FEDERAL COURTS AND THE LAW OF FEDERAL–STATE RELATIONS

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depend on an evaluation of "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."

Of similar effect is the requirement of exhaustion of administrative remedies. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). In that case the Court invoked the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." The goal is to avoid disruption of agency action by premature judicial intervention.

For discussion of these doctrines and a comprehensive analysis of prematurity issues in the administrative context, see Joseph G. Vining, Direct Judicial Review and the Doctrine of Ripeness in Administrative Law, 69 Mich. L. Rev. 1445 (1971). See also John F. Duffy, Administrative Common Law in Judicial Review, 77 Texas L. Rev. 113 (1998).

SUBSECTION C: MOOTNESS

INTRODUCTORY NOTES ON MOOTNESS

1. Introduction. Mootness has been described 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)." Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973).[a] If, during the course of litigation, the requisite live controversy between the contending parties ceases to exist, the case will be dismissed as moot.

So stated, mootness sounds simple. In fact, however, the doctrine is complicated by a number of exceptions and by a history of uncertainty in its administration.

2. Voluntary Cessation of Illegal Activity. An established exception to mootness is illustrated by United States v. W.T. Grant Co., 345 U.S. 629 (1953). In that case the government brought an antitrust action to enjoin the use of interlocking directorates among competing corporations. The offending directors resigned, and the defendants asked to have the suit dismissed as moot. The Supreme Court disagreed:

> Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled,

a. For additional analysis of the relation of mootness and standing, see Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv.L.Rev. 297, 298–99 (1979); Richard H. Fallon, Jr., Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of *Lyons*, 59 N.Y.U.L.Rev. 1 (1984).

> militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

The Court went on to say that although a case might be moot if the defendants could demonstrate that "there is no reasonable expectation that the wrong will be repeated," a mere disclaimer of an intent to revive the illegal practice is insufficient.

For applications of this principle, see City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982), and Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville, 508 U.S. 656 (1993). In *Aladdin's Castle*, a municipal ordinance was declared unconstitutionally vague after it had been repealed. The Supreme Court noted that if the decision below were vacated, the municipality would be free to reenact the same ordinance. Accordingly, the case was not moot.

In *Associated General Contractors*, the contractors challenged Jacksonville's minority set-aside program as unconstitutional. Three weeks after the Supreme Court granted certiorari, the city repealed the set-aside ordinance and enacted a more carefully constructed replacement. Speaking through Justice Thomas, the Court said the case was not moot: "There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so." That the new ordinance differed from the old one did not matter: "[I]f that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." Justice O'Connor, joined by Justice Blackmun, dissented. She argued that *Aladdin's Castle* stated an exceptional rule for those rare cases "where circumstances demonstrate that the legislature will likely reinstate the old law." Other precedents established that, "where a challenged statute is replaced with more narrowly drawn legislation pending our review, and the plaintiff seeks only prospective relief, we generally should decline to decide the case. The controversy with respect to the old statute is moot, because a declaration of its invalidity or an injunction against the law's future enforcement would not benefit the plaintiff."

Who has the better of this argument? Should the courts assume a repealed ordinance will be reenacted or other illegal activity resumed? In making that assumption, are the courts reaching to adjudicate hypotheticals? Or is this stance necessary to prevent the kind of cat-and-mouse game described by Justice Thomas?

3. Controversies "Capable of Repetition, Yet Evading Review". Another exception to mootness is a question "capable of repetition, yet evading review." The phrase comes from Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911), and is typically invoked where the specific case between the plaintiff and the defendant has been mooted by the passage of time, but where the same issue is likely to arise again. As the Court has said, there must be "a

'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur." Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curiam). Moreover, at least as the doctrine is conventionally applied, it is not enough that the same issue will arise in the future; the controversy must be "capable of repetition, yet evading review" with respect to the same claimant.

This principle is illustrated by First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). In that case, Massachusetts corporations attacked a statute forbidding corporate expenditures to influence voter referenda on issues not materially affecting business interests. The statute specified that no issue concerning the taxation of individuals could be deemed materially affecting business interests. The corporations wanted to spend money to oppose a state constitutional amendment authorizing a graduated individual income tax. When informed that such expenditures would violate state law, the corporations challenged the statute as a violation of free speech. By the time the case reached the Supreme Court, the referendum had been held, and the proposed amendment defeated, but the Supreme Court found a live controversy.

Similar amendments had been proposed by the legislature on four occasions. In each instance, the time between the legislative action and submission to the voters had been too short to allow complete judicial review. There seemed little doubt that the proposal would be revived in the future and that the plaintiff corporations would again be subject to the statutory restriction. The case was therefore found to fall within that category of controversies "capable of repetition, yet evading review," and thus not moot.[b]

On what ground is this exception justifiable? Can it be squared with the Court's statement, made in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974), and repeated in other cases, that "[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing"?

4. *Honig v. Doe*. The meaning and implications of "capable of repetition, yet evading review" were disputed in Honig v. Doe, 484 U.S. 305 (1988). The case involved the "stay-put" provision of the Education of the Handicapped Act. That provision directs that a disabled child "shall remain in [his or her] then current educational placement" pending administrative and judicial review of proposed changes. The question was whether emotionally disabled children placed in public school could be expelled for dangerous or disruptive conduct growing out of their disabilities.

b. See also Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979); Gerstein v. Pugh, 420 U.S. 103 (1975); Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974); and Roe v. Wade, 410 U.S. 113 (1973). In *Roe*, a pregnant plaintiff was asserting a right to an abortion, but it took much longer than nine months for the case to get through the legal system to the Supreme Court. Similarly, in *Gerstein* criminal defendants were complaining about pre-trial detentions in cases that were long since over by the time the issue could be fully litigated.

The decision involved two applications of the "stay-put" provision. Both were undoubtedly live controversies in the lower courts but arguably had become moot during the course of litigation. The majority, however, found that one dispute was "capable of repetition, yet evading review." The student had not returned to school but was still entitled to invoke the protections of the federal statute. Moreover, he still suffered from the emotional instability that had led to his expulsion. The Court therefore found a "reasonable expectation" that the problem would recur and that any resulting claim would likely evade review.

This conclusion was disputed by Justice Scalia, with whom Justice O'Connor joined. Scalia noted that the precedents spoke of "a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur" and argued that the two phrases were equivalent. Under that test, the exception to mootness was not shown. There was no showing that the student would return to public school or that, if he did, he would be placed in an educational setting unable to accommodate his disruptive behavior. Therefore, Scalia argued, the traditional standard of "capable of repetition" had not been met.

An interesting concurrence was filed by Chief Justice Rehnquist. Rehnquist called for reconsideration of mootness doctrine and of its relation to Article III:

> If it were indeed Article III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, the "capable of repetition, yet evading" review exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review." If our mootness doctrine were forced upon us by the case or controversy requirement of Article III itself, we would have no more power to decide lawsuits which are "moot" but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions. . . .
>
> The logical conclusion to be drawn from [the precedents], and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Article III, it is an attenuated connection that may be overridden where there are strong reasons to override it. The "capable of repetition, yet evading review" exception is an example. So too is our refusal to dismiss as moot those cases in which the defendant voluntarily ceases, at some advanced stage of the appellate proceedings, whatever activity prompted the plaintiff to seek an injunction. I believe we should adopt an additional exception to our present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction in the case. [Our] resources—the time spent

> preparing to decide the case by reading briefs, hearing oral arguments, and conferring—are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me [that] is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine of mootness in such a manner as the dissent accuses the majority of doing here. I would leave the mootness doctrine as established by our cases in full force and effect when applied to the earlier stages of a lawsuit, but I believe that once this Court has undertaken a consideration of a case, an exception to that principle is just as much warranted as where a case is "capable of repetition, yet evading review."

Justice Scalia responded that he did not see how mootness could be "merely prudential," any more than standing. "Both doctrines have equivalently deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition." As traditionally applied, "capable of repetition, yet evading review" did not argue to the contrary:

> Where the conduct has ceased for the time being but there is a demonstrated probability that it *will* recur, a real-life controversy between parties with a personal stake in the outcome continues to exist, and Article III is no more violated than it is violated by entertaining a declaratory judgment action. But that is the limit of our power. I agree with the Chief Justice to this extent: the "yet evading review" portion of our "capable of repetition, yet evading review" test is prudential; whether or not that criterion is met, a justiciable controversy exists. But the probability of recurrence between the same parties is essential to our jurisdiction as a court, and it is that deficiency which the case before us presents.

Which understanding of the "capable of repetition, yet evading review" exception is more persuasive? Is it plausible to think of mootness as less closely related to constitutional requirements than other justiciability doctrines? If not, is there any way to avoid the waste of resources of which Rehnquist spoke?

5. ***City of Erie v. Pap's "Kandyland"***. The Supreme Court appeared to follow, but not acknowledge, Chief Justice Rehnquist's approach in City of Erie v. Pap's A.M., tdba "Kandyland," 529 U.S. 277 (2000). When the City of Erie passed an ordinance aimed at nude dancing, Pap's, operator of an establishment known as "Kandyland," raised a First Amendment challenge. Eventually, the Pennsylvania Supreme Court ruled in the plaintiff's favor and enjoined enforcement of the ordinance. Thereafter, Pap's closed Kandyland and sold the building to a developer. Pap's sole shareholder, who was of an age to retire, submitted an affidavit recounting those facts and confirming that neither he nor the corporation had any current interest in nude dancing nor any intention to own or operate such an establishment in the future. Based on these facts, the case looked moot.

The problem, however, was that if mootness deprived the Court of jurisdiction to reach the merits, it also lacked jurisdiction to direct a vacatur by the state court. See ASARCO, Inc. v. Kadish, 490 U.S. 605, 621 n.1 (1989). That would mean that the judgment against Erie would remain in effect. Additionally, the Justices were irritated that the facts suggesting mootness had not been mentioned in Pap's response to the city's petition for certiorari but had first been raised in a motion to dismiss filed after certiorari was granted.

Speaking for the Court, Justice O'Connor found that the case was not moot. The Court refused to credit the owner's affidavit, noting that "Pap's is still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie." O'Connor noted that the city had an "ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance," and concluded, somewhat obliquely, that "to the extent Pap's has an interest in resuming operations, it has an interest in preserving the judgment of the Pennsylvania Supreme Court." On the merits, the Court concluded that the ordinance was not unconstitutional.

Justice Scalia, joined by Justice Thomas, dissented on the mootness issue, arguing that the unfortunate situation of leaving in place an erroneous decision of the Pennsylvania Supreme Court did not justify "entertain[ing] a suit that the Constitution places beyond our power."

6. *DeFunis v. Odegaard*. A controversial application of traditional mootness doctrine occurred in DeFunis v. Odegaard, 416 U.S. 312 (1974). Marco DeFunis was an unsuccessful white applicant for admission to the University of Washington Law School. He brought suit in state court, claiming that the school's minority admissions program violated the 14th Amendment. DeFunis won in the trial court and was admitted. That decision was overturned by the Washington Supreme Court, but the judgment was stayed pending final decision by the Supreme Court of the United States. By the time the case was argued, DeFunis was in his final term, and the Law School had asserted that it would not seek to cancel registration for any term in which DeFunis was already enrolled. The Supreme Court therefore found the case moot. That illness, economic necessity, or academic failure might yet prevent DeFunis' graduation was unimportant, for the Court found that such "speculative contingencies" provided no basis for reaching the merits of the case.[c]

Justice Brennan, joined by Justices Douglas, White, and Marshall, dissented:

c. The Court vacated the state court judgment and remanded for "such proceedings as by that court may be deemed appropriate." On remand, the Washington Supreme Court reinstated its judgment on the merits. DeFunis v. Odegaard, 84 Wash.2d 617, 529 P.2d 438 (1974). On the mootness question, the court held that it was not governed by federal standards and that, under state law, "the fact that an issue is moot does not divest this court of jurisdiction to decide it." Since the case presented "a broad issue of substantial public import," the court thought it appropriate to resolve the merits.

> I can ... find no justification for the Court's straining to rid itself of this dispute. While we must be vigilant to require that litigants maintain a personal stake in the outcome of a controversy to assure that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution," there is no such want of an adversary contest in this case. Indeed, the Court concedes that, if petitioner has lost his stake in this controversy, he did so only when he registered for the spring term. But petitioner took that action only after the case had been fully litigated in the state courts, briefs had been filed in this Court, and oral argument had been heard. The case is thus ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues.
>
> Moreover, in endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of 26 amicus curiae briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court.... Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases.

The issues avoided in *DeFunis* returned to the Supreme Court in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978). Does that suggest that Justice Brennan was right in disparaging the *DeFunis* dismissal? Or does it simply show that mootness is properly a doctrine concerned with particular cases, not the issues they raise? What weight, if any, should have been given to the fact that the mootness question arose late in the litigation, after the development of a record and after substantial investment of time by all concerned? Is the societal importance of the issues raised in *DeFunis* a relevant consideration? Does it argue for decision or delay?

From another perspective, why was the exception recognized in the *W.T. Grant* case not applicable in *DeFunis*? The reason, said the Court, was that the question of mootness did not arise from a "unilateral change in the *admissions procedures* of the Law School." Here there had been no voluntary cessation of the challenged admissions practices. Instead, mootness resulted from "the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled."

Is this distinction persuasive? Both cases involved a defendant's representation as to future conduct. Why should that representation render the

case moot when it concerns a collateral issue (whether DeFunis will be allowed to complete the term in which he is enrolled), but not when it concerns the allegedly illegal conduct (whether W.T. Grant will reinstall interlocking directorates)? Why did not the law school's refusal to disavow the challenged admissions practices made *DeFunis* a *less* appropriate case for mootness than *W.T. Grant*?

United States Parole Commission v. Geraghty

Supreme Court of the United States, 1980.
445 U.S. 388.

■ MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." . . .

I

In 1973, the United States Parole Board adopted explicit Parole Release Guidelines for adult prisoners. These guidelines establish a "customary range" of confinement for various classes of offenders. The guidelines utilize a matrix, which combines a "parole prognosis" score (based on the prisoner's age at first conviction, employment background, and other personal factors) and an "offense severity" rating, to yield the "customary" time to be served in prison.

[Geraghty, who had been convicted of conspiracy to commit extortion and of making false statements to a grand jury, was twice denied parole under the guidelines. He brought suit on behalf of "all federal prisoners who are or who will become eligible for release on parole" to challenge the guidelines, both generally and as applied to his case. The trial court refused to certify a class action and rejected Geraghty's claims on the merits. While his appeal was pending, Geraghty was mandatorily released, and the parole authorities contended that his claim had become moot. The Third Circuit, however, ruled that class certification should not have been denied and remanded the case for further proceedings.]

II

Article III of the Constitution limits federal "judicial Power," that is, federal-court jurisdiction, to "Cases" and "Controversies." This case-or-controversy limitation serves "two complementary" purposes. Flast v. Cohen, 392 U.S. 83, 95 (1968). It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." Ibid. Likewise, mootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969).

It is clear that the controversy over the validity of the Parole Release Guidelines is still a "live" one between petitioners and at least some members of the class respondent seeks to represent. This is demonstrated by the fact that prisoners currently affected by the guidelines have moved to be substituted, or to intervene, as "named" respondents before the Court. We therefore are concerned here with the second aspect of mootness, that is, the parties' interest in the litigation. The Court has referred to this concept as the "personal stake" requirement. E.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 755 (1976); Baker v. Carr, 369 U.S. 186, 204 (1962). . . .

III

On several occasions the Court has considered the application of the "personal stake" requirement in the class-action context. In Sosna v. Iowa, 419 U.S. 393 (1975), it held that mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot. It reasoned that "even though appellees . . . might not again enforce the Iowa durational residence requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified." The Court stated specifically that an Article III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot."

Although one might argue that *Sosna* contains at least an implication that the critical factor for Article III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation. E.g., Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975). The "capable of repetition, yet evading review" doctrine, to be sure, was developed outside the class-action context. See Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514–15 (1911). But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake. See, e.g., Roe v. Wade, 410 U.S. 113, 123–25 (1973). Since the litigant faces some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.

When, however, there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's claim. E.g., *Franks v. Bowman Transportation Co.*, supra, at 752–57. Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. The Court considered this possibility in *Gerstein v. Pugh*, supra, at 110. *Gerstein* was an action challenging pretrial deten-

tion conditions. The Court assumed that the named plaintiffs were no longer in custody awaiting trial at the time the trial court certified a class of pretrial detainees. There was no indication that the particular named plaintiffs might again be subject to pretrial detention. Nonetheless, the case was held not to be moot because:

> The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

In two different contexts the Court has stated that the proposed class representative who proceeds to a judgment on the merits may appeal *denial* of class certification. First, this assumption was "an important ingredient" in the rejection of interlocutory appeals, "as of right," of class certification denials. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 470 n.15 (1978). The Court reasoned that denial of class status will not necessarily be the "death knell" of a small-claimant action, since there still remains "the prospect of prevailing on the merits and reversing an order denying class certification."

Second, in United Airlines, Inc. v. McDonald, 432 U.S. 385, 393–95 (1977), the Court held that a putative class member may intervene, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims have been satisfied and judgment entered in their favor. Underlying that decision was the view that "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs." And today, the Court holds that named plaintiffs whose claims are satisfied through entry of judgment over their objections may appeal the denial of a class certification ruling. Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980).

Gerstein, *McDonald*, and *Roper* are all examples of cases found not to be moot, despite the loss of a "personal stake" in the merits of the litigation by the proposed class representative. The interest of the named plaintiffs in *Gerstein* was precisely the same as that of Geraghty here. Similarly, after judgment had been entered in their favor, the named plaintiffs in *McDonald* had no continuing narrow personal stake in the outcome of the class claims. And in *Roper* the Court points out that an individual controversy is rendered moot, in the strict Article III sense, by payment and satisfaction of a final judgment. These cases demonstrate the flexible character of the Article III mootness doctrine.[7]

7. Three of the Court's cases might be described as adopting a less flexible approach. In Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975), and in Weinstein v. Bradford, 423 U.S. 147 (1975), dismissal of putative class suits, as moot, was ordered

IV

Perhaps somewhat anticipating today's decision in *Roper*, petitioners argue that the situation presented is entirely different when mootness of the individual claim is caused by "expiration" of the claim, rather than by a judgment on the claim. They assert that a proposed class representative who individually prevails on the merits still has a "personal stake" in the outcome of the litigation, while the named plaintiff whose claim is truly moot does not. In the latter situation, where no class has been certified, there is no party before the court with a live claim, and it follows, it is said, that we have no jurisdiction to consider whether a class should have been certified.

We do not find this distinction persuasive. [T]he fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class. "The denial of class certification stands as an adjudication of one of the issues litigated." We think that in determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits "expires," we must look to the nature of the "personal stake" in the class certification claim. Determining Article III's "uncertain and shifting contours," see *Flast v. Cohen*, supra, at 97, with respect to nontraditional forms of litigation, such as the class action, requires reference to the purposes of the case-or-controversy requirement.

Application of the personal-stake requirement to a procedural claim, such as the right to represent a class, is not automatic or readily resolved.... The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims. Although the named representative receives certain benefits from the class nature of the action, ... these benefits generally are byproducts of the class-action device. In order to achieve the primary benefits of a class suit, the Federal Rules of Civil Procedure give the proposed class represen-

after the named plaintiffs' claims became moot. And in Pasadena City Bd. of Education v. Spangler, 427 U.S. 424 (1976), it was indicated that the action would have been moot, upon expiration of the named plaintiffs' claims, had not the United States intervened as a party plaintiff. Each of these, however, was a case in which there was an attempt to appeal the merits without first having obtained proper certification of a class. In each case it was the defendant who petitioned this Court for review. As is observed subsequently in the text, appeal from denial of class classification is permitted in some circumstances where appeal on the merits is not. In the situation where the proposed class representative has lost a "personal stake," the merits cannot be reached until a class properly is certified. Although the Court perhaps could have remanded *Jacobs* and *Weinstein* for reconsideration of the class certification issue, as the Court of Appeals did here, the parties in those cases did not suggest "relation back" of class certification. Thus we do not find this line of cases dispositive of the question now before us.

tative the right to have a class certified if the requirements of the rules are met. This "right" is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the "personal stake" requirement.

As noted above, the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply presented issue....

We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Article III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. If, on appeal, it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot.

Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. "[I]t does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' Rule 23(a)." *Sosna v. Iowa*, supra, at 403. We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue....

[The Court held in an omitted portion of its opinion that the remand order by the Court of Appeals should have been modified in a minor respect. Accordingly, the judgment below was vacated and the case was remanded for further proceedings not inconsistent with the Court's opinion.]

■ MR. JUSTICE POWELL, with whom the CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting....

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. Both steps are significant departures from settled law that rationally

cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. There undoubtedly is a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it....

"In order to satisfy Article III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete injury required by Article III." Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 (1976).

As the Court notes today, the same threshold requirement must be satisfied throughout the action.... The limitation flows directly from Article III.

Since the question is one of power, the practical importance of review cannot control. Sosna v. Iowa, 419 U.S. 393, 401 (1975). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). Collateral consequences of the original wrong may supply the individual interest in some circumstances. Sibron v. New York, 392 U.S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." ... We have insisted upon the personal stake requirement in mootness and standing cases because it is embedded in the case-or-controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." Warth v. Seldin, 422 U.S. 490, 498 (1975)....

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class-action context. But Article III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may [not] seek relief on behalf of himself or any other member of the class." O'Shea v. Littleton, 414 U.S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interest asserted by [the named plaintiff]." *Sosna v.*

Iowa, supra, at 399. "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Article III when the named plaintiff's individual claim becomes moot.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.... In these circumstances, Article III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff....

The cases principally relied upon are Gerstein v. Pugh, 420 U.S. 103, 110–11 n.11 (1975), United Airlines v. McDonald, 432 U.S. 385 (1977), and today's decision in Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980). Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Sosna* itself is cited for the proposition that the requirements of Article III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.' " In my view, the Court misreads these precedents.

A

In *Sosna,* the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. And in *Gerstein,* the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.' "

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Article III may be satisfied in the absence of a personal stake in the outcome. In *McDonald,* a putative class member intervened within the statutory time limit to appeal the certification ruling.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action....

There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs...." That gratuitous sentence, repeated in Coopers & Lybrand v.

10. The individual claims of the original named plaintiffs had been settled after judgment on the question of liability.

Livesay, 437 U.S. 463, 469, 470 n.15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper* the Court holds that the named plaintiffs, who have refused to accept proffered individual settlements, retain a personal stake in sharing anticipated litigation costs with the class. Finding that Article III is satisfied by this alleged economic interest, *Roper* reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment....

It is far from apparent how *Roper* can be thought to support the decision in this case.... Here, there is not even a speculative interest in sharing costs, and respondent affirmatively denies that he retains any stake or personal interest in the outcome of his appeal. Thus, a fact that was critical to the analysis in *Roper* is absent in this case....

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Article III doctrine in cases closely analogous to this one. Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975) (per curiam); Weinstein v. Bradford, 423 U.S. 147 (1975) (per curiam); Pasadena City Bd. of Education v. Spangler, 427 U.S. 424 (1976). As they are about to become second class precedents, these cases are relegated to a footnote....

In *Jacobs,* six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." Since the faulty certification prevented the class from acquiring separate legal status, Article III required a dismissal. We reached precisely the same conclusion in *Spangler,* an action saved from mootness only by the timely intervention of a third party. And in *Bradford,* where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures.

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class

representative had suffered no injury that could be redressed by adequate certification....

III

... The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question. Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case.

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal-court jurisdiction when Article III does not. *Gladstone, Realtors,* supra, at 100. Far less so may a rule of procedure which "shall not be construed to extend ... the jurisdiction of the United States District Courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Article III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Article III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Article III jurisprudence, they operate only in " 'cases confessedly within [the Court's] jurisdiction.' " The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none. Indeed, each of these characteristics is sure to be present in the typical "private attorney general" action brought by a public-spirited citizen. Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice....

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Article III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.