in state court and decided in favor of the federal claimant. *See* HART & WECHSLER (3d ed.), *supra* note 129, at 386 n.41.

It is possible, of course, that the first Congress was mistaken about the mandatory nature of the entire federal question jurisdiction. Perhaps the better view is that the two tiers of jurisdictional categories simply create differential *presumptions* about whether Congress should vest the jurisdiction in the federal courts. For example, there is a strong presumption in favor of Congress's vesting federal question jurisdiction in the federal courts, and the burden is on Congress to show a compelling justification for its failure to do so with respect to any part of the jurisdiction. In contrast, the presumption in favor of vesting the diversity jurisdiction in the federal courts is quite weak; hence, Congress need demonstrate very little justification for failing to vest any part of diversity jurisdiction in the federal courts. In any event, the possibility that Amar's theory may be overdrawn does not vitiate my point about cases and controversies.

²¹⁸ Amar's theory has attracted both praise, *see, e.g.*, HART & WECHSLER (3d ed.), *supra* note 129, at 386, and derision, *see, e.g.*, Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1635–47 (1990). Amar responds

and "controversies" are two distinct groups of litigation, and the Constitution requires that some federal court be empowered to hear cases belonging to the first group, but not the second. What justifies assigning a second meaning to the terms — one that relates to the notion of justiciability? If we accept the proposition that the "cases" and "controversies" language places limits of justiciability on the adjudication of disputes in federal court, we must accept that the "cases" and "controversies" language has two distinct operations, somewhat in tension with one another, for we would be construing the source of an affirmative grant of power as a restriction on the very institution being empowered.²¹⁹ The burden must be on those who would give the words this second meaning to demonstrate how their interpretation is supported by Article III's text, history, and structure. To date, they have failed.

B. The Prohibition Against Advisory Opinions

Another objection to allowing federal courts to decide moot cases is that to do so would violate the prohibition against advisory opinions.²²⁰ This objection defines an advisory opinion as a judicial de-

to his detractors in Akhil R. Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990).

Professor William Fletcher has recently suggested a different meaning of the terms "case" and "controversy." According to Fletcher, "case" denotes both civil and criminal jurisdiction, and "controversy" denotes only civil. See William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 265-67 (1990) (citing 1 S. TUCKER, BLACKSTONE'S COMMENTARIES app. note E, at 420-21 (Philadelphia 1803)); William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 131, 133 (1990). It is unclear why the Framers would have thought it necessary to stress that the judicial power was not intended to cover criminal actions "between two or more States," "between Citizens of different States," or "between Citizens of the same State claiming Lands under the Grants of different States." Still, even if Fletcher is correct that the words "case" and "controversy" mean "civil-plus-criminal" and "civil only," the burden is on those who would read those terms as subsuming what we now call the justiciability doctrines to prove this additional meaning.

²¹⁹ This construction is not impossible, however. For example, the affirmative grant of congressional power to "regulate commerce" has also been construed to operate as a prohibition on certain state regulatory power in the absence of congressional action. When Congress regulates a particular area of commerce, contrary state regulations are invalidated under the Supremacy Clause. When Congress is silent, and when the courts interpret that silence as the manifestation of a decision to leave the area unregulated, state regulations must be invalidated under the "dormant commerce clause" doctrine. See NOWAK, ROTUNDA & YOUNG, *supra* note 170, § 8.1, at 260-62. But this analogy is imperfect, because in the case of the Commerce Clause, the Court is construing an affirmative grant of power to one institution as a restriction on a *different*, rival institution (the states), not as a restriction on the institution being empowered.

²²⁰ Little has been written about the problem of advisory opinions by federal courts. The germinal work is Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002

cision incapable of changing anything in the real world.²²¹ Because decisions in moot cases change nothing in the real world, they are advisory opinions and therefore are precluded from federal court review by Article III. This argument is superficially attractive, but it misunderstands the case authority.

The rebuttal to the "advisory opinions" objection can be summarized as follows. The Supreme Court has used the phrase "advisory opinions" in many different ways. In one set of cases, the Court has used the term to describe the problem of non-finality — that is, the vulnerability of a federal court judgment to revision by a co-equal branch of government.²²² In a second set of cases,²²³ the Court has used the term as a slogan-in-chief to cover a disparate group of prudential maxims whose philosophical premise is judicial restraint. In other words, much like the current doctrines of standing, mootness, and ripeness, the advisory opinion doctrine has a constitutionally-mandated core and a large prudential curtilage. Deciding the merits of a moot case does not invade the doctrine's core; it falls within the doctrine's prudential aspect. Thus, the advisory opinions doctrine poses no barrier to the deconstitutionalization of mootness.

Over the years, the Court has been extremely sloppy in its use of the phrase "advisory opinions." Perhaps no other term of art has acquired so many different meanings. The Supreme Court has characterized advisory opinions to include:

* Any judgment subject to review by a co-equal branch of government.²²⁴

* Advice to a co-equal branch of government prior to the other branch's contemplated action (that is, pre-enactment review).²²⁵

(1924), which spawned some debate, see E.F. Albertsworth, *Advisory Functions in Federal Supreme Court*, 23 GEO. L.J. 643 (1935); George N. Stevens, *Advisory Opinions — Present Status and an Evaluation*, 34 WASH. L. REV. 1 (1959). The best contemporary treatment is 13 WRIGHT, MILLER & COOPER, *supra* note 19, § 3529.1, at 293-308.

²²¹ See *CHEMERINSKY*, *supra* note 4, § 2.2, at 45 ("[I]n order for a case to be justiciable and not an advisory opinion, there must be substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect.").

²²² See *infra* pp. 645-47.

²²³ See *infra* pp. 647-51. It is not really accurate to call this a "set" of cases at all; it is actually a disorganized cluster of sets of usages.

²²⁴ See *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948); *Schneiderman v. United States*, 320 U.S. 118, 168 (1943) (Rutledge, J., concurring); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52-53 (1851); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409-10 & n.2 (1792).

²²⁵ See 3 CORRESPONDENCE OF JOHN JAY, *supra* note 211, at 486-89 (1891) (describing the Supreme Court's refusal to answer legal questions propounded by Secretary of State Thomas Jefferson); see also *Coleman v. Miller*, 307 U.S. 433, 459-60 (1939) (Black, J., concurring) (stating that, because Congress enjoys "exclusive power over the [constitutional] amending process," judicial decision would constitute an advisory opinion).

* Supreme Court review of any state judgment for which there is or may be an adequate and independent state ground of decision.²²⁶

* Any opinion, or portion thereof, not truly necessary to the disposition of the case at bar (that is, dicta).²²⁷

* Any decision on the merits of a case that is moot²²⁸ or unripe²²⁹ or in which one of the parties lacks standing.²³⁰

Although deviant statements are scattered throughout the years,²³¹ the weight of the authority establishes that only the first two of these usages denote a constitutional bar. The other three usages are a function of judicial discretion.

1. Post-Judgment Review by Another Branch. — The classic example of the use of the term "advisory opinion" to refer to post-judgment review by another branch is *Hayburn's Case*.²³² In 1792, Congress enacted a statute designed to provide disabled Revolutionary War veterans with pensions.²³³ Under the procedure prescribed by the statute, disabled veterans were to submit an application to the federal circuit court.²³⁴ After examining the degree and nature of the disability, the circuit court was to formulate an opinion about whether the applicant should be placed on the pension list and if so, at what proportion of his monthly pay.²³⁵ The court was then required to "transmit the result of [its] inquiry"²³⁶ to the Secretary of War, who was empowered to reject the court's decision if he suspected "imposition or mistake."²³⁷

²²⁶ See *Harris v. Reed*, 489 U.S. 255, 277 (1989); *Mills v. Rogers*, 457 U.S. 291, 305 (1982); *Fay v. Noia*, 372 U.S. 391, 429-30 (1963); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

²²⁷ See *Grove City College v. Bell*, 465 U.S. 555, 579 (1984) (Stevens, J., concurring); *Shaffer v. Heitner*, 433 U.S. 186, 220 (1977) (Brennan, J., concurring in part and dissenting in part); *Evans v. Newton*, 382 U.S. 296, 313 (1966) (Black, J., dissenting); *Culombe v. Connecticut*, 367 U.S. 568, 636 (1961) (Warren, C.J., concurring).

²²⁸ See cases cited *infra* note 271.

²²⁹ See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947).

²³⁰ See *Boston Firefighters Union, Local 718 v. NAACP*, 468 U.S. 1206, 1209-10 (1984) (Blackmun, J., dissenting); *City of Los Angeles v. Lyons*, 461 U.S. 95, 129 & n.20 (1983) (Marshall, J., dissenting).

²³¹ See, e.g., *Boston Firefighters Union*, 468 U.S. at 1209-10 (Blackmun, J., dissenting) (arguing that ruling in a moot case would amount to an advisory opinion, which would be barred by Article III); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 127 (1974) (Stewart, J., dissenting) (arguing that the Article III bar to advisory opinions precludes the Court from deciding issues that do not directly affect the rights of the parties).

²³² 2 U.S. (2 Dall.) 409 (1792).

²³³ Act of Mar. 23, 1792, ch. XI, § 1 Stat. 243.

²³⁴ Recall that the circuit courts were then trial courts consisting of two Supreme Court justices and one district court judge. See FRANKFURTER & LANDIS, *supra* note 217, at 11 & n.26.

²³⁵ See Act of Mar. 23, 1792, ch. XI, § 2, 1 Stat. at 244.

²³⁶ *Id.*

²³⁷ *Id.* § 4, 1 Stat. at 244.

The Supreme Court never did pass on the constitutionality of the procedure; Congress amended the statute while the case was under advisement.²³⁸ However, prior to the amendment, the circuit courts had uniformly found the procedure unconstitutional because it violated the constitutional imperative of an independent judiciary in a national government of separated powers.²³⁹

In *United States v. Ferreira*,²⁴⁰ the Supreme Court took the same view as the circuit courts had taken in *Hayburn's Case*. *Ferreira* concerned a federal statute that empowered a federal judge to assess certain war damage claims against the United States but subjected the judge's determinations to review by the Secretary of the Treasury, who had ultimate authority for the settlement of such claims.²⁴¹ Upon appeal from one such district court award, the Supreme Court dismissed "for want of jurisdiction."²⁴² In the Court's view, "the power [accorded the judge] was not judicial within the grant of the Constitution."²⁴³ Because the award was subject to revision by an officer of the executive branch, the Court concluded, the district judge must have been acting as a commissioner rather than as a judicial officer, and therefore there was no judgment from which to appeal.²⁴⁴

Hayburn's Case and *Ferreira*, along with *Chicago & Southern Air Lines v. Waterman S.S. Corp.*,²⁴⁵ clearly establish that the federal

²³⁸ See *Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10.

²³⁹ The Circuit Court for the District of New York stated that "neither the secretary at war, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." *Id.* at 410 n.2 (the court consisted of Chief Justice Jay, Justice Cushing, and District Judge Duane). The Circuit Court for the District of Pennsylvania, noting that its decision would have been subject to revision and control by an officer in the executive branch, stated that this was "radically inconsistent with the independence of that judicial power which is vested in the courts." *Id.* at 411 n.2 (the court consisted of Justices Wilson and Blair and District Judge Peters). The Circuit Court for the District of North Carolina — which had no application for pension benefits before it — opined that the statute "subjects the decision of the court to a mode of revision which we consider to be unwarranted by the constitution." *Id.* at 412 n.2 (the court consisted of Justice Iredell and District Judge Sitgreaves).

²⁴⁰ 54 U.S. (13 How.) 40 (1851).

²⁴¹ See *id.* at 46-47.

²⁴² *Id.* at 52.

²⁴³ *Id.* at 51.

²⁴⁴ See *id.* at 47.

²⁴⁵ 333 U.S. 103 (1948). In this case, the issue was whether the federal courts could review orders of the Civil Aeronautics Board granting or denying air routes for a foreign air carrier or granting or denying foreign air routes for a citizen carrier. The statute provided that these orders were to be submitted to the President and were unconditionally subject to the President's approval. The Court of Appeals had held that judicial review of the orders would not offend the President's discretion as long as the President had an opportunity to review the court's final judgment.

The Supreme Court held that there could be no judicial review of the board orders. The

courts are constitutionally and jurisdictionally prohibited from issuing one form of advisory opinion — a judgment open to direct revision by Congress or the President.²⁴⁶

2. *Pre-Enactment Review*. — The watershed decision prohibiting this type of advisory opinion was the Supreme Court's refusal in 1793 to answer a series of questions about international law. President Washington had asked the questions to help decide whether to extend certain porting privileges to French vessels. On its face, the Court's written response declining to answer appears discretionary. The Court stated that separation of powers considerations "afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to."²⁴⁷ However, it is now clear that the federal judiciary is constitutionally prohibited from dispensing the kind of advice that President Washington requested. One might say that the courts merely have a "practice" of refusing such advice, but, as Justice Stevens has stated, it is a "*constitutional practice*."²⁴⁸ A leading treatise asserts that "this precedent has come to establish a firm principle . . . [which] has become so firmly entrenched, indeed, that few significant problems remain to raise genuine questions as to its scope or application."²⁴⁹ No longer can it be said that the Supreme Court refrains from giving such advice on the basis of prudential concerns.

3. *Adequate and Independent State Grounds*. — The Supreme Court has stated that when a state court judgment is based on both federal and state grounds, the Court may not review it if the state

Court rejected the idea that allowing the President to review final judgments was a constitutionally permissible method of preserving presidential prerogative in the face of judicial review:

Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.

To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form. . . . This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.

Id. at 113-14.

²⁴⁶ Professor Chemerinsky cites *Hayburn's Case* to support the proposition that an advisory opinion is any decision without real-world effect. See CHEMERINSKY, *supra* note 4, § 2.2, at 45. In my view, the holding of the case does not warrant so broad an extrapolation. The judges concerned themselves only with lack of worldly effect brought on by legislative revision of the judgment.

²⁴⁷ Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 CORRESPONDENCE OF JOHN JAY, *supra* note 211, at 488.

²⁴⁸ *United States v. Sharpe*, 470 U.S. 675, 726 n.17 (1985) (Stevens, J., dissenting) (emphasis added).

²⁴⁹ 13 WRIGHT, MILLER & COOPER, *supra* note 19, § 3529.1, at 296.

ground "is independent of the federal ground and adequate to support the judgment."²⁵⁰ Some of the Court's statements suggest that this rule is constitutionally compelled. For example, in *Michigan v. Long*,²⁵¹ the Court stated that the rule "is based, in part, on 'the limitations of our own jurisdiction.'"²⁵² The weight of the commentary, however, has demonstrated that the rule is actually a prudential rule of self-restraint.²⁵³ Professor Matasar has shown that the adequate and independent state grounds doctrine has nothing to do with the constitutional core of the advisory opinions doctrine, which is designed to ensure proper judicial process and resolve the problem of non-finality exemplified by *Hayburn's Case*.²⁵⁴ Indeed, a leading treatise argues that it is circular to reason that the review of adequate and independent state court judgments produces advisory opinions.²⁵⁵ The advisory opinion rationale for the adequate and independent state grounds doctrine is itself entirely premised on other reasons for avoiding review of such judgments, such as judicial federalism. Therefore, using the advisory opinions rationale to explain this rule is "essentially useless."²⁵⁶

4. *Dicta*. — It is clear that dicta — whether or not courts deem it to constitute an "advisory opinion" — run afoul of no constitutional or jurisdictional barrier. This can be gleaned from Justice Brandeis's famous concurring opinion in *Ashwander v. Tennessee Valley Authority*.²⁵⁷ In that classic exposition on judicial restraint, Justice Brandeis suggested that the advisory opinions doctrine is divided into constitutional and prudential strands. First, citing *Hayburn's Case* and *Ferreira*,²⁵⁸ he stated that federal courts "have no power to give advisory opinions."²⁵⁹ Dismissal, he observed, is required in such cases for constitutional and jurisdictional reasons.²⁶⁰ Next, he considered categories of cases "confessedly" within the jurisdiction of the federal courts,²⁶¹ but on the merits of which they should nonetheless

²⁵⁰ *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

²⁵¹ 463 U.S. 1032 (1983).

²⁵² *Id.* at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)).

²⁵³ See, e.g., CHEMERINSKY, *supra* note 4, § 10.5.1, at 535 ("The precise legal basis for the doctrine is uncertain, but most commentators regard it not as constitutionally required, but instead as a prudential rule of judicial self-restraint.").

²⁵⁴ See Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1301-10 (1986).

²⁵⁵ See 16 CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & EUGENE GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* § 4021, at 688-89 (1977).

²⁵⁶ 13 WRIGHT, MILLER & COOPER, *supra* note 19, § 3529.1, at 298.

²⁵⁷ 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).

²⁵⁸ See *id.* at 346 n.4.

²⁵⁹ *Id.* at 345-46 (emphasis added).

²⁶⁰ See *id.*

²⁶¹ *Id.* at 346.

avoid constitutional adjudication. One manifestation of such judicial restraint, he noted, is that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'"²⁶² — in other words, it should not indulge in constitutional dicta. Of course, the Court often does just that, and the fact that one might label such indulgences as advisory opinions does not mean the Court is acting unconstitutionally.

Another opinion demonstrating that the Court is not constitutionally prohibited from engaging in dicta is Chief Justice Warren's concurrence in *Culombe v. Connecticut*.²⁶³ The discretionary flavor of the decision concerning what issues to reach is unmistakable from his discussion:

It has not been the custom of the Court, in deciding the cases which come before it, to write lengthy and abstract dissertations upon questions which are neither presented by the record nor necessary to a proper disposition of the issues raised. The opinion which announces the judgment of the Court in the instant case has departed from this custom and is in the nature of an advisory opinion, for it attempts to resolve with finality many difficult problems which are at best only tangentially involved here. . . . In my view, the reasons which have compelled the Court to develop the law on a case-by-case approach, to declare legal principles only in the context of specific factual situations, and to avoid expounding more than is necessary for the decision of a given case are persuasive. . . . I see no reason for making an exception in this case, and I am therefore unable to join the opinion which announces the judgment of the Court.²⁶⁴

Although Chief Justice Warren does not explicitly refer to the question whether dicta are constitutionally prohibited, his phrasings suggest that he regarded dicta as a problem of judicial judgment and craftsmanship and not as a problem of legality.

I cite neither Justice Brandeis's nor Chief Justice Warren's concurrences to extol the virtues of indulging in dicta. It is often unwise for an appellate court to discuss issues not implicated by the facts of the case at bar, for it is difficult to test the operational dynamics of a legal rule being assembled in a factual vacuum. However, whether to engage in dicta is a matter for the considered discretion of a court, and calling it an "advisory opinion" changes that not one whit.

5. *Mootness, Ripeness, and Standing.* — Several Supreme Court cases state that adjudication on the merits of a moot or unripe case or a case in which the plaintiff lacks standing produces an advisory

²⁶² *Id.* (quoting *Liverpool, N.Y. & Philadelphia Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)).

²⁶³ 367 U.S. 568 (1961).

²⁶⁴ *Id.* at 635-36 (Warren, C.J., concurring).

opinion.²⁶⁵ But this statement poses no threat to my proposal; "advisory opinions" of this sort simply fall outside the constitutional core of the doctrine exemplified by *Hayburn's Case* and the correspondence of the Justices with President Washington's administration.²⁶⁶ The issuance of these types of "advisory opinions" is squarely within the discretion of a federal court.

By way of preface, it should be said that the Court's use of the phrase "advisory opinions" in the justiciability context is ill-advised, just as it is in the context of dicta or of the independent and adequate state grounds doctrine.²⁶⁷ These usages have bastardized an otherwise useful term of art. The federal courts need some phrase to denote cases that fall beyond the grant of judicial power in Article III because of vulnerability to revision by another branch of government. The term "advisory opinions" seems apt because courts are, in some sense, making hortatory recommendations to the other branches. Today, however, we are liable to hear the cry "advisory opinion!" bandied about by any dissenting judge who thinks the majority should not have reached the merits of a particular claim. The phrase "advisory opinion" has thus been reduced to a slogan comparable to the charge that a particular judge is a "judicial activist." No one knows exactly what the slogan means, but it sets tongues clucking in disapproval.

Whether or not the Justices continue to insist upon characterizing decisions in moot cases as advisory opinions, the advisory opinion doctrine is no barrier to the deconstitutionalization of mootness. Judgment in a moot case is not subject to revision by any other branch of government. Nor does it constitute pre-enactment review of any statute or executive order. A moot case lies at the opposite end of the temporal continuum from an unripe case. The extreme unripeness of a case may push it into the constitutional core of the advisory opinions prohibition — if, for example, the plaintiff wants to engage in conduct that has not yet been made criminal. For the Court to grant an injunction against the enforcement of the anticipated statute would amount to pre-enactment review.²⁶⁸ Except in the rare case that is simultaneously unripe and moot,²⁶⁹ a moot case will never require a court to engage in adjudication that would offend the core constitutional concepts of the advisory opinion doctrine.

Doubtless some will point to Supreme Court opinions characterizing decisions in moot cases as advisory opinions and stating that the

²⁶⁵ See cases cited *supra* notes 229, 230 and *infra* note 271.

²⁶⁶ See *supra* p. 640.

²⁶⁷ Cf. 13 WRIGHT, MILLER & COOPER, *supra* note 19, § 3529.1, at 296 (characterizing use of the phrase "advisory opinions" as a "[t]rivial usage[]" in the justiciability context).

²⁶⁸ This is the sort of wrinkle that causes me to refrain from calling for the deconstitutionalization of ripeness and standing without a full analysis of those doctrines.

²⁶⁹ An example of such a case is a plaintiff who wants to engage in activity she believes will soon be criminalized but dies while the litigation is pending.

court has no jurisdiction to proceed in moot cases. A few such opinions exist,²⁷⁰ although many more imply that the mootness and advisory opinions doctrines are distinct (but related) ideas.²⁷¹ The most satisfying way to view the present doctrinal relationship of mootness, advisory opinions, and Article III is as follows: decisions in moot cases are currently prohibited because they are said to exceed the jurisdictional grants of Article III; additionally, decisions in moot cases implicate the prudential component of the advisory opinions doctrine, but they do not implicate the doctrine's constitutional core. Thus, the constitutional dimension to the prohibition against deciding moot cases stems directly from Article III and not from an analogy to advisory opinions. If the Court were to repudiate its position that the mootness doctrine is constitutionally compelled, the analogy to advisory opinions would pose no independent constitutional obstacle to deciding moot cases on the merits.

C. The Due Process Defense of the Justiciability Doctrines

Professor Lea Brilmayer has argued that the "case or controversy" requirement should be seen as containing a due process element.²⁷² Her argument is based on an analogy to three of the prerequisites for class certification under Federal Rule of Civil Procedure 23.²⁷³ One is that the class representative must be a member of the class she seeks to represent. A second is that the claims of the representative must be typical of class members' claims. The third is that the named plaintiff will adequately represent and protect the interests of the absent class members. These prerequisites are ultimately grounded in due process considerations because class certification may lead to a judgment that will bind absent class members and deny them their day in court.²⁷⁴ In the justiciability context, the personal stake re-

²⁷⁰ See, e.g., *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975).

²⁷¹ See, e.g., *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam); *Benton v. Maryland*, 395 U.S. 784, 788 (1969); *St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (per curiam).

²⁷² See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306-10 (1979) [hereinafter Brilmayer, *Perspectives*]. This article elaborates on the "due process" argument introduced in R.L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U. L. REV. 807, 808 (1977) [hereinafter Brilmayer, *Limits*]. Professor Brilmayer's argument should not be mistaken for one based on due process per se. Rather, she argues that some of the most important policies underlying Article III are functionally similar to due process principles.

²⁷³ For a list of the prerequisites to class certification in federal court, see FRIEDENTHAL, KANE & MILLER, *supra* note 98, § 16.2, at 726.

²⁷⁴ The adequacy of representation requirement "obviously has a due process dimension to it." *Id.* at 730. The other two requirements, in turn, also are aimed at assuring adequacy of representation. See *id.* at 727 ("Class membership offers some assurance that the representative will adequately protect the interests of the absent class members."); *id.* at 729 (characterizing

quirement is said to assure that the litigant will adequately represent the interests of nonlitigants who will be bound by the stare decisis effect of the judgment.

A reflexive rebuttal to the due process objection would be to stress the difference in the degree to which "absent class members" would be bound. In the class action context, they may be bound by res judicata, which absolutely precludes subsequent action. In the justiciability context, however, nonparties merely face the obstacle of stare decisis, which will not apply if they can distinguish themselves from the prior case, and which will not be absolute even if it does apply.²⁷⁵ I do not want to make too much of this imperfection in the analogy.²⁷⁶ The undesirability of having an adverse precedent on the books is unquestionable.

The real problem with the due process objection is its assumption that the absence of a personal stake makes ideological ("non-Hohfeldian"²⁷⁷) plaintiffs inadequate representatives of the interests at stake. Professor Brilmayer assumes that the merely ideological plaintiff is generally less able to provide adequate representation than the truly interested plaintiff because the ideological plaintiff has no concrete disincentive to make an unnecessarily ambitious and risky argument in pursuit of law reform goals.²⁷⁸ In contrast, a plaintiff with a true stake in the dispute will make only as ambitious an argument as is necessary to win the case — no more and no less. I agree that plaintiffs who have a personal stake in the outcome will do whatever maximizes their chances of winning, but the supposition that ideological plaintiffs will provide less adequate representation for similarly situated persons strikes me as overstated at best and irrational at worst.

the typicality requirement as "practically indistinguishable" from the adequacy of representation requirement).

²⁷⁵ See *Payne v. Tennessee*, 111 S. Ct. 2597, 2609–10 (1991) ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' . . . *Stare decisis* is not an inexorable command" (citations omitted)).

²⁷⁶ Professor Brilmayer has acknowledged the problem. See Brilmayer, *Limits*, *supra* note 272, at 823 ("[E]ven absent res judicata considerations the precedential significance of a decision for later cases may be substantial."). But see Brilmayer, *Perspectives*, *supra* note 272, at 307 ("[O]f course, the impact of stare decisis is less dramatic than that of res judicata.").

²⁷⁷ The terms "Hohfeldian" and "non-Hohfeldian" are used to denote the "distinction between the personal and proprietary interests of the traditional plaintiff, and the representative and public interests of the plaintiff in a 'public action.'" *Flast v. Cohen*, 392 U.S. 83, 119 n.5 (1968) (Harlan, J., dissenting). Professor Jaffe adopted the terms from WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter W. Cood ed., 1978).

²⁷⁸ See Brilmayer, *Limits*, *supra* note 272, at 824 ("As the link between the interest asserted and the type of judicial intervention requested becomes attenuated, the risk of broadly phrased challenges increases"); Brilmayer, *Perspectives*, *supra* note 272, at 309 ("Isn't there a danger that by seeking to change the law too rapidly an ideological plaintiff will take greater risks by framing the issues in a broader, more controversial, manner?").

In fact, incentives to reform the law and to win the instant case overlap substantially. The public interest advocate would rather obtain a sweeping favorable opinion than a narrow favorable opinion. But she would prefer the narrow favorable decision to any kind of unfavorable decision. Concededly, there will be situations in which the public interest lawyer will risk an unfavorable decision for a chance, albeit relatively remote, at the jackpot. In those cases, it may superficially appear that the advocate has taken an unreasonably aggressive or ambitious tack and seemingly doomed herself to defeat. Before she opts for such a strategy, however, she will have made a conscious decision that the potential benefits outweigh the risks. One of those risks is the establishment of unfavorable precedent. Unlike the plaintiff who is in it for herself alone, counsel for the ideological plaintiff must consider the future of the legal landscape. She, her peers, and her future clients will have to live with any unfavorable precedent. Therefore, she will usually scale back the scope of her arguments just enough to give herself a reasonable chance of winning. If she makes an extremely broad or aggressive argument, it will be because she believes the benefit of a potential sweeping victory outweighs the risk of an adverse precedent.²⁷⁹

If anything, the persuasive argument flows in the opposite direction. If we are concerned about the creation of beneficial precedents for the "class," then forcing lawyers to take on clients with a large and meaningful personal stake is the last thing we should want. There is always the possibility that the representative's selfish interests will at some point diverge from those of the class. The attorney's loyalties must then lie with the named plaintiff and not with the class.²⁸⁰ The result may be that the lawyer is forced to sacrifice the class's long-range interests in order to pursue her client's interests in the instant litigation. Thus, a personal stake in the outcome is not a necessary condition of adequate representation and on occasion may have an

²⁷⁹ One might argue that non-Hohfeldian plaintiffs can balance the potential of sweeping victory against the risk of loss, but Hohfeldian plaintiffs care only about the risk of losing and cannot weigh that risk against the potential of a sweeping, precedent-setting victory. Thus, the ideological plaintiff may be more inclined to take some marginally greater risks in fashioning her arguments.

²⁸⁰ See Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 361 & n.100 (1978). The authors note some scholarly opinion to the effect that the ABA Code of Professional Responsibility might require counsel in such a situation to withdraw from the representation altogether. See *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1593 & n.67 (1976). The possibility of restructuring the class into sub-classes with independent representation, however, should not be ignored. See, e.g., *Rental Car of N.H., Inc. v. Westinghouse Elec. Corp.*, 496 F. Supp. 373, 384 (D. Mass. 1980); see also *Developments in the Law — Class Actions*, *supra*, at 1593-94 (discussing sub-classing as a possible solution to the problem of conflict of interest within a class).

inverse relationship to it.²⁸¹ Therefore, the due process objection to the deconstitutionalization of mootness fails.²⁸²

V. MOOTNESS AS A PURELY PRUDENTIAL DOCTRINE

This Part sketches out what mootness doctrine should look like once it is plucked of its constitutional plumage. I begin by articulating

²⁸¹ Another rebuttal to the due process objection is peculiar to the mootness context. In every moot case, the plaintiff at one time had a personal stake in the outcome. Even after the case is mooted, the court will have access to briefs and a record developed while the plaintiff still had full incentive to prevail in the litigation. This access protects the interests of similarly situated future litigants as long as the case is not mooted before counsel have an opportunity to develop full arguments on the merits. Under a prudential mootness regime, the absence of such an opportunity might be one consideration weighing against reaching the merits of a moot case.

²⁸² Two loose ends require attention. First, I have intentionally omitted an examination of what effect my proposal would have on class actions. I am aware that much of the recent scholarly literature on mootness has focused on its problems in the class action context. See, e.g., Richard K. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897, 898 (1983) (asserting that a class's claims do not necessarily become moot when the claims of the class representative do); Mary K. Kane, *Standing, Mootness, and Federal Rule 23 — Balancing Perspectives*, 26 BUFF. L. REV. 83, 84 (1976) (arguing that "rigid standing and mootness requirements may not be a necessary or desirable way of regulating class actions"). Kane has demonstrated that the personal stake requirement is redundant in class actions under Rule 23. The procedural prerequisites for the maintenance of a class action — in particular, the adequacy of representation requirement — virtually assure that the litigation will be conducive to a high-quality judicial decision. See *id.* at 109-14.

Second, my rejection of the justiciability analogy to due process considerations in class actions raises the question whether I find the class membership, typicality, and adequacy of representation prerequisites to class certification irrational. With respect to class membership, I do; with respect to the other two, I do not. Although the class membership requirement seems aimed at nothing other than ensuring personal stake, see FRIEDENTHAL, KANE & MILLER, *supra* note 98, § 16.2, at 727, the remaining two have other, legitimate functions.

Once one comes to the conclusion that personal stake should not be required, it is not at all difficult to abandon the class membership requirement, which "can be thought of as in the nature of a standing requirement." *Id.* The personal stake requirement is generally aimed at ensuring an absence of conflicting interests between the representative and other members of the class. But, personal stake turns out to be a poor proxy for commonality of interests. It is entirely possible for a named plaintiff to have a selfish interest in the outcome, but not the same interest as the class.

In contrast, the adequacy of representation inquiry aims directly at the presence or absence of conflicting or antagonistic interests. See *id.* at 731-32 (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)). The other main factor in the adequacy of representation inquiry is the quality of the proposed class counsel. This factor entails consideration of the lawyer's experience in the field, the quality of the papers submitted to the court, and the attorney's reputation in the legal community. See *id.* at 730 & nn.33-37. Again, this entirely salutary requirement has nothing to do with personal stake.

With respect to the typicality requirement, although "[i]t is not entirely clear what the rulemakers intended to achieve," *id.* at 729, it is best thought of as simply another way of expressing the need for an absence of conflicting or antagonistic interests between the representative and the class.

a general formulation that retains the prudential aspects of the current mootness doctrine and makes explicit the true (but presently hidden) forces that in large part animate certain existing exceptions (such as the "recurring impact" exception²⁸³) to the ongoing personal stake requirement. I then apply the general formulation to the mooted cases mentioned at the outset of this Article to gauge the ways in which results under this proposal would differ from results under present doctrine.

By way of preface, I should explain why I argue for the deconstitutionalization of mootness doctrine rather than merely for a broader interpretation of "cases" and "controversies." The conclusion in favor of outright deconstitutionalization depends upon acceptance of at least two of my principal arguments. First, one must accept the argument that neither the text, the history, nor the structure of Article III forbids federal courts from entertaining moot cases. Second, one must accept *either* that Congress should retain primary control over federal court jurisdiction (the "congressional control" principle) *or* that giving concrete meaning to public values is a legitimate justification for adjudication (the "public values" theory). Only if one agrees with the first and second or the first and third of these arguments can one agree with my ultimate prescription for decoupling mootness and Article III.

The arguments, however, can be severed, which would simply call for adjustments in the conclusion. If, for example, one finds the public values argument persuasive but the other two unpersuasive, the logical conclusion might be to redefine mootness doctrine to accommodate public law litigation more forthrightly, while continuing to insist that Article III prohibits the adjudication of moot cases.²⁸⁴ If one finds

²⁸³ If a defendant to an action for equitable relief voluntarily discontinues the activity that gave rise to the plaintiff's claim, the case will effectively be mooted. The Court has long recognized, however, that if, absent an adjudication on the merits, the defendant would be "free to return to his old ways," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), a federal court may nevertheless hear the technically moot case on its merits, unless "the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated,'" *id.* at 633 (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945)).

Under a related exception, federal courts may hear seemingly moot cases that involve issues "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). This doctrine usually applies to cases in which a challenged action is likely to be repeated with respect to the plaintiff at bar and yet would continue to evade substantive judicial review by its cessation or expiration prior to litigation. See *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). A third doctrine, the "continuing impact" exception, allows federal courts to hear cases in which the injury that the plaintiff originally claimed has been redressed but the now-abated injury continues to harm the plaintiff. See David H. Donaldson, Jr., Comment, *A Search for Principles of Mootness in the Federal Courts: Part One — The Continuing Impact Doctrines*, 54 TEX. L. REV. 1289, 1308-19 (1976).

²⁸⁴ Cf. Corey C. Watson, Comment, *Mootness and the Constitution*, 86 NW. U. L. REV. 143, 165-66 (1991) (advocating retention of constitutional limits on mootness but recognizing

only the congressional control argument persuasive, the solution might be to mark off a fairly small constitutional "core" of mootness — that is, define it fairly narrowly — and leave the remainder of "moot" cases subject to congressional control. These permutations, and others, are perfectly coherent. However, because I believe all three arguments are correct, I advocate outright deconstitutionalization.

A. General Considerations

When a federal court²⁸⁵ is apprised of an event that appears to have drained the life from a pending case, the main inquiry should be whether the likely preclusive effect of a judgment or the likely precedential effect of a decision on appeal would justify the expenditure of judicial resources necessary to adjudicate the merits. There will also be a number of inquiries subsidiary to this ultimate question.

The first involves the task of valuing the likely preclusive or precedential effect of a decision on the merits. No hard and fast rules can guide this valuation. Generally, however, the higher the likelihood that adjudication on the merits will obviate the need for future litigation, the higher the preclusive or precedential value of adjudication will be. With respect to the preclusive effect between the litigants at bar, the relevant question is whether a decision on the merits would make it less likely that these parties will return to court. This determination will rely on essentially the same factors that go into ascertaining the likelihood of continuing or recurring impact under current doctrine.²⁸⁶ With respect to precedential effect for non-parties, the issue is whether a decision on the merits is likely to give true and concrete meaning to public values.²⁸⁷ In determining whether the adjudication of a case offers sufficient precedential promise, the court must be alert to whether the case is in the right kind

the "need to adapt to the ever-changing forms of litigation . . . represented in the prudential and public law models").

²⁸⁵ Unlike Chief Justice Rehnquist and Dean Nichol, see *Honig v. Doe*, 484 U.S. 305, 331–32 (1988); Nichol, *supra* note 23, at 715–19, I do not confine my argument for a prudential mootness doctrine merely to cases mooted while pending before the United States Supreme Court. Rather, I argue that the prudential analysis should extend to cases mooted while pending in any federal court. Thus, a district court might conclude that the *preclusive* value of a particular decision on the merits justifies proceeding even though the case is technically moot. In contrast, the *precedential* value of a district court decision is minimal, see *infra* note 360, and therefore will seldom justify reaching the merits of a case that has been mooted while pending before a district court. Still, the district court must bear in mind that cases with a broad enough or deep enough impact are likely to be appealed and perhaps granted review before the Supreme Court.

²⁸⁶ See *supra* note 283.

²⁸⁷ See Fiss, *supra* note 14, at 29–30.

of shape.²⁸⁸ Are the facts concrete or still evolving?²⁸⁹ Are they typical or atypical of disputes likely to arise among others?²⁹⁰ Is counsel sophisticated enough to help the court develop "cutting edge" law?²⁹¹ Do the parties have sufficient motivation or incentives to spur them into making the fullest presentations on behalf of their respective positions?²⁹² A court may dismiss a case as moot even if not all these considerations counsel against adjudicating its merits. But a court should not seize upon any single factor as a pretext for clearing its docket.

B. Examples

1. *The ROTC Requirement Case.* — In August 1972, Tim Sapp enrolled at Decatur High School, a public school in Georgia.²⁹³ The Decatur City Board of Education required all male high school students to complete a course of military training with the Reserve Officers' Training Corps (ROTC).²⁹⁴ Sapp, morally repulsed by the requirement, openly defied it.²⁹⁵ The school board refused to amend the requirement and refused to allow him to continue his studies at Decatur High.²⁹⁶ Sapp enrolled at a private school, Dekalb Tech, where he had to pay tuition.²⁹⁷

In September 1972, Sapp brought an action against the school board that sought injunctive and declaratory relief and money damages.²⁹⁸ He styled his complaint as a class action, but the district court denied certification.²⁹⁹ Sapp claimed that the refusal to allow him to matriculate at Decatur High violated his rights to free exercise

²⁸⁸ For a similar approach, see REDISH, *supra* note 20, at 105-06, which argues that courts should dismiss constitutional cases as moot only when the absence of a real controversy would render a decision "unenforceable and hypothetical" and the plaintiff's lack of a personal stake makes her an inadequate representative for similarly situated constitutional rightholders.

²⁸⁹ This inquiry forms an integral part of the test for ripeness. See CHEMERINSKY, *supra* note 4, § 2.4.3, at 107-09.

²⁹⁰ Typicality is one of the prerequisites for the maintenance of a class action. See FED. R. CIV. P. 23(a)(3).

²⁹¹ Quality of counsel is a factor in determining whether named representatives can fairly and adequately protect the interests of absent class members. See FRIEDENTHAL, KANE & MILLER, *supra* note 98, § 16.2, at 730.

²⁹² See *United States v. Johnson*, 319 U.S. 302, 304 (1943) (stating that a court may not "safely proceed" to judgment in the absence of a true adversarial posture between the parties).

²⁹³ See *Sapp v. Renfroe*, 511 F.2d 172, 174 (5th Cir. 1975).

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See *id.*

²⁹⁷ See *id.* at 174-75.

²⁹⁸ The complaint apparently did not specifically request money damages. However, the Court of Appeals appears to have assumed that his request for "further relief as is just and proper" included a claim for money damages. *Id.* at 176 n.3.

²⁹⁹ See *Sapp v. Renfroe*, 372 F. Supp. 1193, 1193 (N.D. Ga. 1974).

of religion and free speech.³⁰⁰ The district court tried the case and entered judgment in favor of the school board.³⁰¹ The court found that Sapp's objections to the military training requirement were secular and not religious in nature.³⁰² It did not discuss his free speech claim. Sapp appealed the judgment to the Fifth Circuit.

While the appeal was pending, Sapp graduated from Dekalb Tech. The board contended that his graduation mooted the case in its entirety.³⁰³ Sapp conceded that his claim for injunctive relief was moot, but he argued that he was entitled to pursue his claims for declaratory relief and damages.³⁰⁴ Specifically, Sapp contended that his claim for declaratory relief fell within the "capable of repetition, yet evading review" exception.³⁰⁵ The Fifth Circuit rejected this recurring impact argument and found the declaratory relief claim moot.³⁰⁶ It found that the claim for damages had not been mooted but was nonetheless barred by the doctrine of qualified immunity.³⁰⁷

Under current mootness doctrine, the Fifth Circuit probably decided the case correctly. If Sapp's damages claim was correctly rejected as a matter of immunity, his graduation eliminated any legally cognizable interest in the outcome of the litigation — it transformed him into a truly ideological plaintiff. There was no evidence that Sapp's having been forced to attend Dekalb Tech would have a continuing impact (for example, more difficulty in finding a job than Decatur High graduates). The Fifth Circuit was also quite correct in denying the applicability of the "capable of repetition, yet evading review" exception.³⁰⁸ Tim Sapp would never again "run the gantlet [sic] of [Decatur High's] admission process."³⁰⁹

Once we abandon the needless insistence on personal stake, however, it becomes clear why the court should have decided the merits of at least the free speech claim. A definitive opinion on the merits would likely have prevented future litigation on the same subject involving not only the Decatur City board, but other school boards in the Fifth Circuit as well, unless the facts of Sapp's case were somehow unique or uncertain. Why wait until three, four, five, perhaps even ten more cases just like Sapp's are filed within the Fifth Circuit, each of which would consume precious judicial resources, before coming to a decision on the merits? The facts supporting Sapp's

³⁰⁰ See *Sapp*, 511 F.2d at 174.

³⁰¹ See *Sapp*, 372 F. Supp. at 1196.

³⁰² See *id.*

³⁰³ See *Sapp*, 511 F.2d at 175.

³⁰⁴ See *id.* at 175.

³⁰⁵ See *id.*; *supra* note 283 (describing the exception).

³⁰⁶ See *Sapp*, 511 F.2d at 175-76.

³⁰⁷ See *id.* at 176.

³⁰⁸ See *supra* note 283.

³⁰⁹ *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974).

free speech claim were not unusual. He was a male teenager who believed that it was wrong to parade around school grounds in a military uniform and learn to kill other human beings. He felt that the requirement that he receive military training forced him publicly to affirm beliefs abhorrent to his own.³¹⁰ Surely in 1972, with anti-war sentiment swelling throughout the nation, other teenagers felt the same way and were inclined to bring their grievances to court. Moreover, Sapp's counsel was an experienced civil rights litigator more than capable of providing advocacy conducive to a good judicial decision.³¹¹ Thus, the decision of Sapp's free speech claim on the merits would have been justified merely to conserve judicial resources.

Proponents of the public values theory of adjudication have another, far more important argument that the court should have rendered a decision on the merits. The court had a duty to give concrete meaning to the constitutional value of free speech. It takes no special training or adjudicatory form to ascertain that the First Amendment exalts freedom of speech. What does require the work of judges, acting within a process that requires them to entertain reasoned proofs and arguments and to explain their decisions,³¹² is determining how that value plays out in our daily existence. Does freedom of speech include the freedom not to speak? Is wearing a military uniform speech? Are the state's interests in teaching its youngsters "discipline, leadership, personal hygiene and first aid"³¹³ sufficient to justify compulsory military training of high school students in the midst of an increasingly unpopular war? Furthermore, the potential chilling effect of the ROTC requirement on free expression must not be overlooked.³¹⁴ Even if in fact these high school students had a right not to be sanctioned for expressing their opposition to the war or to the military by refusing to take ROTC, their fear of being expelled might well have inhibited them from dropping ROTC from their class schedules. If they had a First Amendment right to drop ROTC out of protest, it was incumbent upon the court to declare that right immediately, and not wait until it was too late for the next crop of graduating seniors.

³¹⁰ Cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (striking down a public school flag salute requirement because it compelled "affirmation of a belief").

³¹¹ Plaintiff's counsel, Elizabeth Rindskopf, was a prominent civil rights attorney in Atlanta. Three years earlier, she had argued and won cases in the United States Supreme Court. See *Gooding v. Wilson*, 405 U.S. 518, 518 (1972); *Bell v. Burson*, 402 U.S. 535, 535 (1971).

³¹² See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978).

³¹³ *Sapp v. Renfro*, 372 F. Supp. 1193, 1196 (N.D. Ga. 1974).

³¹⁴ Cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

Whether the court should have dismissed Sapp's free exercise claim as moot presents a more difficult question. He does not appear to have alleged much, if anything, in the way of affirmative religious beliefs. The trial court's opinion is devoted to demonstrating that Sapp's religion claim was nothing more than a secular, moral objection dressed up in free exercise garb. If the Fifth Circuit was inclined to believe that the ROTC requirement did not violate the free exercise rights of any individual, no matter what the tenets of his particular religion, it should have proceeded to the merits of the free exercise claim. But if the court thought that the validity of the free exercise claim depended on Sapp's ability to prove the sincerity of his belief that his religion forbade him from dressing in a military uniform or taking up arms, perhaps the court was correct not to reach the merits of the free exercise claim. Based on the trial record apparently available to it,³¹⁵ the Court of Appeals would have needed to create a hypothetical religion, or perhaps several such religions, against which to test any proposed legal standard of "genuineness" or "sincerity." Under those circumstances, a decision on the merits almost certainly would have raised more questions than it would have answered and therefore would not have been likely to yield a true or concrete interpretation of public values. Under a purely prudential mootness doctrine, then, the Fifth Circuit would have been correct not to entertain Sapp's free exercise claim.³¹⁶

2. *The Anti-Abortion Protesters Case.* — The Northern Virginia Women's Medical Center was a hospital licensed to perform outpatient abortion procedures.³¹⁷ In five separate incidents in 1977 and 1978, anti-abortion protesters trespassed on hospital grounds for what they believed was the purpose of saving the lives of fetuses.³¹⁸ On each occasion some of the protesters refused to quit the premises after police asked them to leave. According to the testimony of one police officer, on at least one occasion the protesters locked arms in front of the hospital's front door to keep people out.³¹⁹ Other protesters broke into the hospital screaming and tried to break into a locked room. On all five occasions, protesters were arrested and prosecuted for criminal trespass. Some of the defendants were acquitted on the ground that they believed the trespasses were necessary to save lives.³²⁰ The charges against the rest apparently were dismissed on grounds of nolle prosequi after a county judge held unconstitutional

³¹⁵ See *Sapp*, 372 F. Supp. at 1195.

³¹⁶ One might object that my proposal is improperly result-oriented. For my response, see pages 662–63 below.

³¹⁷ See *Northern Va. Women's Medical Ctr. v. Balch*, 617 F.2d 1045, 1048 (4th Cir. 1980).

³¹⁸ See *id.*

³¹⁹ See *id.*

³²⁰ See *id.*

the state statute³²¹ permitting physicians to perform first-trimester abortions.³²²

Following the county court's holding that the abortion statute was unconstitutional, the commonwealth attorney announced that he would no longer prosecute anti-abortion protesters who trespassed on hospital grounds.³²³ The hospital, several of its staff members, and one of its patients then brought an action in federal court against the commonwealth attorney and requested an injunction under section 1983 prohibiting the commonwealth attorney from effectuating his blanket non-prosecution policy against anti-abortion trespassers.³²⁴ The plaintiffs' sole legal theory was that the policy violated the equal protection rights of persons in the county seeking or performing abortions.³²⁵ The plaintiffs in this federal action stipulated that the commonwealth attorney made no agreement with any protester not to prosecute, encouraged no one to protest, and decided not to prosecute based solely on his professional judgment that he could not win such prosecutions.³²⁶

The district court dismissed the plaintiffs' action.³²⁷ At oral argument on appeal, however, counsel for the commonwealth attorney represented to the court that the non-prosecution policy was no longer being followed and that anti-abortion trespassers were once again being prosecuted. The plaintiffs did not deny that trespassers were currently being prosecuted, but they urged the court to decide the claim on its merits. The Fourth Circuit refused; it stated that the "controversy between the [hospital] and the commonwealth attorney is now moot and . . . is not likely to be revived."³²⁸

Even under currently prevailing mootness doctrine, the Fourth Circuit's refusal to adjudicate the claim for injunctive relief on its merits is questionable. The courts have generally recognized an exception to mootness in cases in which the defendant has voluntarily discontinued the complained-of activity.³²⁹ This exception seems applicable here; the commonwealth attorney was in some sense "free to return to his old ways."³³⁰ Unless the commonwealth attorney could carry his heavy burden of proving that there was "no reasonable expectation that the wrong [would] be repeated," the court should

³²¹ VA. CODE ANN. § 18.2-72 (Michie 1988).

³²² See *Bulch*, 617 F.2d at 1048.

³²³ See *id.* at 1049.

³²⁴ See *id.* at 1047.

³²⁵ See *id.* at 1049.

³²⁶ See *id.*

³²⁷ See *id.* at 1048.

³²⁸ *Id.*

³²⁹ See *supra* note 283.

³³⁰ *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

have decided the merits of the claim.³³¹ On the other hand, courts generally trust public officials' representations that they will refrain from the offending conduct at issue.³³² The Fourth Circuit may well have determined that the commonwealth attorney satisfied his burden of proving no likelihood of recurrence by presuming that he would keep his promises to the court.

Under a purely prudential mootness doctrine, it would be clear that the court should have reached the merits of the claim for injunctive relief if it would have ruled for the plaintiffs, but perhaps not if it would have ruled for the defendants. This distinction sounds odd, but it flows quite simply from the peculiar posture of this litigation on appeal. Recall that the plaintiffs had advocated a quite far-reaching theory of liability: the non-prosecution policy denied them equal protection irrespective of the commonwealth attorney's true motives. This litigating position made it possible for them to stipulate that the prosecutor had declined to prosecute cases solely on the basis of his professional judgment about his chances of winning. Thus, if the appellate court were ultimately to hold that the plaintiffs' equal protection rights were violated by the prosecutor's policy, there would be no ambiguity about whether the holding would apply to policies of non-prosecution adopted out of complicity with protesters. Such policies would be clearly unconstitutional. But the precedential value would be far less if the holding were in favor of the defendant. In any subsequent case in which the prosecutor allegedly was in complicity with or had encouraged the anti-abortion trespassers, the present case would have little or no *stare decisis* effect.

One might object that hinging the decision whether to adjudicate the merits of a case on who would win is improperly result-motivated. The answer is that the decision turns on the likely precedential value of the opinion, not on who is likely to win. The practice would be similar to the Supreme Court's screening its docket through the *certiorari* practice.³³³ A court *should* be unconcerned with whether the likely winner is the party advancing the more "liberal" position or the more "conservative" position, whether it is a private individual or the government, or whether it is the plaintiff or the defendant. In most cases, the likelihood of precedential value will depend less on who wins than on how the opinion is written. But in some instances, such as the anti-abortion protesters case, unusual fact patterns create asymmetry in the precedential value of possible outcomes. The court should not necessarily consider itself barred from proceeding on the

³³¹ *Id.* at 633 (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945)).

³³² See, e.g., *Preiser v. Newkirk*, 422 U.S. 395, 402-03 (1975); *DeFunis v. Odegaard*, 416 U.S. 312, 316-17 (1974); *WRIGHT, MILLER & COOPER*, *supra* note 19, § 3533.7, at 354 & n.9.

³³³ See SUP. CT. R. 19.

merits if it would rule in favor of the defendant. The justification for expending judicial resources for the purpose of producing such a narrow precedent, however, would be relatively slight.³³⁴ A court in that situation should take into account the likely precedential effect of adjudication in much the same way as the Supreme Court would take it into account upon the filing of a certiorari petition.

In the anti-abortion protesters case, a precedent "with some teeth" would have been generally desirable regardless of who won. Even if the commonwealth attorney were to keep his promise not to refrain from prosecuting anti-abortionists, the issue likely would have come up elsewhere in the Fourth Circuit. Some other locally-elected prosecutor in a heavily anti-abortion region of Virginia, the Carolinas, or West Virginia was a good bet to adopt a program of non-prosecution of anti-abortion trespassers. More importantly, similarly situated persons on *both* sides of the political dispute needed to know their rights. If anti-abortionists had a right to "protect unborn life" by invading hospitals (and if the court could so proclaim despite the above-mentioned stipulation), they needed to be apprised that they possessed such a right. The failure to apprise them of such a right almost certainly would deter some would-be "rescuers" from joining "rescue missions." Similarly, if the refusal to prosecute an entire class of criminal trespassers denied the victims equal protection within the meaning of the Fourteenth Amendment, those seeking or providing abortions needed to know *as soon as possible* that violators would be prosecuted. Without the security of this knowledge, some women might stay away from the hospital and instead resort to medically unsafe abortions.

3. *The Firefighters Hiring Case.* — From the foregoing treatment of the ROTC and anti-abortion trespassers cases, one may suspect a hidden political agenda — one that favors "left" or "liberal" results. An application of the proposed doctrine to *County of Los Angeles v. Davis*,³³⁵ however, demonstrates that it favors neither liberal nor conservative results. Instead, it favors the resolution of important questions of public law over the avoidance of such questions when a good decision can be made.

Attempting to eliminate the disparate impact of its past hiring process against blacks and Hispanics, the Los Angeles County Fire Department in 1971 instituted a new method of screening job applicants.³³⁶ Of the applicants who passed the written test, the department would randomly select 500 applicants for oral interviews and

³³⁴ Elsewhere I have argued that the same consideration should drive decisions about what standard of review to use for district court findings on so-called "mixed" questions of law and fact. See Lee, *supra* note 70, at 284-91.

³³⁵ 440 U.S. 625 (1979).

³³⁶ See *id.* at 628.

physical agility tests. In 1972, however, before the random selection could take place, a state court action was brought against the county on the ground that the random selection process violated the county charter and civil service regulations.³³⁷ The state court enjoined the county from using the random selection method during the litigation.³³⁸ The result was a lengthy, unintended hiring freeze.³³⁹

Desperate for new firefighters, the county personnel department then proposed simply to interview the top 544 applicants, ranked by their score on the written test.³⁴⁰ This group was overwhelmingly white. In January 1973, black and Hispanic plaintiffs brought a class action against the county, the board of supervisors, and the county civil service commission.³⁴¹ They alleged that the plan to interview the applicants with the 544 highest scores on the written test violated 42 U.S.C. § 1981.³⁴² Although the federal district court found no discriminatory intent, it nevertheless agreed that the plan violated section 1981 because the written test had not been validated as predictive of job performance.³⁴³ The district court permanently enjoined further violations and also ordered race-conscious remedial hiring, with provisions requiring twenty percent of all new hires to be black and another twenty percent to be Hispanic, until the proportion of blacks and Hispanics in the department corresponded to their proportion in the general population of the county.³⁴⁴ The Ninth Circuit affirmed.³⁴⁵

The Supreme Court granted certiorari to consider whether section 1981 could be violated without discriminatory intent and if so, whether the imposition of hiring quotas was an appropriate remedy.³⁴⁶ But it never reached the merits. Justice Brennan's majority opinion held that the plaintiffs' claim for injunctive relief was now moot for two reasons: first, there was "no reasonable expectation" that the county would ever again use an unvalidated written exam;³⁴⁷ and

³³⁷ *See id.*

³³⁸ *See id.*

³³⁹ *See id.* at 628-29.

³⁴⁰ *See id.* at 629.

³⁴¹ *See id.*

³⁴² Section 1981 states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

³⁴³ 42 U.S.C. § 1981 (1988).

³⁴⁴ *See Davis*, 440 U.S. at 629.

³⁴⁵ *See id.* at 629-30.

³⁴⁶ *See Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1978).

³⁴⁷ *See Davis*, 440 U.S. at 627.

³⁴⁸ *Id.* at 631-32.

second, the county's compliance with the district court's permanent injunction had "completely cured any discriminatory effects of the 1972 proposal."³⁴⁸

Justice Powell's dissenting opinion argued that the case was not moot.³⁴⁹ The county had abandoned its plan only because it was under a direct court order to do so.³⁵⁰ Justice Powell correctly pointed out that under previous decisions, a case could not be deemed moot simply "because a court order redressing the alleged grievance has been obeyed."³⁵¹ This rule makes abundant sense; otherwise, a defendant who had lost at the trial level would never want to comply with the judgment pending appeal — as soon as she did comply, her appeal might become moot and she would never obtain appellate review. Frequently a losing defendant will have been required to comply by virtue of preliminary injunctive relief, which (if it happened to redress the plaintiff's grievances completely) would moot the defendant's appeal before the trial court entered its final judgment!

One might ask whether the result in *Davis* would have been any different under the proposed prudential mootness doctrine. Justice Brennan seemed intent on avoiding the merits; perhaps he lacked a sufficient number of votes to uphold the quotas employed by the district court in its remedy.³⁵² Perhaps the majority would have held the case moot even under a purely prudential mootness regime. But I cannot see how — prudence, after all, is not the same as discretion. Any decision made on the basis of pragmatic considerations may have a discretionary component, but some prudential decisions are more correct than others. In this case, all the relevant factors pointed toward reaching the merits. The case involved two issues of overriding public importance — whether section 1981 could be violated without an intent to discriminate, and whether a district court could order hiring quotas as part of a remedy for proven racial discrimination in past government hiring. One can scarcely imagine a case more directly implicating our constitutional and public values. Moreover, the factual predicate was concrete — the written examination actually used in 1972 had been placed in evidence and the Court knew the exact racial makeup of the 544 top scorers and of the rest of the

³⁴⁸ *Id.* at 633.

³⁴⁹ See *id.* at 637 (Powell, J., dissenting). Chief Justice Burger joined Justice Powell's dissent. Justice Stewart, joined by then-Justice Rehnquist, also dissented on the grounds that the case was not moot. See *id.* at 635 (Stewart, J., dissenting).

³⁵⁰ See *id.* at 642–43 (Powell, J., dissenting).

³⁵¹ *Id.* at 643 (citing *NLRB v. Raytheon Co.*, 398 U.S. 25 (1970); and *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271 (1938)).

³⁵² At least four Justices would have struck down the remedy as overbroad: Chief Justice Burger and Justices Stewart, Powell, and Rehnquist. See *Davis*, 440 U.S. at 636 (Stewart, J., dissenting); *id.* at 647 n.12 (Powell, J., dissenting).

pool. The quality of advocacy was high on both sides, in part because of the participation of many amici.³⁵³

No less eminent a scholar than Professor Bickel has argued that the justiciability doctrines should be used to postpone decisions until the most appropriate moment.³⁵⁴ In a broad sense, perhaps that is what Justice Brennan and the majority had in mind in *Davis*. But aside from deriving comfort from the rejoinders of Professors Gunther and Wechsler,³⁵⁵ I truly believe that the leeway inherent in the certiorari jurisdiction was equal to the task.³⁵⁶ With certiorari, Congress has quite emphatically ceded to the Court nearly total discretion over what portion of its jurisdiction to reach and what to let simmer.³⁵⁷ The Court can refuse to adjudicate virtually any of the cases concededly within its appellate jurisdiction for any reason, as long as it is willing to couch that refusal in the form of a denial or dismissal of certiorari.³⁵⁸ It seems infinitely preferable for the Court to "wait out"

³⁵³ See *Davis*, 440 U.S. at 626 n.*.

³⁵⁴ See BICKEL, *supra* note 175, at 143-56.

³⁵⁵ See Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 13-16 (1964) (criticizing Bickel for tolerating unprincipled Court action in its exercise of certiorari jurisdiction); Herbert Wechsler, Book Review, 75 YALE L.J. 672, 674-76 (1966) (same).

³⁵⁶ Professor Redish shares this view. See REDISH, *supra* note 20, at 98.

³⁵⁷ This is all the more true now that virtually all of the Court's mandatory jurisdiction over appeals from the lower federal courts has been repealed. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

³⁵⁸ I am aware of the furor that dismissals of certiorari have stirred up within the Court from time to time. See generally Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1082-95 (1988) (examining cases in which the Court explicitly addressed the conflict between the power to dismiss and the "Rule of Four"). Justice Douglas was particularly insistent that Justices who had originally voted to deny certiorari should not later vote to dismiss as improvidently granted over the dissents of those who originally voted to grant. See *United States v. Shannon*, 342 U.S. 288, 298 (1952) (Douglas, J., dissenting); see also James F. Blumstein, *The Supreme Court's Jurisdiction — Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 930 (1973) (arguing that dismissal of certiorari as improvidently granted is indefensible when four Justices dissent). Nonetheless, the Court has repeatedly dismissed certiorari over the dissents of four Justices. See, e.g., *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971) (per curiam); *Hanner v. De-Marcus*, 390 U.S. 736 (1968); *NAACP v. Overstreet*, 384 U.S. 118 (1966); *Hammerstein v. Superior Court*, 341 U.S. 491 (1951). Justice Stevens has taken the most tenable position on this subject:

The decision to decide a constitutional question may be the most momentous decision that can be made in a case. Fundamental principles of constitutional adjudication counsel against premature consideration of constitutional questions and demand that such questions be presented in a context conducive to the most searching analysis possible. . . . If a majority is convinced after studying the case that its posture, record or presentation of issues makes it an unwise vehicle for exercising the 'gravest and most delicate' function that this Court is called upon to perform, the Rule of Four should not reach so far as to compel the majority to decide the case.

New York v. Uplinger, 467 U.S. 246, 251 (1984) (Stevens, J., concurring). Although I would disavow any "dispute resolution" overtones in his discussion, I believe that allowing the majority

the appropriate moment for adjudication through congressionally sanctioned "abstention" rather than through justiciability doctrines, for which congressional approval has generally been screened out by constitutional components. If the majority in *Davis* simply thought that it was not the appropriate time to adjudicate the section 1981 and quota issues, it should have dismissed certiorari as improvidently granted and accepted whatever loss of credibility or prestige that might have entailed.

In light of my recommended resolution of these three cases, one might ask whether a federal court under a purely prudential regime should ever decline to reach the merits of a case on mootness grounds. The answer is yes — for example, the court in the ROTC case probably should not have proceeded to the merits of the free exercise claim, and the court in the anti-abortion protesters case perhaps should not have reached the merits if its decision would not have carried much precedential value. For illustrative purposes, however, a more clear-cut case would be helpful.

Suppose a municipality enacts an ordinance prohibiting smoking in all establishments classified as restaurants but permitting smoking in all establishments classified as bars, even those that serve food. A small restaurant (a sole proprietorship) brings a section 1983 action in federal district court against the municipality³⁵⁹ on the ground that the ordinance violates the restaurant owner's equal protection rights under the Fourteenth Amendment. Several municipalities with identical ordinances intervene on behalf of the defendant. Suppose further that the district court grants a permanent injunction against the enforcement of the ordinance but stays execution pending the city's appeal. While the appeal is pending, the city council repeals the ordinance. The original defendant moves to dismiss its appeal voluntarily, but the intervenors oppose dismissal. They request that the court of appeals hear the appeal and reverse the district court's decision.

Under a prudential mootness doctrine, the court of appeals should not proceed to the merits. The sole proprietor would make a poor representative for those who would challenge the constitutionality of the ordinance. She has no economic incentive to pursue the litigation, and she is unlikely to have a purely ideological commitment to preserving the freedom to smoke or the freedom to serve food to those who are smoking. To be sure, the intervenor municipalities have a sufficient incentive to litigate the case to its conclusion. The political

to control the disposition is essential to the Court's fulfillment of its critical function under the "public values" model of adjudication.

³⁵⁹ Because the statute represents official policy, the municipality can be sued directly. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

impact — and, to a lesser extent, the stare decisis impact³⁶⁰ — of the district court decision threatens their interests.³⁶¹

But it takes two to tango. A proceeding between litigants who lack a truly adversarial posture is far less likely to produce a high quality decision than a proceeding between genuinely hostile litigants. Despite their lack of a “personal stake” in the controversy, the intervenor municipalities have a strong incentive to adduce every plausible argument in favor of the statute’s constitutionality. But the sole proprietor probably could care less. If forced to defend the judgment below, she might well conclude that the most economical course would be to mount a token defense or perhaps even to confess error. Therefore, the federal courts should decline to adjudicate any case in which mootness robs either party of *all* incentives — both economic and ideological — to litigate the case.³⁶²

VI. CONCLUSION

The mootness doctrine should be cut loose of its constitutional moorings. This would bring the doctrine into line with the well-established principle in federal courts law that, when possible, Congress should retain supervisory control over the contours of federal subject matter jurisdiction. It would also be consistent with the emerging public values model of adjudication. Logically, both arguments in favor of deconstitutionalizing mootness apply with equal force to standing and ripeness.³⁶³ Until the effects of deconstitutionalization on those doctrines can be studied in some detail and in disparate factual contexts, however, I must restrict my endorsement to the mootness area. In a profound way, however, the deconstitutionalization of mootness should be *less* controversial than in the standing or ripeness areas. After all, moot cases are the only one of

³⁶⁰ There is some authority for the proposition that, in the absence of an authoritative higher court ruling, a federal district court should follow the decisions of other federal district courts within the same state. See *In re McKee*, 416 F. Supp. 652, 654–55 (E.D. Ark. 1976). The weight of the authority, however, is to the contrary. See *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987); *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977); *State Farm Mut. Auto. Ins. Co. v. Bates*, 542 F. Supp. 807, 816 (N.D. Ga. 1982).

³⁶¹ These interests would not qualify as a “personal stake” under currently prevailing doctrine. See *supra* pp. 623–25.

³⁶² Of course, this is not the only circumstance under which a federal court should decline to adjudicate a moot case, because adversariness between the parties is not the only prerequisite to a high quality decision. The absence of sufficiently high caliber counsel and the absence of a sufficiently concrete factual predicate are also reasons not to proceed to the merits of moot cases.

³⁶³ Convincing arguments have previously been made in favor of deconstitutionalizing standing and ripeness, but not on the ground of preserving a legislative-judicial colloquy. See *supra* note 25.

the three categories in which typically the plaintiff once had a personal stake in the outcome.

The objections to the deconstitutionalization of mootness are unpersuasive. The argument that federal courts lack jurisdiction to hear moot cases because they are not "cases" or "controversies" vastly overstates the historical evidence and ignores the true purpose of the words, which is to denote two distinct groups of subject matter jurisdiction categories. The argument that federal courts may not proceed in moot cases because such decisions are "advisory opinions" confuses the finality cases (which truly are jurisdictional) with the "effect-in-the-real-world" cases (which are not). And the argument that all the justiciability doctrines should remain constitutionally grounded because they serve due process concerns is misplaced; purely ideological plaintiffs ordinarily can be expected to provide better, not worse, representation for similarly situated non-parties who will be saddled with the stare decisis effect of the decision at bar.

When confronted with a case that may be moot, federal courts should ask whether the likely preclusive effect of a judgment or likely precedential effect of a decision on appeal justifies the expenditure of judicial resources necessary to adjudicate the merits. This question will often lead the court to gauge whether adjudication on the merits would give true and concrete meaning to constitutional or public values. If such adjudication is not likely to give true and concrete meaning to these values, either because the factual predicate of the litigation is too nebulous or because the advocates' presentations are in some way not conducive to good judicial decisionmaking, the court should decline to reach the merits. Although the many exceptions to current mootness doctrine have already greatly broadened access to federal courts for important public issues, the doctrine recommended here would likely broaden such access further, unless and until Congress exercises its prerogative to narrow it. In this manner, my proposal seeks to maximize the effectiveness and efficiency of the federal courts as our primary expositor of constitutional and public values, while saving for Congress the opportunity to oversee the agenda. For a nation whose fondest hope has been to balance majoritarian control with protection for irreducible individual rights,³⁶⁴ it seems a worthy goal.

³⁶⁴ Cf. REDISH, *supra* note 20, at 75-85 (arguing that the challenge of federal courts law and substantive constitutional law is to reconcile representative democracy with the institution of judicial review).