California Law Review

VOL. 62 DECEMBER 1974 No. 5

Mootness in Judicial Proceedings: Toward a Coherent Theory

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In this critical examination of the doctrine of mootness, the authors argue that federal courts have too often restricted their analysis in determinations of mootness to the constitutional requirement of a case or controversy. They advocate a greater recognition of the role played by considerations of judicial economy and illustrate these principles by applying them to a recent case.

The recent decision of the United States Supreme Court in *DeFunis v. Odegaard*[1] has drawn unusual attention to the legal doctrine of mootness. In the past there has been little judicial[2] or scholarly[3]

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1. 94 S. Ct. 1704 (1974).

2. Only two substantial judicial discussions of the doctrine are known to the authors: Super Tire Eng'r Co. v. McCorkle, 469 F.2d 911 (3d Cir. 1972) (Adams, J., for the court; Gibbons, J., dissenting), *rev'd*, 94 S. Ct. 1694 (1974); Alton & S. Ry. v. International Ass'n of Machinists, 463 F.2d 872 (D.C. Cir. 1972) (Leventhal, J.).

3. The only theoretically important scholarly consideration of mootness in recent years is Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970). The following list contains virtually the entire remaining literature: Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430 (1973); Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1946); Kates, *Memorandum on the Law of Mootness*, 3 CLEARINGHOUSE REV. 213, 285 (1970) (a distant ancestor of this Article); Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229 (1969); Note, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 COLUM. L. REV. 867 (1965); Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77 (1955); Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955). After this article was sent to the printer, the literature was augmented by Note, *Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974).

writing on the subject, but this neglect[4] is not because the mootness doctrine lacks importance[5] or significant problems.[6]

The rule that a court will not decide a "moot" case is recognized in virtually every American jurisdiction.[7] It is particularly important in the federal courts, because deciding a moot case has been held to be beyond the judicial power of the United States.[8] Despite wide recognition of the doctrine, however, there is a dearth of discussion as to what renders a controversy moot. Mootness questions can appear in any case at any stage; they can arise in almost any factual situation and they assume varied guises.[9] Mootness questions are often summarily

4. Compare the vast literature on the related doctrine of standing, a tiny fraction of which is cited in notes 142-44, 148 *infra*.

5. The importance of the problem is indicated by the large number of litigated mootness cases appearing in the reports. Since 1968, for instance, the United States Supreme Court has considered various aspects of the mootness doctrine in more than two dozen cases. DeFunis v. Odegaard, 94 S. Ct. 1704 (1974); Super Tire Eng'r Co. v. McCorkle, 94 S. Ct. 1694 (1974); Rosario v. Rockefeller, 410 U.S. 752 (1973); Roe v. Wade, 410 U.S. 113 (1973); Indiana Empl. Security Div. v. Burney, 409 U.S. 540 (1973); Mancusi v. Stubbs, 408 U.S. 204 (1972); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Roudebush v. Hartke, 405 U.S. 15 (1972); Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972); SEC v. Medical Comm. for Human Rights, 404 U.S. 403 (1972); North Carolina v. Rice, 404 U.S. 244 (1971); Whitcomb v. Chavis, 403 U.S. 124 (1971); Cole v. Richardson, 397 U.S. 238 (1970); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1970); Hall v. Beals, 396 U.S. 45 (1969); Brockington v. Rhodes, 396 U.S. 41 (1969); Powell v. McCormack, 395 U.S. 486 (1969); Moore v. Ogilvie, 394 U.S. 814 (1969); Street v. New York, 394 U.S. 576, 579 n.3 (1969); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968); Carroll v. President & Comm'rs, 393 U.S. 175 (1968); Sibron v. New York, 392 U.S. 40 (1968); Carafas v. La Vallee, 391 U.S. 234 (1968). In addition, lower federal courts and state courts have decided thousands of mootness questions. *See, e.g.*, cases cited notes 47-58 *infra*.

6. Indeed, Mr. Justice Stewart has recently described the doctrine as "difficult and complex." Super Tire Eng'r Co. v. McCorkle, 94 S. Ct. 1694, 1703 (1974) (dissenting opinion).

7. *See, e.g.*, Pittenger v. Home Sav. & Loan Ass'n, 166 Cal. App. 2d 32, 332 P.2d 399 (2d Dist. 1958); People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Huber v. Schmidt, 180 Kan. 80, 299 P.2d 33 (1956); Lloyd v. Board of Supervisors, 206 Md. 186, 111 A.2d 379 (1954); Overesch v. Campbell, 95 Ohio App. 359, 119 N.E.2d 848 (1953).

8. *See, e.g.*, Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964). But see text accompanying notes 108-53 *infra*. Whether the refusal of state courts to decide moot cases is jurisdictional or simply a rule of decision is discussed in Lloyd v. Board of Supervisors, 206 Md. 186, 111 A.2d 379 (1954), and Overesch v. Campbell, 95 Ohio App. 359, 119 N.E.2d 848 (1953).

9. The following cases are illustrative of some, but by no means all, of these guises: Hall v. Beals, 396 U.S. 45 (1969) (case moot when state repealed challenged statute and enacted different statute which did not, and could not, apply to plaintiff and those similarly situated); United States v. Hamburg Amerikanische Gesellschaft, 239 U.S. 466 (1916) (case moot when change in circumstances prevented continuation of challenged activity and barred its resumption in the future); Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968) (student's suit to compel readmission to university moot on appeal when it developed that the student no longer desired readmission); Tyson

disposed of,[10] and almost none of the literally thousands of mootness opinions has attempted a comprehensive analysis of the area.[11] As a result the law is a morass of inconsistent or unrelated theories, and cogent judicial generalization is sorely needed. This Article will attempt to provide a long overdue analysis of this complex doctrine.

At the outset, a few words about terminology are in order. The word moot is frequently used as a synonym for abstract or hypothetical and applied to any case not suitable for judicial determination.[12] This usage confuses mootness with such cognate doctrines as ripeness, justiciability, abstract or hypothetical questions, collusive litigation, and requests for advisory opinions.[13] Unquestionably many of the concepts are related to each other and to mootness,[14] although a cynic might suggest that their chief relationship is functional rather than doctrinal, for each allows a judge to eschew decisionmaking. We shall, however, restrict the term to its narrow technical meaning and will describe as moot only those cases in which a justiciable controversy once existing between the parties is no longer at issue due to some change in circumstance after the case arose.

Taken at face value the mootness doctrine is but a logical corollary to the courts' refusal to entertain suits for advisory or speculative opinions. If a person cannot bring a case about a non-existent or already resolved controversy, it would seem that he should not be able to continue a case when the controversy is resolved during its pendency. Moreover, a case should not be heard when the parties' interests are not sufficiently adverse to ensure proper and effective presentation of the arguments for each side.[15]

But there are additional values served by the mootness doctrine. When the matter is resolved before judgment, judicial economy dictates that the court abjure decision. This is particularly true today, when trial and appellate calendars are commonly backlogged from two to five years. Furthermore, neither the judicial system nor adverse parties should be subjected to the burden of litigation continued purely for spite or for personal vindication.

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v. Cazes, 363 F.2d 742 (5th Cir. 1966) (case moot when repeal of law made challenged conduct no longer illegal).

10. *E.g.*, Indiana Empl. Security Div. v. Burney, 409 U.S. 540 (1973); Local 8-6, Oil Workers v. Missouri, 361 U.S. 363 (1960).

11. The best analytical attempts by courts known to the authors are the cases cited in note 2 *supra.*

12. *E.g.*, 1 C.J.S. *Actions* § 17 (1936); Diamond, *supra* note 3.

13. *E.g.*, Diamond, *supra* note 3. The tendency of courts to blur the distinctions between mootness and other doctrines was noted in Snper Tire Eng'r Co. v. McCorkle, 469 F..2d 911, 915 (3d Cir. 1972), *rev'd*, 94 S. Ct. (1974).

14. *See* Note, *Mootness on Appeal, supra* note 3, at 1672-73.

15. *See, e.g.*, Marchand v. Director, U.S. Probation Office, 421 F.2d 331 (1st Cir. 1970) and cases cited therein. But see text accompanying notes 139-53 *infra.*

Nevertheless, since a determination of mootness results in the drastic action of dismissal, the doctrine should be applied with caution. In many cases the inherent brevity of the particular dispute creates an obstacle to any adjudication.[16] In other cases, the defendant may seek to "moot out" a case against him by temporarily discontinuing the practice alleged to be illegal.[17] In a variation on this technique, the defendant will cease the challenged practice as to the individual plaintiffs in a class action in order to obtain a dismissal and preserve the freedom to continue the practice as to all others.[18]

The analysis that we advocate was developed primarily in the context of federal judicial power, but it also should be broadly applicable to state judiciaries, since it is our view that the only constitutional constraint on the mootness doctrine involves the maintenance of adversity between the parties, an element essential to any court's functional competence to make law.[19] If the adversity of the parties has been so compromised that their advocacy will not meet the minimal constitutional requirement of a case or controversy,[20] the functional competence of the court is endangered, and it should not decide even though it may have the power to do so. Conversely, if there exists adequate functional competence to decide, the factors to be considered in administering mootness as a doctrine of judicial economy should not change when the court is bound by a case or controversy restriction.

It should be recognized initially that certain classes of cases in which mootness claims are sometimes made are simply not moot. Part I will examine these cases and explain why they are not moot.

Next, since the case or controversy requirement defines the constitutional limits to adjudication in the federal courts, part II will consider to what extent the mootness doctrine rests on constitutional foundations. We conclude that the constitutional content in the doctrine of mootness is relatively unimportant in the vast majority of cases in which mootness questions are actually litigated. In part III, we will demonstrate how mootness is most important as a doctrine of judicial economy. Finally, part IV will illustrate the suggested analysis by applying it to *DeFunis v. Odegaard.*[21]

16. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Indiana Empl. Security Div. v. Burney, 409 U.S. 540 (1973) (right to hearing prior to termination of unemployment compensation).

17. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); *cf.* United States v. W.T. Grant Co., 345 U.S. 629 (1953).

18. *See, e.g.*, Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969) (defendant welfare officer attempted to moot several different challenges to a statewide welfare regulation by granting aid to the named plaintiffs but not to the class).

19. See text accompanying notes 108-53 *infra.*

20. U.S. CONST. art. III, § 2.

21. 94 S. Ct. 1704 (1974).

I

CASES NOT MOOT

In certain cases in which mootness claims are raised, the necessary conditions for a finding of mootness are not present. These cases can be conveniently grouped into three classes: (1) cases where only one of the elements of relief sought has ceased to be available, (2) cases where the challenged conduct has continuing collateral consequences which may be ameliorated by judicial action, and (3) class actions where the challenged conduct has been discontinued only as to the representative plaintiff or plaintiffs. The first two categories simply illustrate the principle that a case is moot only if the court can no longer affect the specific factual dispute which caused the case to be brought; the third combines elements of the specific relief principle with elements of the principles regarding discontinuance of challenged conduct.[22] The point to be noted generally is that lack of an "effective" remedy is a necessary, but not sufficient condition for a finding of mootness.

Before turning to a detailed discussion of cases which are not moot, it must be emphasized that the question of whether a case is moot is distinct from that of whether an injunction should issue in a given case.[23] The trial court determines what relief is to be granted after a full trial on the issues, but mootness claims are frequently advanced before trial by demurrer, motion to dismiss, motion for summary judgment, or motion for judgment on the pleadings. Therefore, the issue to be decided in a pretrial motion alleging mootness is not whether injunctive relief will be warranted after a full trial; it is whether all aspects of the case are moot at the time the motion is being decided. This formulation of the issue applies even where the plaintiff has explicitly sought only injunctive relief, because most courts have discretion to grant other forms of relief instead, or to merely render judgment, thereby definitively resolving the controversy.

A. Alternate Remedies

The typical case moot as to only one form of relief is a suit for both injunctive relief and damages in which the injunction becomes unavailable. This was the situation in *Sullivan v. Little Hunting Park*,[24] a case in which a Negro sought injunctive relief and damages for racial discrimination in housing. After commencing suit the plaintiff ob-

22. See text accompanying notes 160-84 *infra*.

23. *See, e.g.*, United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

24. 396 U.S. 229 (1969).

tained other accommocations and no longer sought an injunction against the discrimination. Nevertheless, the damages claim so clearly kept the case alive that the Supreme Court did not find it necessary even to discuss mootness. Because this principle is so well established,[25] mootness contentions in such cases are normally disputes over the availability of the alternative remedy. This was the real issue in *Sullivan*, since the statute made no explicit provision for damages.[26]

Another consequence of the clarity of the alternative remedy principle is that courts have sometimes strained to find a damage claim because of their concern for some other factor which militates against dismissal. For example, in *Rickey v. Wilkins*[27] a state prisoner sued to enjoin alleged racially discriminatory practices in a particular prison. He was transferred to another prison, and the state suggested mootness. The court was primarily concerned with ensuring effective judicial review, and it accomplished this in part by construing a prayer for "redress to [sic] the above said religious persecution, and that plaintiff have such other and further relief as justice requires" as a claim for damages requiring decision of the case.[28]

In applying the principle that a case is not moot so long as any of the relief sought is available, it does not matter that the relief still available is decidedly subsidiary to that originally sought. In *Powell v. McCormack*,[29] for example, Adam Clayton Powell sought a judgment that he had been improperly denied his seat in the House of Representatives of the Ninetieth Congress. He was seated in the Ninty-first Congress pending decision. The defendants suggested mootness, asserting that the "primary and principal relief" sought was the seating of Powell in the Ninetieth Congress, and claiming that the "wholly incidental and subordinate" claim for salary during the period of exclusion did not prevent the case from becoming moot when the primary relief became unavailable with the expiration of the term.[30] The Court found this contention unpersuasive and held that the "claim for back salary remains viable . . . and thus [renders] it unnecessary to determine whether the other issues have become moot."[31]

Other forms of subsidiary relief which have been found to prevent a case from being moot include recovery on a bond for damages caused

25. *See, e.g.*, McCabe v. Nassau County Med. Center, 453 F.2d 698, 701-02 (2d Cir. 1971) (public hospital's policy of denying voluntary sterilizations unless patient had specified number of children).

26. 396 U.S. at 235 & n.3, 238. *See also* Wirtz v. Local 153, Glass Bottle Blowers, 389 U.S. 463 (1968).

27. 335 F.2d 1 (2d Cir. 1964).

28. 335 F.2d at 6. See text accompanying notes 220-40 *infra*.

29. 395 U.S. 486 (1969).

30. *Id.* at 499.

31. *Id.* at 496.

by an injunction,[32] even a since dissolved preliminary injunction;[33] counsel fees;[34] and "a question of costs which differs materially from the usual question of costs on appeal."[35]

B. *Continuing Collateral Consequences*

The doctrine that a case is not moot when the challenged conduct has continuing collateral consequences for the challenger, although it has ceased to affect him directly, was first recognized in *Southern Pacific Co. v. ICC*.[36] That case involved an ICC order determining that certain rates charged for the transportation of lumber were excessive and fixing lower maximum rates. The district court denied an injunction against its enforcement, and the order expired by its own terms before the Supreme Court heard argument. In rejecting a claim of mootness, the Court relied in part on the need to ensure effective judicial review,[37] but it also noted that the order might well have continuing collateral effects on the railroad in terms of possible liability to shippers and the setting of rates.[38]

One of the feared collateral consequences has been the binding effect of the trial court's determination on a later action. At least in federal courts, this consequence of refusing review has ostensibly been eliminated, since the res judicata effect of a judgment whose review

32. Liner v. Jafco, Inc., 375 U.S. 301 (1964).

33. American Bible Soc'y v. Blount, 446 F.2d 588 (3d Cir. 1971). In that case, various large-scale mail users sought to enjoin enforcement of regulations that would require them to pre-sort mail by zip code as a condition of obtaining the preferential rates given certain classes of mail. After a preliminary injunction was obtained, the defendant issued new and less demanding regulations, which were not contested. After these became effective, the district court dissolved the injunction and dismissed the case as moot. The Third Circuit reversed the dismissal, finding that a determination of the merits was required in order to ascertain whether defendant could recover on the bonds given against damages caused by the injunction, if the regulations proved valid.

34. Buckner v. County School Bd., 332 F.2d 452 (4th Cir. 1964); Brown v. County School Bd., 327 F.2d 655 (4th Cir. 1964). In both of these school desegregation cases, the court's concern was that effective judicial review be ensured. *Brown* and *Buckner*, however, partially relied on a case which held that where a school board has by its recalcitrance and obstruction rendered it necessary to obtain judicial action to secure desegregation, the plaintiffs are entitled to counsel fees. Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963). Thus even if the case were otherwise moot, it would still be necessary to pass on the merits in order to determine the plaintiffs' right to counsel fees.

35. Rattray v. Scudder, 67 Cal. App. 123, 153 P.2d 433 (4th Dist. 1944). Again, the court's primary concern was to ensure effective judicial review, and the question of costs was clearly a makeweight. The general rule is that taxation of litigation costs is not enough to prevent mootness. Morrison v. Hess, 231 S.W. 997 (Mo. 1921).

36. 219 U.S. 433 (1911).

37. This reliance is shown by the citation of Southern Pac. Terminal Co. v. ICC, 19 U.S. 498 (1911), discussed in text accompanying notes 221-22 *infra*.

38. 219 U.S. at 452.

is precluded by mootness will ordinarily be eradicated by a reversal and remand with instructions to dismiss the complaint.[39] Similarly, the effect of an order such as that involved in *Southern Pacific* can be eradicated by a remand to the agency involved with instructions to vacate.[40] As will be shown, however, the collateral consequences doctrine is still operative.[41]

Following *Southern Pacific* the doctrine that collateral consequences preclude a finding of mootness lay dormant for over half a century. It was finally revived in a series of criminal cases concerning review of convictions where the sentence had already been fully served.[42] In overruling earlier cases denying review[43] the Court gave considerable weight to the collateral consequences of a criminal conviction. The new doctrine was most clearly stated in *Sibron v. New York*:

> [M]ost criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness."[44]

It does not matter that the collateral effects are diminished by the existence of other convictions;[45] the state has the heavy burden of showing that there is "no possibility" of collateral legal consequences in order to obtain a finding of mootness.[46]

Southern Pacific is the only case in which the Supreme Court has applied the collateral consequences doctrine to any situation other than a criminal conviction.[47] Other courts, however, have read the doctrine broadly and have applied it in a variety of circumstances. The follow-

39. *See* United States v. Munsingwear, 340 U.S. 36, 39 (1950). *See generally* Comment, *Disposition of Moot Cases, supra* note 3.

40. A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 328-30 (1961). When proceedings prior to the allegedly mooting circumstances have been judicial, at least some stare decisis effect probably remains. The extent to which this may be significant will vary widely from case to case, and further discussion of this particular point does not seem worthwhile.

41. Note that the collateral consequences here ensure the continued interest only of the private litigants, but that the interest of the regulatory agency is adequately ensured by its concern for its power to issue similar orders in the future.

42. Street v. New York, 394 U.S. 576 (1969); Sibron v. New York, 392 U.S. 40 (1968); Carafas v. La Vallee, 391 U.S. 234 (1968); Ginsberg v. New York, 390 U.S. 629 (1968).

43. Parker v. Ellis, 362 U.S. 574 (1960); St. Pierre v. United States, 319 U.S. 41 (1943).

44. 392 U.S. 40, 55 (1968). *Sibron* involved a misdemeanor conviction; it was the first case to indicate clearly that the rule was not confined to felonies.

45. *Id.* at 56.

46. *Id.* at 57.

47. California followed the new federal rule as to criminal convictions. *In re* King, 3 Cal. 3d 226, 474 P.2d 983, 90 Cal. Rptr. 15 (1970), *cert. denied*, 403 U.S. 931 (1971).

ing situations have been found to have sufficient collateral consequences to preclude mootness despite termination of direct effects: involuntary commitment to a mental hospital;[48] temporary commitment to a mental hospital for emergency treatment and diagnosis;[49] a finding that a criminal defendant is a "probable mentally disordered sex offender;"[50] solitary confinement of a prisoner;[51] "undesirable" discharge from the armed forces;[52] a finding that a juvenile is delinquent;[53] expulsion[54] or suspension[55] from a university for alleged misconduct; and suspension from high school.[56] The only plausible candidates that have been rejected as reasons for reviewing actions whose direct consequences have ceased are a finding that a criminal defendant was incompetent to stand trial by reason of insanity[57] and a finding that a juvenile who had left her parents' home was a person in need of supervision for the protection of herself and the community.[58]

While the Supreme Court has never considered a case not involving collateral consequences imposed by the state, a number of the cases

48. Justin v. Jacobs, 449 F.2d 1017 (D.C. Cir. 1971).

49. *In re* Curry, 470 F.2d 368 (D.C. Cir. 1972). In this case, petitioner alleged a procedural defect in his original commitment for emergency observation and study. The United States argued that this claim was mooted by a later valid commitment for the period required to complete permanent commitment proceedings, and by the later unconditional release of petitioner coupled with dismissal of the permanent commitment proceeding. The court was of the opinion that had the first commitment not occurred, perhaps the commitment pendente lite would not have taken place. *Id.* at 371. Furthermore, petitioner was entitled to clear his name of the finding made in the first proceeding that he was a danger to himself or to others. *Id.* at 371.

50. People v. Succop, 67 Cal. 2d 785, 433 P.2d 473, 63 Cal. Rptr. 569 (1967); People v. Townsend, 20 Cal. App. 3d 919, 98 Cal. Rptr. 8 (2d Dist. 1971). The state contended in these cases that since proceedings to treat the defendants as mentally disordered sex offenders had been terminated, that aspect of the proceedings was moot. Both defendants were serving admittedly valid prison sentences after ordinary criminal trials and sentencing.

51. Black v. Warden, United States Penitentiary, 467 F.2d 202 (10th Cir. 1972). The consequences feared had to do with parole prospects and later internal disciplinary proceedings.

52. Grubb v. Birdsong, 452 F.2d 516 (6th Cir. 1971) (proceeding to review denial of conscientious objector discharge not mooted by later undesirable discharge); McAliley v. Birdsong, 451 F.2d 1244 (6th Cir. 1971) (same); Brown v. Resor, 407 F.2d 281 (5th Cir. 1969) (same).

53. *In re* Dana J., 26 Cal. App. 3d 768, 103 Cal. Rptr. 21 (2d Dist. 1972); *cf. In re* Richard D.D., 23 Cal. App. 3d 592, 100 Cal. Rptr. 351 (2d Dist. 1972).

54. Papish v. Board of Curators, 464 F.2d 136 (8th Cir. 1972).

55. Esteban v. Central Missouri College, 415 F.2d 1077 (8th Cir. 1969); Scoggin v. Lincoln Univ., 291 F. Supp. 161 (W.D. Mo. 1968).

56. Montalvo v. Madera Unified School Dist., 21 Cal. App. 3d 323, 98 Cal. Rptr. 593 (5th Dist. 1971). The contention that the suspension was a blot on plaintiff's record appears, however, to have been a makeweight; the court's real concern was settlement of a reeurrent issue, validity of hair length regulations.

57. People v. Lindsey, 20 Cal. App. 3d 742, 97 Cal. Rptr. 872 (2d Dist. 1971).

58. *In re* Katherine R., 6 Cal. App. 3d 354, 86 Cal. Rptr. 281 (5th Dist. 1970).

decided by other courts[59] also seem to involve collateral consequences imposed socially or economically by private persons.[60] The concern of the courts with these consequences certainly seems valid, at least when the consequences will flow from allegedly wrongful conduct of a government entity. The injured party cares little about the direct source of the consequence, and the eradication of its cause is his best, and often only, protection.

C. *Class Actions*

When the plaintiff is suing on behalf of a class of similarly situated individuals, a special problem may arise if the individual claim of the representative plaintiff is rendered "moot" in some way which does not affect the other members of the class. For example, *Singleton v. Board of Commissioners*[61] was a class action by inmates of two Florida reform schools, challenging continued racial segregation of those institutions. The named plaintiffs were released during the pendency of the action, a fact which the defendants claimed rendered the action moot. The Fifth Circuit responded:

> The problem in this case is not one of mootness, but one of *standing*. . . . A case is moot when there is "no longer a subject on which the judgment of this Court [can] operate." Obviously that description does not fit here; assuming that the Florida State Schools for Boys and Girls are in fact segregated . . . we could render an effective decree, responsive to the complaint. Only permanent—demonstrably permanent—desegregation of the Schools would render this case moot.[62]

Even when the problem is reformulated in these terms, courts have found substantial obstacles to adjudication. It is sometimes reasoned that the mooting of the representative's claim results in the loss of his membership in the class. Since the plaintiff may not represent a class of which he is not a member, the conclusion is that the plaintiff lacks standing to represent the class.[63]

The case of *Hall v. Beals*[64] is often cited in support of this argument. In *Hall* the plaintiffs challenged a six-month durational residence requirement for voting. The three-judge district court dismissed the complaint; pending appeal the election occurred *and* the legislature

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59. *See* cases cited at notes 48-56 *supra*.

60. *See* notes 49, 52, 54-56 *supra*. *Contra*, cases cited notes 57-58 *supra*.

61. 356 F.2d 771 (5th Cir. 1966) (Wisdom, J.).

62. *Id.* at 773 (citation omitted).

63. Frequently this analysis is expressed in shorthand form. For example:

> It must be a novel theory, at least one to which we do not subscribe, that named plaintiffs without the right further to represent themselves can continue to represent unnamed parties allegedly in a similar situation.

Watkins v. Chicago Housing Auth., 406 F.2d 1234, 1236 (7th Cir. 1969).

64. 396 U.S. 45 (1969).

reduced the requirement to two months. Since the named plaintiff would have been eligible to vote in the election had the new requirement been in effect, and since he had never been included in the class—those barred by the two-month rule—he now purported to represent, the Court dismissed the case as moot.[65]

In *Dunn v. Blumstein*,[66] another voter residency case, the Court distinguished *Hall* by noting:

> In this case, unlike [*Hall*], the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class . . . affected by the presently written statute.[67]

Thus *Dunn* limited *Hall* to the proposition that a party may not represent a class of which he was not a member when the suit commenced.

The contention that a plaintiff necessarily loses standing to represent the class when his individual claim becomes moot wrongly concentrates solely upon the plaintiff's personal stake in the litigation. We will argue later that concentrating upon this one factor is an unsatisfactory way of resolving mootness questions.[68] It is particularly inappropriate in many class actions. Except where the litigation will, if successful, produce a fund available for the payment of attorney's fees, the plaintiff will ordinarily have no personal stake in maintaining a class action rather than an individual action.[69] Thus singleminded concentration on personal stake would preclude the maintenance of most class actions that seek injunctive relief only despite their manifest utility.

Better analysis appears in *La Sala v. American Savings & Loan Association*[70] which contains the most extensive judicial discussion of the problems of mootness and class actions known to the authors. There the California Supreme Court observed that representative plaintiffs assume a fiduciary obligation to the members of the class and surrender "any right to compromise the group action in return for an individual gain."[71] Consequently, the satisfaction of the representative plaintiffs' individual claims does not divest them of the obligation to continue the action for the benefit of the class.[72] The court in *La Sala* reasoned that the correct inquiry was "[w]hether the named plaintiffs will fairly and adequately protect [the] class,"[73] concluding that the satisfaction

65. *Id.* at 49.
66. 405 U.S. 330 (1972).
67. *Id.* at 333 n.2.
68. See text accompanying notes 142-52 *supra*.
69. Also, where the plaintiff's attorney's fees will be an element of recovery (for example in a private antitrust action, *see* 15 U.S.C. § 15 (1970)), the production of a fund may be irrelevant to the plaintiff's personal net recovery.
70. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).
71. *Id.* at 871, 489 P.2d at 1116, 97 Cal. Rptr. at 852.
72. *Id.*
73. *Id.* at 871, 489 P.2d at 1117, 97 Cal. Rptr. at 853.

of the representative plaintiffs' individual claims "does not mechanically render those plaintiffs unfit per se to represent the class."[74]

An important distinction must be made between cases in which the mooting events are beyond the control of the defendant[75] and cases in which the mooting event is the defendant's voluntary settlement of the representative plaintiff's individual claim without any attempt to satisfy the claims of the class.[76] Where the mootness claim arises from events beyond the control of the parties, it can be argued that the named plaintiff's right to pursue the action should be resolved by ordinary principles of the mootness doctrine without reference to the involvement of a class.[77] Where the defendant himself causes the allegedly mooting events, however, the case should not be held moot. If such behavior is allowed to moot the case it will almost surely be repeated should another plaintiff seek to vindicate class interests.[78]

The cases line up reasonably well along these lines,[79] many of them asserting the broader principle that a class action properly com-

74. *Id.*

75. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

76. *E.g.*, La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

77. If the situation giving rise to the mootness claim will probably recur in future challenges, the plaintiff should normally be permitted to continue the action. See text accompanying notes 220-38 *infra*. Where the situation is purely fortuitous, another plaintiff will presumably be able to obtain adjudication of the issues. The very fortuity may raise questions as to the typicality of plaintiff's claim, suggesting that it is less necessary and sometimes less useful to allow the current plaintiff to proceed. Even here, however, if the court is satisfied that the representative's claim is typical and that he will adequately represent the class, it is probably desirable to allow him to vindicate the interests of the class.

78. As the California Supreme Court observed in *La Sala*:

> If defendant is permitted to succeed with such revolving door tactics, only members of the class who can afford to initiate or join litigation will obtain redress; relief for even a portion of the class would compel innumerable appearances by individual plaintiffs. Yet the function of the class action is to avoid the imposition of such burdens upon the class and upon the court. . . . If we sanction American's tactic defendants can always defeat a class action by the kind of special treatment accorded plaintiffs here and thus deprive other members of the class of the benefits of the litigation and any notice of opportunity to enter into it.

La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 873, 489 P.2d 1113, 1118, 97 Cal. Rptr. 849, 854 (1971) (citation omitted). Consequently, courts should be most reluctant to allow such tactics to succeed, at least in the absence of some substantial showing that the present case is unusual in some way which will cause the defendant to react differently in the future.

79. *But cf.* cases cited notes 82-104 *infra*. For example, no real significance appears to have been attached to the class action status of Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residence requirements for voting), or Roe v. Wade, 410 U.S. 113 (1973) (abortion), both involving events beyond the control of the parties.

On the other hand, where defendant's actions toward the class representative cause the allegedly mooting circumstances, the mootness claim is generally rejected. Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972); Jenkins v. United Gas Corp., 400 F.2d 28 (5th

menced is never rendered moot merely by the mooting of the representative plaintiff's personal claim.[80] One case has even indicated additional reasons for refusing to hold at least certain cases moot when the defendant takes action affecting only the representative plaintiff.[81]

The only serious problem with the suggested analysis is created by a confused and inconsistent series of cases dealing with claims that recipients of various governmental social welfare benefits are entitled to a hearing prior to termination of those benefits.[82] Starting with

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Cir. 1968); Cypress v. Newport News Gen. Hosp., 375 F.2d 648 (4th Cir. 1967) (en banc); Singleton v. Board of Comm'rs, 356 F.2d 771 (5th Cir. 1966); Buckner v. County School Bd., 332 F.2d 452 (4th Cir. 1964); Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971); Gatling v. Butler, 52 F.R.D. 389 (D. Conn. 1971); Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd mem.*, 400 U.S. 884 (1970); Adens v. Sailer, 312 F. Supp. 923 (E.D. Pa. 1970); *see* Heumann v. Board of Educ., 320 F. Supp. 623, 624 (S.D.N.Y. 1970) (distinguishing that case from those where there is a danger of deliberate frustration of adjudication); *cf.* Gaddis v. Wyman, 304 F. Supp. 717, *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970). *Contra*, Cash v. Swifton Land Corp., 434 F.2d 569 (6th Cir. 1970) (alternative holding).

80. Quevedo v. Collins, 414 F.2d 796 (5th Cir. 1969) (by implication); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Cypress v. Newport News Gen. Hosp., 375 F.2d 648 (4th Cir. 1967) (en banc); Buckner v. County School Bd., 332 F.2d 452 (4th Cir. 1964); Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971); Gatling v. Butler, 52 F.R.D. 389 (D. Conn. 1971); Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd mem.*, 400 U.S. 884 (1970); *cf.* Moss v. Lane Co., 471 F.2d 853 (4th Cir. 1973) (decision against plaintiff's individual claim on the merits does not preclude class relief if otherwise appropriate); Parham v. Southwestern Bell Tel., 433 F.2d 421 (8th Cir. 1970) (same).

81. Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968). *See also* Rosen v. Public Serv. Gas Co., 409 F.2d 775 (3d Cir. 1969). In *Jenkins*, the plaintiff sued for himself and all other Negro employees, contending that defendant's promotion policies were discriminatory. When the defendant promoted the plaintiff to the job he sought during the action, the district court dismissed the action as moot. The court of appeals reversed on the ground that plaintiff was entitled to represent the class. The opinion suggests that the acceptance of such a mootness claim would itself violate equal protection and due process in that the individual plaintiff would be receiving relief wrongfully denied to the other class members. Moreover, the court would be condoning, in a manner forbidden by Shelley v. Kraemer, 334 U.S. 1 (1948), the defendant's continuing discrimination against all of his other Negro employees.

Jenkins also relies upon the legislative history of Title VII of the 1964 Civil Rights Act. As initially envisioned, Title VII would have been enforced by an agency having cease and desist powers, but as finally enacted, all real enforcement powers inhered in individuals alleged to have been discriminated against. The court in *Jenkins* characterized this enforcement method as one whereby the individual plaintiff becomes a private attorney general entitled to represent the rights of the entire public. 400 F.2d at 33. This rationale would seem equally applicable to any situation in which private parties enforce statutory or decisional law or rights, at least unless the enforcement of the law or rights is primarily entrusted to a governmental agency.

82. Two cases which are part of this cluster should, however, be put aside. Richardson v. Wright, 405 U.S. 208 (1972), involved the right to a hearing before termination of Social Security benefits. The district court had found that the existing scheme for termination was procedurally inadequate. Pending decision of the appeal the regulations were altered to provide more protection than previously accorded, but less than the

Goldberg v. Kelly,[83] which established a right to a pre-termination hearing for ordinary welfare benefits, mootness questions have arisen in some form in all these cases.[84] Until recently treatment of these questions had been consistent and seemingly clear. The lower courts uniformly rejected claims that post-termination hearings afforded to the representative plaintiffs rendered the case moot,[85] and the Supreme Court passed on the merits without mentioning that any mootness problem even existed.[86]

For example, in *Torres v. New York State Department of Labor*,[87] plaintiffs challenged the termination of unemployment compensation benefits without a prior hearing. Defendant contended that the case had become moot when the plaintiff's post-termination hearing sustained the termination, and it opposed class action certification on the ground that plaintiff was no longer a member of the class he sought

district court had required. The Supreme Court, as a matter of discretion, remanded to allow administrative reprocessing under the new regulations, observing that should plaintiffs be found eligible, the case would become moot. However questionable this disposition may be on other grounds, see text accompanying notes 248-50 and 267-71 *infra*, the case does not bear on the present discussion for two reasons. First, defendant had altered his conduct with regard to the entire class and not just the representatives. Second, given the remand and reprocessing, any plaintiff found to be eligible for continued benefits would not be a member of the class adversely affected by the new regulations. Thus the observation on mootness is a simple application of Hall v. Beals, 396 U.S. 45 (1969), discussed in text accompanying notes 64-67 *supra*.

Watkins v. Chicago Housing Auth., 406 F.2d 1234 (7th Cir. 1969), concerned the right of a tenant in public housing to a statement of reasons for his eviction. Prior to a hearing in the district court, defendant terminated eviction proceedings against plaintiffs, and the district court dismissed the case as moot. On appeal, the court rejected the contention that the representatives' right to prosecute the action on behalf of the class survived the demise of their own right of action. The real heart of the decision, however, appears to be a holding that, without a showing of some current eviction proceeding, no member of the class had a claim which was ripe for adjudication. See text accompanying notes 130-33 *infra*. This is a rather dubious ripeness holding, since the fact situation presented by the named plaintiffs will satisfy the need for a concrete fact situation. The decision, however, can be justified on grounds of judicial economy, for a new federal regulation clearly required the defendant to comply with procedures the plaintiff believed to be constitutionally compelled. Thus there was little prospect of recurrence.

83. 397 U.S. 254 (1970).

84. *See* Indiana Empl. Security Div. v. Burney, 409 U.S. 540 (1973); California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971) (automatic suspension of unemployment compensation pending initial hearing on appeal by employer); Torres v. New York State Dep't of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970), *vacated*, 402 U.S. 968 *adhered to*, 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd mem.*, 405 U.S. 949 (1972), *reh. denied*, 410 U.S. 971 (1973).

85. *E.g.*, Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968), *aff'd sub nom.* Goldberg v. Kelly, 397 U.S. 254 (1970).

86. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

87. 318 F. Supp. 1313 (S.D.N.Y. 1970), *vacated*, 402 U.S. 968, *adhered to*, 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd mem.*, 405 U.S. 949 (1972), *rehearing denied*, 410 U.S. 971 (1973).

to represent. The court rejected these arguments, noting that this would seriously jeopardize the possibility of ever obtaining an adjudication of the issue. It cited cases intimating that a class action is never mooted solely by the mooting of the representative's personal claim.[88] Furthermore, it observed, plaintiff's standing as a representative of those who were terminated without prior hearings was unimpaired, since he had received only a *post*-termination hearing. On appeal, the district court's judgment on the merits in favor of defendants was vacated[89] for reconsideration in the light of *California Department of Human Resources Development v. Java*,[90] reinstated by the district court,[91] and affirmed summarily without opinion.[92] After *Torres*, however, the law in this area was thrown into confusion by *Indiana Employment Security Division v. Burney*.[93] The issues in *Burney* were identical to those in *Torres*, but the facts differed slightly. First, Burney had obtained a judgment declaring termination without a prior hearing to be unconstitutional prior to decision of her appeal from an unfavorable determination at her post-termination hearing. Second, shortly after that judgment was rendered, the administrative appeal resulted in a favorable determination, and she received full retroactive benefits. After hearing argument the Court entered a brief order vacating the decision below and remanding for determination of whether payment of full retroactive compensation had rendered the case moot.

Soon after probable jurisdiction was noted in *Burney* the plaintiff in *Torres* filed a petition for rehearing, suggesting that the case would be controlled by the decision in *Burney*. After *Burney* was remanded, the petition for rehearing in *Torres* was denied.[94] Thus the Court apparently reached contrary resnlts in two virtually indistinguishable cases.[95]

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88. 318 F. Supp. at 1317.
89. 402 U.S. 968 (1971).
90. 402 U.S. 121 (1971).
91. 333 F. Supp. 341 (S.D.N.Y. 1971).
92. 405 U.S. 949 (1972).
93. 409 U.S. 540 (1973).
94. 410 U.S. 971 (1973). Mr. Justice Marshall filed a dissenting opinion in which he argued, *inter alia*, that if *Burney* required a remand to consider the possibility of mootness, then so should *Torres*. *Id.* at 973-74.
95. A Missouri district court case adds to the confusion. In Callier v. Hill, 326 F. Supp. 669 (W.D. Mo. 1970), the plaintiff, who had been found eligible for A.D.C. benefits, sought a hearing on whether her benefits should be started in February 1970 or a later month. When the administrative authorities failed to provide a hearing within 60 days of her request, she sought an injunction compelling the defendant to comply with a federal regulation that she claimed required him to grant hearings within 60 days to all who so requested. After the action was filed, defendant held a hearing at which a determination adverse to plaintiff was made. He then urged that the holding of the administrative hearing had rendered the case moot. Plaintiff responded that she sought relief for all others similarly situated in the form of an injunction commanding defend-

The Court concealed even from its own dissenting members the reasons for its action.[96] Only two facts apparently distinguished *Burney* and *Torres*: that Burney prevailed below and that, since the allegedly mooting circumstances arose after the judgment below in *Burney*, the district court had no occasion to pass on their effect. Burney's success below might be relevant if it meant that the Court would not be provided with the continued interest and vigor that results from the efforts of the party whose interests are in question to move the case forward. This analysis might explain why the Court decided to reach the merits in cases like *Java* and *Blumstein*, which are distinguishable from *Burney* by the fact that the party who no longer had a personal stake was the respondent.[97] Petitioner Burney's position, however, was supported by able and diligent amici[98] who might be expected to make up for any lack of vigor in plaintiff's advocacy and thereby ensure the full presentation of the case necessary to preserve the functional competence of the court.[99]

Burney and *Torres* are even less comprehensible when considered in terms of judicial economy. The issues presented are being extensively litigated with conflicting results.[100] Because of the apparently

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ant to provide hearings within 60 days of request in the future and to provide them forthwith for all who had already waited more than 60 days. The court appeared to doubt whether the authorities cited (almost all involving racial discrimination) governed cases of this type, but it distinguished them by the fact that *this* case had not yet been certified as a class action pursuant to rule 23(c)(1) of the Federal Rules of Civil Procedure.

This reasoning has a number of flaws. First, it ignores the general rule that a purported class action is to be treated as a class action for purposes of dismissal or compromise until a determination is made to the contrary. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967). *See also* Comments of the Advisory Committee, *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 104 (1966). Second, it totally fails to suggest why the fortuitous timing of certification of an otherwise proper class action should have such substantial effects on its disposition. Third, it ignores the need to provide judicial review of normally brief controversies. See text accompanying notes 220-38 *infra*.

For a more extensive discussion and critique of *Callier* and its almost identical companion, Craddock v. Hill, 324 F. Supp. 183 (W.D. Mo. 1970), see Bledsoe, *supra* note 3, at 439-40, 443-51.

96. Torres v. New York State Dep't of Labor, 410 U.S. 971, 973-75 (1973) (Marshall, J., dissenting to denial of rehearing).

97. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971).

98. Both the AFL-CIO and the National Employment Law Project, an OEO Legal Services backup center, submitted amicus briefs. 409 U.S. at 540.

99. While amici might not be able to compensate for deficiencies in the conduct of a trial, the plaintiff's interest here was not jeopardized until after judgment. Therefore, the only deficiencies which would bear on the court's competence would fall in the area of inadequate presentation of the legal argument, precisely the problem which amici are best suited to remedying.

100. *Compare* Torres v. New York State Dep't of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970), *vacated*, 402 U.S. 968, *adhered to*, 333 F. Supp. 341 (S.D.N.Y. 1971),

applicable precedents in *Goldberg* and *Java*, this litigation will almost surely continue until there is a definitive resolution, which only the Supreme Court can give, since the litigation is conducted primarily in three-judge district courts. Further, the Court fails to explain why the usual weight is not given to preserving the availability of review of brief controversies. Normally a post-termination hearing will intervene before appellate review can be had (and frequently before any judicial review can be completed). Thus if any right to a pre-termination hearing exists, the holding of a post-termination hearing should not be allowed to preclude vindication of that right. Surely the Court in *Burney* cannot have meant to undercut the authorities which give considerable weight to this factor,[101] for it relied on that line of cases just five days later in *Roe v. Wade*.[102] Consequently, it is difficult not to conclude that *Burney* is an aberrant decision grounded primarily on the Court's desire to avoid an issue it had determined not to decide.[103] Since the other cases appear to agree substantially with the mootness analysis we have suggested for class actions,[104] we do not believe that it should be modified to comport with *Burney*.

II

MOOTNESS AS A DOCTRINE OF JUSTICIABILITY

In the federal courts, treatment of mootness has centered on the constitutional requirement of a case or controversy[105] as a prerequisite to the exercise of the federal judicial power.[106] Because of this pre-

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aff'd mem., 405 U.S. 949 (1972), *with* Steinberg v. Fusari, 364 F. Supp. 922 (D. Conn. 1973), *prob. juris. noted*, 94 S. Ct. 1406 (1974).

101. *E.g.*, Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). See text accompanying notes 220-38 *infra*.

102. 410 U.S. 113, 125 (1973).

103. *Cf.* Richardson v. Wright, 405 U.S. 208 (1972), discussed in note 82 *supra* and in text accompanying notes 267-71 *infra*.

104. *See* notes 79-80 *supra*.

105. U.S. Const. art. III, § 2.

106. *E.g.*, North Carolina v. Rice, 404 U.S. 244, 246 (1971). Fortunately, this treatment of mootness has not resulted in total inattention to using the doctrine as a technique for allocating scarce judicial resources. See text accompanying notes 154-271 *infra*. Instead, factors seemingly irrelevant to the question of judicial authority have been forced into the framework of justiciability rather than frankly addressed as questions of resource allocation calling for the exercise of sound judicial discretion. This confusion of concepts has contributed heavily to the ambiguity and apparent inconsistency of the decisions.

In state courts not burdened with a case or controversy requirement the situation is substantially better. There is often candid recognition that if a case raises an issue of broad public interest likely to recur, the court may exercise its inherent discretion to resolve the issue, even though an event occurring during its pendency would normally render the matter moot. *E.g.*, *In re* William M., 3 Cal. 3d 16, 23, 473 P.2d 737, 741, 89 Cal. Rptr. 33, 37 (1970). State court opinions, however, consistently fail to indicate

occupation with the constitutional dimensions of mootness, the more important basis for the doctrine has been largely overlooked.[107] Nevertheless, because the constitutional analysis has overshadowed the other component of the mootness doctrine, this Article will consider the demands of article III before moving to considerations of judicial economy. The Supreme Court has stated that the federal courts do not have the power to decide a moot case because such a suit does not present a case or controversy within the meaning of article III.[108] The Court has limited explanations as to why this is so to declarations in the most general and conclusory terms.[109] In other contexts, however, it has identified four principal elements of a case or controversy: (1) susceptibility to resolution by a judicial remedy; (2) absence of policy questions which should be decided by nonjudicial branches of the government; (3) existence of legal questions adequately illuminated by a concrete fact situation; and (4) presence of parties sufficiently adverse to ensure adequate presentation of all arguments bearing on the issues presented.[110] This part will examine each of these elements in turn to determine what factors may be said to render moot cases nonjusticiable.

A. Susceptibility to Judicial Resolution

One function of the case or controversy requirement is to "limit the business of federal courts to questions presented . . . in a form his-

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the criteria for identifying an "issue of broad public interest." *E.g.*, Collier v. Lindley, 203 Cal. 641, 645, 266 P. 526, 527 (1928). *See also* Montalvo v. Madera Unified School Dist., 21 Cal. App. 3d 323, 329, 98 Cal. Rptr. 593, 597 (5th Dist. 1971); People v. West Coast Shows, Inc., 10 Cal. App. 3d 462, 468, 89 Cal. Rptr. 290, 295 (1st Dist. 1970); Azevedo v. Jordan, 237 Cal. App. 2d 521, 525, 47 Cal. Rptr. 125, 127 (1st Dist. 1965). Even where the court explains why the issue is of public interest, there is never any separate discussion of the factors to be considered in the exercise of judicial discretion. *E.g.*, Ballard v. Anderson, 4 Cal. 3d 873, 876-77, 484 P.2d 1345, 1347, 95 Cal. Rptr. 1, 3 (1971). In practice, the public interest and judicial discretion issues are treated as a single question. Thus no case has been discovered by the authors in which a state court has identified the issues as being of public interest and yet declined to exercise its discretion to decide those issues.

107. See text accompanying notes 149-52 *infra*. Judicial economy is mentioned as a policy underlying mootness in Marchand v. Director, U.S. Probation Office, 421 F.2d 331, 332 (1st Cir. 1970), but the entire thrust of the opinion is directed toward justiciability considerations. The only recent opinion of a federal court known to the authors which explicitly considers mootness as a doctrine of judicial economy is Alton & S. Ry. v. International Ass'n of Machinists, 463 F.2d 872, 877-82 (D.C. Cir. 1972). Even the otherwise perceptive analysis in Super Tire Eng'r Co. v. McCorkle, 469 F.2d 911 (3d Cir. 1972) *rev'd*, 94 S. Ct. 1704 (1974), is couched entirely in terms of case or controversy.

108. *E.g.*, North Carolina v. Rice, 404 U.S. 244, 246 (1971).

109. *Id.*

110. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 95 (1968); Note, *Mootness on Appeal*, *supra* note 3, at 1672-73.

torically viewed as capable of resolution through the judicial process."[111] An historically important consideration in this determination was the availability of an effective remedy with which the courts might finally resolve the dispute. Indeed, the lack of an effective remedy was considered the central element of the mootness.[112] The courts' concentration on the availability of some judicial remedy served in the past both to rationalize the mootness doctrine and to give it coherence. But this aspect of the mootness doctrine has been drastically affected in recent decades by expanding concepts of judicially available remedies, principally declaratory judgments.[113] A declaratory judgment is always theoretically available so long as there is an "actual controversy" between the parties,[114] and consequently the traditional search for *some* judicial remedy is no longer useful.

It could be argued that the availability of declaratory relief will not always satisfy the requirement that the controversy be susceptible of judicial resolution.[115] Yet the court can make findings of fact and determine the legal questions presented. Thus the true objection must be that the remedy will be ineffective because no future conduct will be influenced by the decree. If it can confidently be predicted that no future conduct will be affected, then considerations of judicial economy[116] would dictate a holding of mootness. Where the question of mootness is litigated, however, there is good reason to doubt such a prediction. After all, the moving party could discontinue the litigation, and the other party could usually consent to the decree sought. The fact that both are prepared to engage in expensive litigation over whether such a decree should issue is strong evidence that they believe conduct *will* be affected, at least to the extent of foreclosing options

111. Flast v. Cohen, 392 U.S. 83, 95 (1968).

112. That the availability of an effective remedy is important to mootness may be seen from this oft-quoted passage from Mills v. Green, 159 U.S. 651 (1895):

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect . . . . It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court . . . to grant [plaintiff] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

Id. at 653. Also illustrative of this point are frequent but bare assertions that the court has no subject matter on which to act. *E.g.*, St. Pierre v. United States, 319 U.S. 41, 42 (1943); *Ex parte* Baez, 177 U.S. 378, 390 (1900).

113. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (Federal Declaratory Judgment Act constitutional); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933) (state declaratory judgment reviewable); Declaratory Judgment Act, 28 U.S.C. § 2201 (1970).

114. Declaratory Judgment Act, 28 U.S.C. § 2201 (1970).

115. This would be true if declaratory relief would not resolve the dispute.

116. See text accompanying notes 159-219 *infra*.

which one party desires to preserve. It would therefore appear that availability of declaratory relief will satisfy the requirement of susceptibility to judicial resolution, except perhaps in a class of cases where considerations of judicial economy dictate dismissal for mootness independent of any constitutional compulsion.

Since a declaratory judgment is sufficient relief to satisfy this requirement for justiciability, with such relief being conditioned only on existence of an "actual controversy," determining whether the latter requirement has been fulfilled becomes crucial. And since other aspects of justiciability, such as concreteness of the factual setting and adversity of the parties, are determinative of the existence of an actual controversy,[117] remedial problems no longer present an independent constitutional obstacle to adjudication.[118] Thus the first element of a case or controversy, susceptibility to judicial resolution, contributes nothing to the analysis of mootness.

B. Propriety of Judicial Policymaking

Another function of the case or controversy requirement is to "define 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."[119] At least one commentator[120] and the then Solicitor General of the United States[121] have suggested

117. The United States Supreme Court has held that the test is whether "there is a substantial controversy, between parties having adverse legal interests; of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Lake Carriers' Ass'n v. MacMillan, 406 U.S. 498, 506 (1972), *quoting* Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

118. *See* Powell v. McCormack, 395 U.S. 486, 517-18 (1969) (possible inappropriateness of coercive relief against officers of House of Representatives does not render case nonjusticiable in view of availability of declaratory judgment).

119. Flast v. Cohen, 392 U.S. 83, 95 (1968).

120. Note, *Cases Moot on Appeal*, *supra* note 3, at 796.

121. Excerpts from the oral argument of the Solicitor General were quoted in the appendix to the dissenting opinion of Justice Douglas in Sierra Club v. Morton:

> "Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the Congress should have wide powers, and that the Executive Branch should have wide powers.
>
> "All these officers have great responsibilities. They are not less sworn then are the members of this Court to uphold the Constitution of the United States.
>
> "This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words 'case' and 'controversy' in Article III of the Constitution.
>
> "Analytically one could have a system of government in which every legal question arising in the core of government would be decided by the courts. It would not be, I submit, a good system.
>
> "More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.
>
> "Over the past 20 or 25 years, there has been a great shift in the decision

that this is one function of the mootness doctrine. The difficulty with this position is that mootness questions are not ordinarily related to the policymaking considerations which would be involved in deciding the case. The issues presented for adjudication may raise separation of powers problems, but the fact that supervening events have precluded any effect upon the factual situation which brought the parties to court does not.[122] The scope of judicial policymaking undeniably must be limited to allow the other branches of government full scope for the policy decisions committed to them, but mootness serves to limit judicial policymaking only in an essentially random and fortuitous way.[123] For this reason it would be better to use doctrines related to the proper scope of judicial policymaking where that is the concern, rather than to rely on mootness and other doctrines unrelated to the problem.[124]

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of legal questions in our governmental operations into the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

"I've already mentioned the most ancient of all: case or controversy, which was early relied on to prevent the presentaotin of feigned issues to the court.

"But there are many other doctrines, which I cannot go into in detail: reviewability, justiciability, sovereign immunity, *mootness in various aspects*, statutes of limitatious and laches, jurisdictional amount, real party in interest, and various questions in relation to joinder.

"Under all of these headings, limitations which previously existed to minimize the number of questions decided in courts, have broken down in varying degrees."

405 U.S. 727, 753-54 (1972) (emphasis added).

122. Mr. Chief Justice Warren made a similar point regarding standing. Flast v. Cohen, 392 U.S. 83, 100-01 (1968).

123. *Cf.* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 691 n.173 (1973).

124. Similarly, it has been said with respect to the law of standing:

> The law of standing is the wrong tool to accomplish judicial objectives unrelated to the task of deciding whether a particular interest asserted is deserving of judicial protection. The courts should avoid hypothetical or remote questions—through the law of ripeness, not through the law of standing. The courts should decline to enter political areas—through the law of political questions, not through the law of standing. The courts should limit themselves to issues "appropriate for judicial determination"—through the law of case or controversy, but not through that part of the law of case or controversy pertaining to standing. The courts should avoid taking over functions of government that are committed to executives or administrators—through the law of scope of review, not through the law of standing. The courts should virtually stay away from some governmental activities, such as foreign affairs and military operations—through the law of unreviewability, not through the law of standing. The courts should insist upon competent presentation of cases—through refusals to respond to inadequate presentations, not through the law of standing.

Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 469 (1970). *See also* Barlow v. Collins, 397 U.S. 159, 168-70 (1970) (concurring opinion) (need to distinguish problem of standing from that of reviewability); Flast v. Cohen, 392 U.S. 83, 99-101 (1968) (need to distinguish problem of standing from that of justiciability of issues). *Cf.*, Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Idealogical Plaintiff*, 116 U. PA. L. REV. 1033, 1040-43 (1968).

The availability of numerous doctrines which are directed specifically towards limiting the scope of judicial policymaking reinforces this argument. Most prominent among these is the nonjusticiability of political questions.[125] In addition there are other doctrines of nonreviewability, such as the provision in the Administrative Procedure Act[126] excluding review where "agency action is committed to agency discretion,"[127] as well as the doctrine of sovereign immunity.[128] In view of the availability of doctrines tailored specifically to limiting the scope of judicial policy making and the mootness doctrine's unsuitability to deal with this problem, it would seem that the judicial policymaking function of the case or controversy requirement has little if anything to add to an analysis of mootness.[129]

C. *Concreteness of Fact Situation*

The third element of a case or controversy is an adequately developed and concrete factual situation.[130] This element is necessary to provide the sharp illumination of issues upon which a court depends for resolving disputes.[131] It represents a determination of the functional

125. For discussions of this doctrine see Powell v. McCormack, 395 U.S. 486, 518-22, 548-49 (1969); Baker v. Carr, 369 U.S. 186, 217 (1962). The most complete recent statement of the scope of the political questions doctrine emphasizes the precision with which it is directed to the desired end. A question is political and hence nonjusticiable when there is:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

126. Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 3105 (1970), *formerly* ch. 324, 60 Stat. 237 (1946).

127. 5 U.S.C. § 701(a)(2) (1970). For a brief discussion and illustration of this provision see Langevin v. Chenango Court, Inc., 447 F.2d 296, 302-04 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243, 1249-51 (1st Cir. 1970). A more thorough treatment is Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

128. *See, e.g.*, United States v. Sherwood, 312 U.S. 584 (1941); Brown v. Commonwealth, 453 Pa. 566, 305 A.2d 868 (1973).

129. One response might be that mootness does not limit the scope of judicial policymaking, merely its timing. This approach would have special relevance when constitutional questions are presented, in view of the traditional refusal to decide such questions unless strictly necessary. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625, 633-34 (1972). See especially the noted concurring opinion of Mr. Justice Brandeis in Ashwander v. TVA, 297 U.S. 288, 341, 346-48 (1936). This argument is considered in the text accompanying notes 186-90 *infra*.

130. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 86-91 (1947).

131. Baker v. Carr, 369 U.S. 186, 204 (1962).

limits of judicial competence and is basic to the process of judicial lawmaking.[132] Again the doctrine of mootness bears no relation to the principle sought to be implemented. It is, however, central to the doctrine of ripeness.[133] The ripeness doctrine involves the interaction of this need for a concrete factual setting with an assessment of the parties need for adjudication. As the imminence of injury to one or both of the parties grows, the requisite degree of concreteness is relaxed. Problems involving the concreteness of the factual situation should be resolved solely by reference to the doctrine of ripeness, which is specifically concerned with that requirement. Certainly this problem should not be left to turn upon the fortuitous circumstances which render a case live or moot. Moreover, if the situation was once sufficiently concrete to provide a basis for review, the illumination of the legal principles by those facts must still be available despite the mooting circumstances.

Dismissals for mootness rarely show any concern for the adequacy of the fact situation. Among those cases which do show such concern, none is inconsistent with the view that concreteness considerations add nothing to the discussion of mootness, at least at the constitutional level. Some cases which mention this point are really expressing serious doubt that a similar factual situation will recur.[134] As will be shown later,

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132. With respect to constitutional issues, it is warned that:

> Every tendency to deal with them abstractedly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities.

Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003 (1924). Similar considerations would seem to apply to many nonconstitutional questions.

133. *See, e.g.*, 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 21.01-.02, 21.10 (1958).

134. In Halvonik v. Reagan, 457 F.2d 311 (9th Cir. 1972), for example, the plaintiffs challenged regulations issued by the state governor pursuant to his declaration of a state of emergency resulting from rioting at the state university. The regulations banned all public meetings in the city and prohibited the use of sound trucks or amplifiers in public places. Before the hearing on the prayer for a preliminary injunction the situation quieted, and the regulations were rescinded.

In Davis v. Ichord, 442 F.2d 1207, 1212 (D.C. Cir. 1970), the plaintiffs had been subpoenaed by the House Unamerican Activities Committee in connection with its investigation of the disturbances at the 1968 Democratic National Convention. They sought a declaratory judgment that both the rule defining the committee's jurisdiction and the resolution authorizing the investigation were unconstitutionally vague and overbroad. The Congress during which the subpoenas were issued expired after only five of the seven plaintiffs had testified and before the remaining two had been called. The subsequent Congress abolished the Committee, but created a similar Internal Security Committee. The case was held moot.

In Committtee to Free the Fort Dix 38 v. Collins, 429 F.2d 807, 812 (3d Cir. 1970), the plaintiffs had been denied a permit to use a road, controlled by the military, but functioning as a public thoroughfare for a proposed demonstration. They sought an injunction directing issuance of the permit, but before a hearing was held the date

judicial economy dictates dismissal of such cases independent of any constitutional compulsion,[135] so the constitutional argument adds no independent weight. Other cases refrain from giving declaratory relief as an explicit exercise of discretionary power for reasons related to the mootness and ripeness doctrines.[136] In a few cases, a ripeness problem appears in a mootness context. Thus, for example, in *Socialist Labor Party v. Gilligan*,[137] the one issue which was said to keep the case alive had never been ripe for adjudication with the result that the case was moot.[138] We may therefore conclude that the necessity for a concrete factual context to illumine the legal issues completely fails to support the conclusion that moot cases are beyond the judicial power of the United States.

D. Adversity of Parties

The function of the case or controversy requirement most often cited is to "limit the business of the federal courts to questions pre-

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of the proposed demonstration had passed. Finding no indication that future permits would be sought or, if sought, refused, the court held the case moot.

135. See text accompanying notes 159-219 *infra*.

136. In Richardson v. Wright, 405 U.S. 208 (1972), plaintiffs challenged the failure to provide a hearing prior to termination of Social Security benefits. The district court found the existing procedures constitutionally insufficient, though it did not require all of the protections plaintiffs contended were necessary. While the appeals were pending new regulations were issued meeting some, but not all of the requirements of the district court's decree. The Supreme Court concluded:

> In light of [the new procedure], we believe that the appropriate course is to withhold judicial action pending reprocessing under the new regulations . . . . In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise.

Id. at 209.

Plaintiffs in A.L. Mechling Barge Lines v. ICC, 368 U.S. 324 (1961), attacked the ICC's practice of issuing interim exemptions from a particular regulatory prohibition without either prior investigation or adversary hearing, and without making findings of fact. Pending final disposition of the case the particular exemption challenged was withdrawn, and the ICC conceded the necessity of making findings of fact, though it maintained that its practice was valid in all other respects. The Court concluded that it would not be appropriate to decide the case at that time.

> Despite the Commission's present insistence that it is not so required, experience with its newly adopted practice of making findings . . . may lead the Commission to provide a hearing—at least in some circumstances.
>
> . . . We think that sound discretion withholds [declaratory judgment] where it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted.

Id. at 330.

137. 406 U.S. 583 (1972).

138. Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972), involved a variation of this situation. In that case the challenged law had been substantially amended. The Court held that the amendment rendered the case moot and remanded to permit plaintiffs to amend their complaint so as to challenge the new law. Presumably this

sented in an adversary context."[139] This requirement stems from the fact that the court is neither a representative institution nor one equipped with facilities for gathering information on its own. Consequently it must rely on the parties to frame the problem and present the opposing considerations relevant to its solution. It is particularly important that the parties in fact be adverse and adequately motivated to develop the facts and legal arguments fully. Courts have traditionally required that parties have a "personal stake in the outcome of the controversy" to ensure that this requirement is met.[140] The corollary of this principle is that once a party has ceased to have such a personal stake the quality of his advocacy should be regarded as endangered. Mootness viewed in this manner is simply "the doctrine of standing set in a time frame."[141]

It has been cogently argued, however, that the criterion of personal stake is ill-suited to ensure adequate presentation,[142] that other types of interest will adequately ensure the quality of advocacy,[143] and that history does not support the conclusion that the framers of the Constitution implicitly assumed a personal stake as a requisite of a justiciable case or controversy.[144] Thus, the argument concludes, a personal stake should not be considered a constitutional requirement. There have been occasional intimations of this in judicial opinions,[145] and there is language in *Sierra Club v. Morton* which suggests that the Supreme Court may have adopted this position.[146]

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disposition was necessary because the original record did not adequately illumine the problems raised by the law as amended.

139. Flast v. Cohen, 392 U.S. 83, 95 (1968).

140. Baker v. Carr, 369 U.S. 186, 204 (1962).

141. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973).

142. *See* Davis, *supra* note 124, at 470.

143. Professor Jaffe presented the argument forcefully:

> If it were thought that self-aggrandizement is a more dependable motive than ideological interest, I would point out that it usually requires a financial outlay to undertake a lawsuit, so that once launched on the lawsuit the ideological plaintiff has, at least, committed a sum of money and so, in some sense, has a financial investment to protect. But the very fact of investing money in a lawsuit from which one is to acquire no further monetary profit argues, to my mind, a quite exceptional kind of interest, and one peculiarly indicative of a desire to say all that can be said in the support of one's contention. From this I would conclude that, insofar as the argument for a traditional plaintiff runs in terms of the need for effective advocacy, the argument is not persuasive.

Jaffe, *supra* note 124, at 1037-38.

144. Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

145. Flast v. Cohen, 392 U.S. 83, 119-20, 130-33 (1968) (Harlan, J., dissenting), and cases cited therein.

146. Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions . . . or to entertain 'friendly' suits . . . or to resolve political

If the possession of a personal stake is not a requirement of constitutional dimensions, the only constitutional aspect of mootness is the need for sufficient continued adversity of the parties to satisfy the minimal requirements of article III.[147] Whether this adversity exists is a question that must rest in the sound discretion of the courts. Willingness to initiate or continue expensive litigation, however, should argue powerfully for the existence of the requisite interest on the part of the plaintiff.[148] Also in many cases the defendant has at least some interest in retaining the option to pursue a course of action similar to that involved in the current litigation at another time or against other persons. To the extent that these circumstances prevail, we believe there is adequate assurance of adversity to meet the demands of article III. Moreover, where the defendant can demonstrate his permanent abandonment of the challenged conduct, judicial economy will dictate dismissal without the necessity of reaching the constitutional point.[149]

> questions . . . because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one *within the power of Congress* to determine.

405 U.S. 727, 732 n.3 (1972) (citing, *inter alia*, the authorities cited in notes 143-45 *supra*) (emphasis supplied).

147. Alton & S. Ry. v. International Ass'n of Machinists, 463 F.2d 872, 877 (D.C. Cir. 1972).

148. Professor Scott makes the argument cogently:

> [D]espite the subsidization of court costs, the remaining private costs of litigation are quite sufficent to serve as an initial screening barrier of considerable height. When the "floodgates" of litigation are opened to some new class of controversy by a decision, it is notable how rarely one can discern the flood that the dissenters feared. The plaintiff (or the organization actually funding and conducting the litigation, if legal rules force the use of nominal plaintiffs) must feel strongly enough about the issue in question to pay the bills, and that both cuts down the flood and gives us at least a partial measure of his "stake" in the outcome.
>
> The implication of these considerations is that most of the concern over plaintiff's standing in terms of the minimal requirements of Article III, or "pure" standing, is empty. . . . [I]nsofar as standing focuses on the plaintiff and whether he has a sufficient "personal stake in the outcome of the controversy," it is an idle and unnecessary Article III exercise. If plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation.
>
> . . . The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom.

Scott, *supra* note 123, at 673-74 (footnotes omitted).

It is true that this consideration will favor the affluent to the extent that the less wealthy segments of society will not have discretionary funds to spend in expressing their own concerns. This point, however, fails to take account of institutional litigants, such as the OEO Legal Services offices and the ACLU, which may substantially further the interests of the less affluent. And, to the extent that the point still has force, it should be seen as a consequence of the way in which our judicial system is organized and financed which has implications for mootness theory regardless of the merits of that organization.

149. For a detailed discussion of the commands of judicial economy on this point

In most litigated mootness cases the plaintiff has arguably lost his personal stake in the litigation, and it can reasonably be concluded that the defendant wishes either to continue a similar course of conduct to that in issue or at least to retain the option of doing so. Since it is in precisely such cases that adversity has a good probability of surviving the arguably mooting change of circumstances, even the requirement of adversity of parties appears to have little significance in the numerically most important class of cases.

At least implicit support for this analysis in the context of mootness, if not of "pure" standing, can be drawn from *Dunn v. Blumstein*.[150] *Dunn* was a challenge to state and county durational residence requirements for voting. The district court held the requirements unconstitutional but refused to grant a preliminary injunction permitting plaintiff and the members of the class he represented to vote or to allow plaintiff to cast a provisional ballot. Before the case could be heard on appeal, the election in question had been held. The Court reasoned that the naturally brief duration of this type of controversy rendered it one which was "capable of repetition, yet evading review."[151] Before the appeal was heard, not only the representatives, but all original members of the class except those who had made a subsequent interstate move had satisfied the requirements. Thus they had no personal stake unless it could be assumed that they would move their domiciles out of Tennessee and then back into the state.[152] If such remote possibilities give rise to a personal stake, then any such requirement has been reduced to a legal fiction.

In summary, the requirement that a dispute be susceptible of judicial resolution no longer contributes significantly to the analysis of mootness problems, and neither the need to limit the scope of policy-making by the courts, nor the need for illumination of the legal issues by an adequately developed factual context appears ever to have figured importantly in such analysis. Thus the case or controversy aspect of mootness rests solely on the need to preserve the adversity of the parties, but even the need for adversity fails to eliminate a substantial number of cases, including most of the litigated cases.

Our conclusion that not all aspects of the mootness doctrine are of constitutional magnitude is not without precedent. The Supreme

and the showing required to render a case moot, see text accompanying notes 159-84 *infra*.

150. 405 U.S. 330 (1972).

151. *Id.* at 333 n.2. For a detailed consideration of the doctrine invoked by the Court see text at notes 220-41 *infra*.

152. A number of other cases where the courts have sought to guarantee full judicial review of normally brief controversies could also be cited for this point. See notes 213-15 *infra* and accompanying text. *Dunn*, however, presents one of the more remote prospects of adverse effect on the representative party if the case is not adjudicated.

Court has begun to recognize similar problems in related areas. For example, in the context of standing it observed:

> Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is "not always clearly distinguished from the constitutional limitation." . . . The "many subtle pressures" which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.[153]

The application of this insight to mootness is long overdue.

III

MOOTNESS AS A DOCTRINE OF JUDICIAL ECONOMY

Long before the Constitution was adopted, the mootness doctrine had developed as a common law limitation on the duty of a court to decide a case.[154] At common law mootness was largely directed to considerations of judicial economy; historically it focused on the availability of an effective remedy.[155] We are now ready to turn our attention to those nonconstitutional policy considerations which constitute the real basis for the mootness doctrine as it applies in most litigated cases.

As has been previously discussed, the focus on remedy has been greatly weakened by the increasing importance of the declaratory judgment.[156] But the need to conserve scarce judicial resources and to ration them among numerous claimants remains vital.[157] Where the court can no longer affect the factual dispute between the parties, but sufficient adversity remains to preserve its functional competence, the court must determine whether judicial economy suggests dismissal of the case, and if so, whether judicial economy is outweighed by policies which would be advanced by a final decision of the case. The task facing the courts, then, is to determine what is at stake and to weigh

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153. Flast v. Cohen, 392 U.S. 83, 97 (1968) (footnotes omitted).

154. Alton & S. Ry. v. International Ass'n of Machinists, 463 F.2d 872, 877 (D.C. Cir. 1972); *see* Local 8-6, Oil Workers v. Missouri, 361 U.S. 363, 367-68 (1960); Mills v. Green, 159 U.S. 651, 653-54 (1895). The common law limitation is the entire basis for the mootness doctrine in those jurisdictions which have no case or controversy limitation on judicial power.

155. One commentator put the argument this way:

> [T]he business of the courts, it is said, is the resolution of disputes, a duty so time-consuming and pressing that courts should not "waste" their time passing on the merits of "nondisputes"—controversies for which there is no judicial remedy.

Note, *Mootness on Appeal, supra* note 3, at 1675.

156. See text accompanying notes 113-18 *supra.*

157. For an analysis of the judicial process as a subsidized product and the doctrine of standing as a device for rationing that product, see Scott, *supra* note 123, at 670-83.

the social costs of deciding the case against the social costs of not deciding it. If the dispute is sufficiently likely to recur, for example, judicial economy will be served by a decision that will forestall future litigation. Moreover, decision of a case which is likely to recur better protects the rights of victims than will a decision delayed until harm has again occurred.

Another factor which would justify adjudication of a case where the immediate rights of the parties will not be affected is the need to ensure effective judicial review of conduct that would otherwise evade such scrutiny. In some circumstances, moreover, there will be substantial social costs stemming from continued uncertainty in the law.[158] These costs militate for adjudication, even though a decision may not immediately affect the parties to the case before the court. This part will examine these factors in turn.

A. Probability of Recurrence

The primary determinant of whether a finding of mootness would serve the end of judicial economy is the probability of recurrence. If the probability of recurrence is high, deciding the case may forestall future litigation resulting from recurrence. Probability of recurrence also bears on determining the continued adversity between the parties[159] and the propriety of injunctive relief. This factor is commonly considered in two different contexts. The first is where, either voluntarily or under compulsion of circumstances, a defendant ceases conduct which the plaintiff sought to have enjoined. The other arises where the current dispute is said to be only one of a series of essentially similar disputes in a "continuing controversy."

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158. A related consideration is the nature of the judicial role in the relevant area of the substantive law. For example, courts tend to be more activist in cases involving racial discrimination, freedom of expression, and state regulation of interstate commerce than they are in cases involving labor relations. It is entirely appropriate that these role differences should influence the exercise of discretion in determinations as to mootness.

Thus in a case concerning the legality of selective strikes under the Railway Labor Act, the court cited reluctance to interfere in labor relations as a primary reason for refusing to decide the case after the strikes had been terminated by legislative imposition of a settlement. Alton & S. Ry. v. International Ass'n of Machinists, 463 F.2d 872, 881 (D.C. Cir. 1972). It is important to note, however, that judicial reluctance to interfere in an area does not necessitate a mootness holding. Indeed, a straightforward decision on the merits may be less intrusive. For example, surely the holding of mootness in Local 8-6, Oil Workers v. Missouri, 361 U.S. 363 (1960), encouraged continued judicial interference in labor relations until the legal questions were resolved three years later in Division 1287, Street Employees v. Missouri, 374 U.S. 74 (1963). See text accompanying notes 194-98 *infra*.

159. See text accomanying notes 139-41 *supra*.

1. Cessation of Challenged Conduct

Frequently the defendant in an action for injunctive relief will voluntarily cease the challenged conduct and contend that the case has thereby become moot. The leading federal decision on this point is *United States v. W.T. Grant Co.*,[160] in which the defendant eschewed its previous illegal conduct prior to trial and adamantly insisted that it would never resume. Although affirming refusal of injunctive relief in those circumstances, the Supreme Court was careful to point out that the lower court need not have accepted defendant's assurances,[161] and that the case was not automatically moot even if it did so.[162] The Court went on to set out a stringent standard for mootness claims: "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' . . . The burden is a heavy one."[163]

Indeed, the burden is such that voluntary cessation does not preclude injunctive relief.[164] In *NLRB v. General Motors Corp.*,[165] cited with approval in *W.T. Grant*,[166] the court argued in cogent dicta that the defendant's interest in escaping any possible stigma attached to a finding adverse to him and to a court's refusal to accept his promise not to repeat the unlawful conduct would not ordinarily outweigh the interest in protection for which the plaintiff had once demonstrated a

160. 345 U.S. 629 (1953).

161. *Id.* at 632 n.5, *quoting from* United States v. Oregon Med. Soc'y, 343 U.S. 326, 333 (1952):

> When defendants are shown to have settled into a continuing practice . . . , courts will not assume that it has been abandoned without clear proof. . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentence and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

162. 345 U.S. at 633.

163. *Id.* (citation omitted). California has taken much the same position on this issue, with the clearest statement appearing in Professional Firefighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963). In that case the California Supreme Court sharply criticized the trial court's holding that past discrimination was not proof of future discrimination. The correct doctrine was that injunction or mandate is the proper remedy when circumstances are such that past illegal acts were likely to recur. 60 Cal. 2d at 286, 384 P.2d at 164, 32 Cal. Rptr. at 836.

Perhaps the most extreme statement of the *W.T. Grant* doctrine is in Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz.), *aff'd mem.*, 400 U.S. 884 (1970) (Arizona statute permitting removal of nonresidents from state hospitals held unconstitutional), which cited *Grant* for the proposition that a defendant cannot moot a case and deprive the court of jurisdiction by his voluntary actions. 313 F. Supp. at 40. This view is certainly correct if, as the other cases cited indicate, it means that a defendant cannot moot a case by a bad faith temporary discontinuance of his conduct. But the general rule is that a defendant can moot a case by a good faith permanent discontinuance. *Cf.* United States v. Oregon Med. Soc'y, 343 U.S. 326, 334 (1952).

164. United States v. W.T. Grant, 345 U.S. 629, 633 (1953).

165. 179 F.2d 221 (2d Cir. 1950).

166. 345 U.S. at 632.

need.[167] Although there is some suggestion that the holding in *NLRB* is limited to cases involving injunctions sought by governmental agencies,[168] the dicta would seem to be generally applicable.

In *United States v. Atkins*[169] the court indicated that in some cases one of the factors a court would consider in determining the probability of recurrence[170] is the character of past violations. Assurances of future good conduct would be particularly discounted from a defendant whose past illegal conduct was knowing and willful.[171] Moreover, a case is not moot unless voluntary cessation is accompanied by admission of past illegality and assurances of future reform.[172] Nevertheless, where a court finds adequate assurance that the challenged conduct will

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167. 179 F.2d at 222. *See also* Vaughan v. John C. Winston Co., 83 F.2d 370 (10th Cir. 1936), in which the court said:

> If, except for the injunction, Vaughan would have continued to send out the defamatory circulars then the order concededly was proper; if he did not so intend, then he is not hurt by the order. His appeal from that part of the order indicates that it hurts; but it can only hurt if he desires to resume his unlawful acts.

168. *Id.* at 374. See notes 253-62 *infra* and accompanying text.

169. 323 F.2d 733 (5th Cir. 1963).

170. *Id.* at 739.

The burden upon the defendant to demonstrate the permanence of the cessation may be a heavy one. In *Walling v. Haile Gold Mines*, for example, the Secretary of Labor sought to enjoin the defendant from violating the Fair Labor Standards Act (FLSA), and the district court denied the injunction. During the appeal the defendant ceased mining gold, closed the mine where the alleged violations had occurred, and moved to another state. After the closing of the mine, the War Production Board requested cessation of gold mining and defendant surrendered its license to mine gold. The court found that the case was not moot because the defendant retained the mines and equipment necessary to resume the operation in question and expressed the intent to seek a new license when the ban on gold mining was lifted. 136 F.2d 102 (4th Cir. 1943) (decided on other grounds).

A more extreme case was *Walling v. Mutual Wholesale Food and Supply Co.*, again involving injunctive enforcement of the FLSA. After the district court denied the injunction and the Secretary filed his brief in the court of appeals, the trustee in bankruptcy of the defendant's estate notified the court that the assets of the corporation had been liquidated and it had ceased doing business. Nevertheless, the court held that, "Ceasing an illegal practice (by going out of business or otherwise) after institution by a public agency of a proceeding to prevent future violations does not make the controversy moot." 141 F.2d 331, 334 (8th Cir. 1944) (decided on other grounds).

171. *See id.* at 740. *See also* Pullum v. Greene, 396 F.2d 251, 254 (5th Cir. 1968) (exclusion of Negroes from jury service); Lankford v. Gelston, 364 F.2d 197, 203 (4th Cir. 1966) (flagrant invasions of privacy); SEC v. Culpepper, 270 F.2d 241, 251 (2d Cir. 1959) (defendant, familiar with the consequences of his activities, showed lack of concern in compliance with statutes governing securities); ICC v. Keeshin Motor Express Co., 134 F.2d 228, 230 (7th Cir. 1943) (large motor express company charged with knowledge of what its duties were).

172. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 308 (1897); *In re* Colton, 291 F.2d 487, 492 (2d Cir. 1961); Yarnell v. Hillsborough Packing Co., 70 F.2d 435, 438 (5th Cir. 1934). *See also* Walling v. Helmerich & Payne, 323 U.S. 27, 43 (1941) (defendant contended his past conduct was lawful); United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1946) (same).

not recur, the case should be held moot.[173]

Similar to, but distinguishable from, a voluntary cessation situation is one in which, due to factors beyond his control, the defendant either can no longer engage in the challenged conduct or no longer has any incentive to do so. Superficially at least, the changed condition argument is more convincing than the voluntary cessation argument. That the defendant's past illegal acts are no longer feasible, and will not be feasible in the foreseeable future, is more impressive evidence that the unlawful conduct will not recur than any self-serving assurance of repentance and reform. Nonetheless, as a matter of practice the courts seem to demand even more proof for a changed conditions claim than for one of voluntary cessation. There is good reason for this difference. If the changed conditions do not really prevent resumption of defendant's former conduct, or if the change is only temporary, the defendant will presumably resume the conduct at his earliest opportunity, for he has neither admitted its illegality nor promised not to resume it. We suggest that any changed condition argument must meet three crucial tests: the changed conditions must actually prevent or render unprofitable defendant's previous conduct; the change in conditions must be beyond defendant's ability to reverse; and the changes must seem likely to continue into the indefinite future. The cases will be analyzed within the framework of these criteria.[174]

Changed conditions cannot render an injunction case moot unless they actually prevent repetition of the challenged conduct, a fact which must be demonstrated with the same clarity as that required to show the permanence of a voluntary cessation. In *United States v. Concentrated Phosphate Export Association*,[175] a government antitrust action against an association formed by American companies engaged in ex-

173. *E.g.*, Sanders v. Wyman, 464 F.2d 488 (2d Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973); Berman v. Board of Elections, 420 F.2d 684 (2d Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970).

174. Although the elements of this three-part test may be detected in the cases, it is nowhere explicitly enunciated. Indeed, most courts fail to differentiate theoretically between changed conditions and voluntary cessation, citing cases involving the two situations interchangeably. Thus the latest changed condition case, United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968), cited and relied heavily upon two voluntary cessation cases, United States v. W.T. Grant Co., 345 U.S. 629 (1953), and United States v. Trans Missouri Freight Ass'n, 166 U.S. 290 (1897). *W.T. Grant* in turn relied heavily upon United States v. Aluminum Corp. of America, 148 F.2d 416, 447-48 (2d Cir. 1946), a changed conditions case. The test enunciated in *Concentrated Phosphate* is apparently identical to that pronounced in *W.T. Grant*. *Compare Concentrated Phosphate*, 393 U.S. at 203 ("[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur *with W. T. Grant*, 345 U.S. at 633 ("[t]he case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated' ").

175. 393 U.S. 199 (1968).

porting fertilizer to Korea under the AID program, attorneys for the Association contended on appeal that the dissolution of the Association had mooted the case. It had been dissolved, they asserted, because changes in AID regulations made its operations uneconomical. The Court rejected this contention and held that the Association's unsupported statement regarding the economics of joint operations was not sufficient to satisfy its heavy burden of persuasion.[176] The Court did note that while the case was not moot the Association still might demonstrate to the trial court that the likelihood of further violations was sufficiently remote to render an injunction unnecessary.[177]

Changed conditions that are reversible by the defendant—essentially a variant of voluntary cessation—do not moot a case. A series of desegregation cases, including *Anderson v. City of Albany*,[178] and *City of Montgomery v. Gilmore*,[179] exemplifies this proposition. In both of these cases, the Fifth Circuit flatly rejected contentions that the desegregation suits were mooted when the cities closed the public facilities to which plaintiffs sought access during the pendency of the actions. The controversies were held not to be moot so long as the facilities remained in existence, since they could be reopened by defendants at any time.

In *Anderson* the court extended this reasoning to reject a contention that defendants had mooted the case by repealing all municipal segregation ordinances.

> The same principle applies to the repeal of the segregation ordinances long after the suit was filed and the matter submitted to the trial court. The passage of City Ordinances is a matter of regular action by the Commission of the City of Albany. *What has been adopted can be repealed, and what has been repealed can be readopted.*[180]

Finally, the changed conditions must be expected to continue into the indefinite future. In the leading case, *United States v. Aluminum*

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176. *Id.* at 203.

177. *Id.*

178. 321 F.2d 649 (5th Cir. 1963).

179. 277 F.2d 364 (5th Cir. 1960).

180. 321 F.2d at 657 (emphasis added). Another example of this principle is United States v. Beach Associates, Inc., 286 F. Supp. 801 (D. Mo. 1968), which involved racial discrimination in the rental of transient housing facilities. The court enjoined such discrimination, although the units had been closed for failure to comply with local ordinances and there was no present intention to reopen them:

> While five of the apartments are now being used for storage, there are no plans to tear the building down, and it can be used for its original purpose if the defendants comply with local ordinances. Under these circumstances, the Court is compelled to issue an injunction enjoining the operation of the lodging facility on a racial discriminatory basis.

Id. at 808.

Co. of America,[181] defendants alleged that their international cartel had ceased functioning many months before the beginning of World War II and was necessarily not functioning thereafter because of war between the nations to which the cartel members belonged. The court, sitting in March, 1945, observed that wars are not of infinite duration; it concluded defendants had failed to show convincingly that the cartel would never be reactivated.

Similar reasoning accounts for rejection of mootness contentions in a wide variety of cases. These have included: wartime orders excluding plaintiff from the Eastern Seaboard withdrawn on account of diminished German threat;[182] challenges to practices in a particular prison claimed to be mooted by transfer to a different prison;[183] and prohibition of challenged disciplinary practice by a nondefendant state agency.[184]

2. *Identity of the Parties*

Also relevant to the resolution of mootness claims is the probability that the dispute will again arise between the same parties, between either of the current parties and a third party, or between two completely different parties. This consideration becomes an issue in the context of the continuing controversy doctrine. Briefly, the continuing controversy doctrine holds that if essentially the same controversy is likely to be presented again, judicial economy or other values[185] may be better served by deciding the case presently before the court, provided that the parties remain sufficiently adverse to preserve the functional competence of the court. A case where the balance of these

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181. 148 F.2d 416 (2d Cir. 1945) (sitting as a court of last resort) (L. Hand, J.).

182. Ebel v. Drum, 55 F. Supp. 186 (D. Mass. 1944). The court reasoned:

> [Defendants] disclaim neither the right nor the intent to remove the plaintiff from the entire Eastern Military Area should conditions revert to the state prevailing at the date of the original exclusion order. . . . [Defendants' about face] does not suffice to make moot what the defendants, by their own unilateral action, may again render controversial.

Id. at 189.

183. Barnett v. Rogers, 410 F.2d 995 (D.C. Cir. 1969); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961). The transfers did not moot the claims for injunctive relief against the challenged practices because the plaintiffs might later be returned to the prison whose practices were challenged.

184. Jackson v. Bishop, 404 F.2d 571, 575-76 n.5 (8th Cir. 1968). This was an action to enjoin a prison superintendent from using corporal punishment as a means of maintaining prison discipline. The court refused to hold the case moot even though the nonparty State Penitentiary Board had, during the pendency of the appeal, removed defendant's authority to administer corporal punishment. Although the rejection of the mootness argument was due in part to the court's unwillingness to accept defendant's assertions during appellate argument, the primary reason was that the new rule might be abrogated at any time by the Board.

185. These other values are discussed in subsequent sections.

factors dictates decision is said to involve a continuing controversy of which the now terminated factual dispute is only one of many chapters.[186]

There is an argument, which we reject,[187] suggesting that at least much of the continuing controversy doctrine is fundamentally wrong. It proceeds from the premise that the lawmaking function of the courts is justified solely as an incident of the necessity to decide cases. Consequently, when it is no longer strictly necessary to decide a particular case, the justification for judicial lawmaking terminates, and dismissal of the case should follow. When it is argued that the possible recurrence of the problem renders it likely that the courts will eventually decide the questions presented, the rejoinder is that even if the argument is true, the question of timing is crucial. The later court will necessarily have more information, at least in the form of a longer historical record, and the future should be as nearly free from any hampering precedents as is consistent with the responsible exercise of the judicial function.

In response to this argument, we contend that other values, which will be served by adjudication rather than dismissal, may override the normal reluctance to allow judicial lawmaking.[188] Moreover, an analysis of the probability of recurrence also argues for the continuing controversy doctrine. If the dispute is unlikely to recur in a form substantially similar to that presented by the instant case, no purpose is served by decision. Dismissal is dictated both by considerations of judicial economy and the reluctance to have the judiciary engage in unnecessary lawmaking. Whether the requisite adversity of the parties would often be maintained might also be doubtful.

If, however, the dispute is one expected to recur in substantially identical form with great frequency in the near future, dismissal may not be the answer. Where the arguably mooting circumstances are purely fortuitous and unlikely to present a substantial obstacle to future adjudication, judicial economy will probably be better served by continuing the litigation to final adjudication rather than by requiring a new action after the problem recurs.[189] Where the individual episodes of the recurrent dispute will generally be very brief, the problem is more complex. It could be argued that both judicial economy and minimiza-

186. *E.g.*, Jeannette Rankin Brigade v. Chief of Capitol Police, 421 F.2d 1090, 1097-1101 (D.C. Cir. 1969) (Bazelon, J., concurring on mootness question, but dissenting on the merits). The continuing controversy doctrine originated in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911). See text accompanying notes 221-22 *infra*. The doctrine is fully discussed in the text accompanying notes 191-271 *infra*.

187. See text accompanying notes 188-90 *infra*.

188. See notes 220-52 *infra* and accompanying text.

189. Moreover, if the dispute is expected to recur frequently, a finding of mootness will delay adjudication only briefly.

tion of judicial lawmaking will be served by dismissal, for if all such actions will inevitably be dismissed they will probably not be brought at all, thereby eliminating those demands on judicial resources. However, it is our position, and the courts have clearly held, that it is unacceptable to preclude judicial determination of an entire class of disputes solely because of their inherent brevity.[190] Therefore the argument drawn from the desire to minimize or at least postpone judicial lawmaking is weak when frequent recurrence is expected in the immediate future.

Moving along the continuum from the situation where frequent recurrence within the immediate future is highly likely to the situation where recurrence is not expected in the immediate future, the case for adjudication becomes progressively weaker. There may be no mechanical rule for determining when the balance tips in favor of dismissal, especially when the necessity of weighing other factors is considered, but it is balancing that is required, not automatic dismissal.

Returning to the question of whether the expected recurrence must involve the same parties now before the court, it seems relatively certain that where neither of the present parties will be affected the necessary adversity is lacking. Rarely will it happen that both parties will remain interested in a legal question which by hypothesis is not expected to affect either of them in the future. On the other hand, courts generally assume that a reasonable prospect of recurrence involving the same parties is adequate to support finding of a continuing controversy.[191]

The more difficult question is whether the continuing controversy doctrine should be applicable where it seems likely that only one but not the other of the present parties will be involved in future recurrences. This problem was presented in *Marchand v. Director, U.S. Probation Office*,[192] which involved the substantive issue of whether an alleged parole violator was entitled to bail pending a parole revocation hearing. Pending appeal from the denial of habeas corpus the appellant completed service of his sentence and was released. The First Circuit held the case moot because, though other parolees might be incarcerated and denied bail, "[t]he likelihood of [appellant's] again being

190. See text accompanying notes 220-24 *infra*.

191. *E.g.*, Marchand v. Director, U.S. Probation Office, 421 F.2d 331, 334 (1st Cir. 1970). Cases in which the recurrence would be likely to bring the same parties into conflict usually involve attempts to get injunctive relief, since suits for damages or other relief for past conduct are normally impossible to moot without granting the relief sought. See text accompanying notes 24-35 *supra*. Logically, there should be little difference between injunction cases and others likely to bring the same parties again before the court if the issue disputed is not settled by a decision in the present cases.

192. *Id.* *See also* Committee to Free the Fort Dix 38 v. Collins, 429 F.2d 807, 812 (3d Cir. 1970).

placed in the situation of which he complains is speculative."[193]

Marchand does not cite the two opinions which, taken together, most powerfully support its conclusion: *Local 8-6, Oil Workers v. Missouri*[194] and *Division 1287, Street Employees v. Missouri*.[195] The substantive issue in both cases was the constitutionality of a Missouri statute allowing the governor to seize and operate a struck business when it was deemed necessary to the public interest. In *Oil Workers*, pursuant to the seizure, the state trial court enjoined the strike, compelling employees to resume work. On appeal, long after the strike and the resultant seizure had ceased, the Missouri Supreme Court upheld the law. The United States Supreme Court refused the subsequent appeal as moot, noting that a new contract had been entered into over four years previously.[196] Three years later, in *Street Employees*, the Court decided a case in which the seizure was long over but the strike continued. Mr. Justice Stewart, who wrote both opinions, distinguished *Oil Workers* on the grounds that in that case the strike had been settled.[197] The decision in *Oil Workers* recognized that the same controversy as to the constitutionality of the seizure law might recur as to other unions, but said that such recurrence as to the immediate party, Local 8-6, was purely speculative. In *Street Employees*, however, the continuance of the strike made recurrence of the controversy as to the immediate parties eminently possible. These cases thus provide strong support for *Marchand's* conclusion that the continuing controversy doctrine applies only where the controversy is likely to recur between the immediate parties.

Oil Workers and other cases requiring identity of the parties are not concerned with judicial economy, as such, for the relevant inquiry from the standpoint of judicial economy is directed to the probability of recurrence between any parties in a form sufficiently resembling the present case that a decision here will forestall later litigation. What does lie at the root of these cases is concern about the adversity of the parties, and specifically about the apparent lack of a personal stake in the outcome of the litigation of a party who may well not be involved in the continuing controversy.[198]

The recent decision in *Super Tire Engineering Co. v. McCorkle* em-

193. 421 F.2d at 334.

194. 361 U.S. 363 (1960).

195. 374 U.S. 74 (1963).

196. The Court commented rather acidly: "Whatever the practice in the courts of Missouri, the duty of this Court 'is to decide [only] actual controversies . . . .'" 361 U.S. at 367, *quoting* Mills v. Green, 159 U.S. 651, 653 (1895).

197. 374 U.S. at 77-78.

198. Note, however, that Missouri does have a continued stake in the case, since the state wishes to retain the ability to utilize the challenged seizure provision in the future. This situation is typical of the vast majority of litigated mootness cases.

phatically confirms this point.[199] In *Super Tire*, an employer sought to enjoin payment of state welfare benefits to its striking employees on the ground that such payments interfered with the federal labor policy of free collective bargaining by insulating one party—the union—from the economic consequences of the strike. The strike involving plaintiff ended at about the same time the district court dismissed the complaint on the merits. Relying on *Oil Workers* and *Street Employees*, the Third Circuit held that termination of the strike rendered the case moot.[200] The Supreme Court reversed and remanded for consideration on the merits.

The Court found that the availability of welfare constituted a continuing injury sufficient to preserve the employer's personal stake in the litigation.[201] It characterized the availability of welfare benefits to strikers as "an extant and fixed policy" of the state.[202] In contrast, it reasoned, the Missouri seizure scheme in *Oil Workers* required not only a strike, but also an exercise of gubernatorial discretion for its invocation, so any future harm was rendered "remote and speculative."[203]

While there would seem to be strong reasons for doubting the viability of this distinction,[204] it is apparent that the entire Court read *Oil Workers* and *Street Employees* as directed to maintaining the plaintiff's personal stake in the litigation.[205] We have already noted, however,

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199. 94 S. Ct. 1694 (1974).

200. 469 F.2d 911, 918-21 (3d Cir. 1972).

201. 94 S. Ct. at 1698.

202. *Id.* at 1699.

203. *Id.* n.7.

204. As Mr. Justice Stewart argued in dissent:

> The argument that eligibility of strikers for future New Jersey welfare benefits might affect the "ongoing" process of collective bargaining fares no better in the light of the *Oil Workers* decision. The continued existence of the King-Thompson Act in *Oil Workers* arguably had a most significant effect on the employees' collective-bargaining ability, since it threatened to deprive them of their principle economic weapon, the capacity to strike. Yet the Court found the continuing threat of seizure in future labor disputes to be insufficient to save the *Oil Workers* case from mootness. No different weight should be accorded to the petitioners' argument that the possibility of strikers receiving welfare benefits will make future work stoppage less onerous for their employees.

Id. at 1703 (footnote omitted).

The Court acknowledged that "the threat of seizure in *Oil Workers* constituted a far more severe form of governmental action [than that in *Super Tire*], going as it did to cripple any strike." *Id.* at 1699 n.7. Consequently, even though it may have been less likely to affect any given strike than the welfare benefits in *Super Tire*, the overall effect of the seizure provision on the ongoing bargaining relationship was comparable both in nature—enhancing the bargaining power of one of the parties—and degree. Thus the union in *Oil Workers* would also appear to have retained a substantial personal stake in that litigation.

205. The dissent differs both in viewing the employer's personal stake as less substantial and in considering maintenance of that stake more essential to the existence of a

that such a personal stake is not essential to ensure adversity of the parties.[206] If that analysis is correct, it is wrong to impose a flat requirement of probable identity of the parties.

Despite the dicta in *Super Tire* suggesting that *Oil Workers* retains its vitality,[207] the case has been simply ignored in a number of subsequent decisions that have applied the continuing controversy label to cases in which the party desiring to continue the litigation was unlikely ever again to be adversely affected by the rule involved. Perhaps most nearly on point is *Mancusi v. Stubbs*,[208] where a state prisoner sentenced under a multiple offender law challenged his sentence on the ground that it was based on a prior conviction which had been obtained by unconstitutional methods. The Second Circuit upheld his claim that the prior conviction could not be used as a predicate for a sentence as a second offender. Pending review in the Supreme Court, the state court reimposed the same sentence—this time by reference to a different prior conviction—and the prisoner initiated an appeal of the resentencing in the state courts. The Supreme Court held that these circumstances did not moot the state's appeal of the determination that resentencing was required.[209] The Court reasoned that should the appeal of the resentencing prove successful, the state might again wish to use the conviction on which the original sentencing was based.[210]

Mr. Justice Marshall took vigorous issue with what he felt to be the Court's distortion of the probabilities:

> [I]n this case the Court can find that the controversy will probably recur only by presuming that the . . . conviction [used in resentencing] is probably invalid. Such a presumption flies in the face of the principle that state convictions are ordinarily presumed valid.[211]

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case or controversy. *See id.* at 1702-03 (Stewart, J., dissenting). For further analysis of the dissenting opinion see text accompanying notes 231-32 *infra.*

206. See text accompanying notes 139-53 *supra.*

207. 94 S. Ct. at 1698-99. But see note 204 *supra*, and text accompanying notes 213-19 *infra.*

208. 408 U.S. 204 (1972).

209. *Id.* at 206.

210. *Id.*

211. *Id.* at 219. Indeed, the true gravamen of the dissent's complaint seems to be the failure to apply the same doctrine in other cases:

> The Court argues that the Texas conviction, and the resentencing based on it, may be found invalid in other proceedings, in which case New York may wish to revive its interest in the Tennessee conviction. Thus the argument rests on the Court's estimate that the controversy that gave rise to this litigation has a substantial possibility of recurring. That analysis might in my view carry considerable weight, if it were applied uniformly in all cases. But this Court has regularly refused to adjudicate the claims of litigants who argue that illegal action will probably harm them in the future. *E.g.*, Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972); SEC v. Medical Comm. for Human Rights, 404 U.S. 403 (1972).

408 U.S. at 218-19.

His observation seems valid if attention is restricted to the fate of the particular prisoner before the Court. But if the field of vision is widened to include others who will press similar claims, judicial economy is well served by a definitive ruling in *Mancusi*.

Possibly *Mancusi* is applying, sub silentio, the doctrine of the injunction cases that when other factors favor adjudication rather than dismissal, a "mere possibility"[212] of recurrence between the same parties is enough to keep the case alive. *Mancusi* offers only limited support for this conclusion, however, because as was previously noted, the question of recurrence between the same parties bears principally upon the question of adversity. In *Mancusi*, adversity is clearly preserved, for the state wishes to protect its ability to sentence this felon and also to preserve sentences imposed or to be imposed on other felons similarly situated. The prisoner wishes to preserve the value of his pending state appeal, which would become academic if the conviction originally used as a predicate for sentencing were once again available for such use.

Further support for the hypothesis that the Court is using the mere possibility standard may be found in certain other cases. In *Roe v. Wade*,[213] the plaintiff challenged the validity of the Texas statute prohibiting abortions. The Supreme Court rejected the contention that the case had become moot because the pregnancies of all members of the class had terminated before the date of the Supreme Court hearing.[214] The Court observed: "Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will

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With all due respect to Mr. Justice Marshall, those cases are not contrary to *Mancusi* on mootness. *Socialist Labor Party* involved an extensive revision of the challenged portions of Ohio's election laws; all parties agreed that the revision mooted all aspects of the case except a challenge to a provision requiring loyalty affidavits which was retained in the new law. This aspect of the controversy was held not to be *ripe* because there was no showing that plaintiffs would refuse to comply. 406 U.S. at 586, 589. And in the *Medical Committee* case, Mr. Justice Marshall himself wrote the opinion which found that "the allegedly wrongful behavior could not reasonably be expected to recur." 404 U.S. at 406, *quoting* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968). Thus the objection to *Medical Committee* appears to be the result of second thoughts about the application of the standard there enunciated, rather than the rectitude of the standard.

212. United States v. W.T. Grant, 345 U.S. 629 (1953) held that an injunction case is not moot because the defendant has ceased the challenged practice unless the defendant could show that there was "no reasonable expectation" that the practice would be resumed. The Court went on to hold, however, that where there has been such voluntary cessation no injunction should issue unless there is a "cognizable danger of [recurrence], something more than the *mere possibility* that serves to keep the case alive." *Id.* at 633 (emphasis added). See text accompanying notes 160-84 *supra*.

213. 410 U.S. 113 (1973).

214. The Court appeared primarily concerned, however, with preserving appellate review of brief controversies. See text accompanying notes 220-38 *infra*.

always be with us."[215] This appears to be an acceptence of the mere possibility standard, for the plaintiff presumably had no more reason to expect that she would again desire an abortion than any other woman of similar age who views abortion as a permissible alternative to continued pregnancy.

More support for the mere possibility standard may be drawn from *Dunn v. Blumstein*,[216] a challenge to durational residence requirements for voting. The case was held not moot even though the named plaintiff and, presumably, all members of the class, had satisfied the requirements before the hearing in the Supreme Court. Since the events necessary to subject the plaintiff to disqualification[217] again were unlikely to occur, no more than a mere possibility of recurrence between the parties existed.[218]

Roe and *Moore* are arguably special cases, since both involved brief controversies which will normally be evasive of appellate review and both concerned infringements on fundamental rights. But if the concern is adversity, these factors would appear to have little bearing on the propriety of adjudication. Thus, these cases appear to afford considerable support for the proposition that probable involvement of the same parties in the expected recurrence is not a necessary condition for finding that a continuing controversy is presented. True adversity can more appropriately be judged on other grounds.[219]

B. The Need to Provide Judicial Review of Controversies Otherwise Evasive of Review

Another factor demanding serious consideration in any theory treating mootness as a doctrine of judicial economy is the need for full judicial review of controversies whose short duration would otherwise defeat review.[220] The brief controversy branch of the continuing con-

215. 410 U.S. at 125.

216. 405 U.S. 330 (1972). See text accompanying notes 150-52 *supra*.

217. See text accompanying note 152 *supra*.

218. Moore v. Ogilvie, 394 U.S. 814 (1969) is similar. Petitioners in *Moore* were minor party candidates for the 1968 election who were excluded from the Illinois ballot because of legislation which limited ballot position to parties of a certain minimum size. Though the trial court decided the case against the petitioners well before the 1968 election, the Supreme Court refused to expedite consideration since it was claimed that it would be a physical impossibility for the state to place petitioners' names on the ballot. 394 U.S. at 815-16. Subsequently, the election having been held, and there being no allegation that petitioners intended to run in a subsequent election, the state moved to have the appeal dismissed as moot. This argument was curtly rejected. Absent an allegation that petitioners intended to run again, it might be suggested that there is only a mere possibility they would be involved in any subsequent dispute over the application of this law.

219. See note 148 *supra* and accompanying text.

220. It could be argued that no special effort should be made to review such cases.

troversy doctrine originates from *Southern Pacific Terminal Co. v. ICC*,[221] still a leading case in the area. *Southern Pacific* involved a challenge to an ICC order directing that the plaintiff cease granting certain preferential rates to a specific lumberman. The Court decided the case despite the fact that the order had expired under its own terms, because short-term administrative orders tend to be unreviewable on appeal. It reasoned:

> The question[s] involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.[222]

That the brief controversy doctrine is not simply a response to the possibility that a defendant might manipulate allegedly wrongful conduct to evade adjudication can readily be seen from the recent case of *Roe v. Wade*.[223] There, when it was contended that the termination of the plaintiffs' pregnancies had mooted their challenge to the Texas abortion statute, the Court responded:

> If that termination makes a case moot, pregnancy litigation will seldom survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be so rigid. . . . Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be "capable of repetition, yet evading review."[224]

An important question regarding the brief controversy doctrine is whether it should be limited to controversies whose inherent brevity is such that they could never be definitively settled by the courts before the termination of the immediate controversy. *Super Tire Engineering Co. v. McCorkle*[225] presents the arguments for both of the important views on the point. In *Super Tire*, the Third Circuit held that an employer's challenge to the payment of welfare benefits to strikers was rendered moot by the termination of the particular strike against him which gave rise to the case. While recognizing that there was a problem in reviewing cases arising out of usually short-lived labor disputes,

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Not only would judicial resources thereby be conserved, as knowledge of the futility of suing would tend to preclude such suits, but judicial lawmaking would be minimized. The brevity of the dispute, however, bears no relation to the importance of the rights involved or the desirability of judicial review. See text accompanying notes 186-90 *supra*.

221. 219 U.S. 498 (1911).

222. *Id.* at 515.

223. 410 U.S. 113 (1973); *accord*, Moore v. Ogilvie, 394 U.S. 814 (1969).

224. 410 U.S. at 125.

225. 469 F.2d 911 (3d Cir. 1973), *rev'd*, 94 S. Ct. 1694 (1974). See notes 199-202 *supra*.

the court noted that not all such disputes are so brief as to preclude review and pointed to a similar case which had been resolved by the First Circuit while the underlying strike remained unsettled.[226] Substantial authority[227] for these decisions may be found in *Local 8-6, Oil Workers v. Missouri*[228] and *Division 1287, Street Employees v. Missouri*.[229] Taken together, these cases held that a union's challenge to a state statute permitting seizure and public operation of a struck utility was moot on appeal unless the strike which led to the challenged seizure remained unsettled (though the seizure itself might have terminated) when the dispute was presented to the Supreme Court.[230]

It is not surprising that when *Super Tire* reached the Supreme Court, Mr. Justice Stewart, who wrote for the Court in both *Oil Workers* and *Street Employees*, took precisely this position in his dissent.[231] Concerning the application of the continuing controversy doctrine, he apparently concluded that the mere possibility that some future occurrence of a similar dispute will persist long enough to obtain full judicial review suffices to negate any value attached to preserving the availability of such review.[232]

Marchand v. Director, U.S. Probation Office[233] evinces support for the position taken by Mr. Justice Stewart in his *Super Tire* dissent. In *Marchand* it was held that a habeas petition to determine the right of a parolee to bail pending a probable cause hearing on the revocation of his parole was rendered moot by his subsequent release upon completion of his sentence. While it was argued that the case was one "capable of repetition, yet evading review," the Court found it was inappropriate to decide the case because it was only fortuitous that the problem arose with a parolee whose sentence was almost complete.[234] The

226. ITT Lamp Div. v. Minter, 435 F.2d 987 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971). The substantive issue was essentially the same as that in *Super Tire*.

227. Indeed, the Third Circuit felt that these cases were controlling authority in *Super Tire*. 469 F.2d at 919-22. See the discussion of these cases in text accompanying notes 194-98 *supra*.

228. 361 U.S. 363 (1960).

229. 374 U.S. 74 (1963).

230. For additional discussion of *Super Tire* in the context of continuing controversies, see text accompanying notes 199-206 *supra*.

231. 94 S. Ct. at 1702-03 (dissenting opinion). See note 204 and text accompanying notes 201-03 *supra*.

232. 94 S. Ct. at 1703 (footnote omitted). In addition to the objections to this view raised in the text which follows, it should be noted that the time required to obtain review in a Court of Appeals, especially on appeal from the denial of a preliminary injunction, is much shorter than that required to obtain review in the Supreme Court. It therefore seems inappropriate to base the standards for mootness in the latter on the prospects for obtaining review in the former.

233. 421 F.2d 331 (1st Cir. 1970). See text accompanying notes 192-93, 200-01 *supra*.

234. Marchand v. Director, U.S. Probation Office, 421 F.2d 331, 336 (1st Cir. 1970).

issue might easily be decided in a later case where the parolee would have a substantial portion of his sentence remaining.

The all or nothing form in which the question is posed by these cases illustrates the problems caused by attempting to fit all mootness questions into the framework of case or controversy rather than recognizing that most litigated mootness cases call for the exercise of sound discretion, balancing several factors such as the desirability of conserving judicial resources and the need to provide a forum for controversies otherwise evasive of review. From this perspective, the court in *Marchand* appears to conclude correctly that the need to afford full judicial review to brief controversies adds little to the argument for present adjudication[235] when the circumstances obstructing review are fortuitous and unlikely to occur generally. Labor disputes, however, will rarely continue long enough to obtain review in the Supreme Court if continuance is required to preclude mootness. Thus, the need to provide review of brief disputes seems to strengthen considerably the arguments for adjudication of cases such as *Oil Workers* and *Super Tire.*

This analysis of the brevity required is suggested in the Court's alternative holding in *Super Tire.*[236] After finding a continuing injury to the employer, the Court observed that requiring a continuation of the strike as a precondition for review would render the dispute "capable of repetition, yet evading review."[237] After briefly mentioning certain other recent continuing controversy cases, the Court continued:

> Economic strikes are of comparatively short duration. There are exceptions, of course. . . . But the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. A strike that lasts six weeks . . . may seem long, but its termination, like pregnancy at nine months and elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.[238]

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235. This is not to say that the result in *Marchand*—a finding of mootness—is correct. See text accompanying notes 192-219 *supra* and 245-47 *infra.* It is only to say that its evaluation of this one factor seems accurate.

236. 94 S. Ct. at 1700.

237. *Id.*

238. *Id.* (citation omitted).

In evaluating the necessity of deciding a case to preserve effective judicial review, the court will consider the extent to which the party seeking review is responsible for the obstacle to review. If he shares this responsibility to any significant degree, the court may decide that review would be available to another, more diligent party whose factual dispute has not terminated. *Compare* St. Pierre v. United States, 319 U.S. 41 (1943), *with* Sibron v. New York, 392 U.S. 40, 52 (1960).

At least a few courts have recognized that a controversy may be evasive of review for reasons other than chronological brevity. The cost of making a challenge may be so great as to deter all, or most, efforts to do so. *Ross v. Lucey*,[239] for example, involved a statute authorizing the withdrawal of patients on welfare from nursing homes which an inspection found to jeopardize the health, safety, or welfare of such patients. Plaintiff nursing home owner sought to have the statute declared unconstitutional and to enjoin future enforcement proceedings against her on the grounds that the statute denied due process because it failed to provide a hearing on the alleged deficiencies prior to the withdrawal of patients. The defendant urged that the case was moot because the enforcement proceeding against the plaintiff had terminated. The court held that the case was not moot, since the state could take similar action against plaintiff's facility in the future and it would then be necessary for "plaintiff to suffer the withdrawal of patients and loss of funds in order to insist on her alleged right to be heard . . . ."[240] Reasoning that economic realities would compel the plaintiff to forego her claim if faced with such a choice, the court concluded that the problem was " 'capable of repetition, yet evading review.' "[241]

C. Social Costs of Continued Uncertainty in the Law

In determining whether or not a case is moot the courts have recognized that even though review may be obtained in some other case at a later date, there may be a substantial social cost involved in such postponement. *Carroll v. President & Commissioners*[242] indicates the harmful effect postponement may have in the area of expressive conduct. That case concerned an appeal from a 10-day temporary restraining order prohibiting the National States Rights Party from holding certain rallies. While the Court's discussion of mootness was mainly directed at showing the probability of recurrence between these parties and the need to assure judicial review, it also noted that it is impossible to defend contempt charges arising from disobedience of an injunction by asserting the unconstitutionality of the injunction.[243] For this reason injunctions are peculiarly effective in deterring the conduct at which they are directed. Since our society values expressive conduct highly, an injunction against such conduct may entail serious social costs.[244] These costs militate against delaying adjudication, even though the issue may ultimately be reviewable in another case.

239. 349 F. Supp. 264 (E.D. Wis. 1972).
240. *Id.* at 267.
241. *Id., quoting* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).
242. 393 U.S. 175 (1968).
243. *Id.* at 179, *citing* Walker v. City of Birmingham, 388 U.S. 307 (1967).
244. *Cf.* Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) (chilling effect on free expression of a threat of criminal prosecution).

A case in which the prospective future challenger would have to suffer incarceration pending successful challenge further illustrates the potential costs of postponing adjudication. *Bacon v. United States*,[245] was a habeas corpus case in which the petitioner challenged her confinement as a material witness. After petitioner became subject to simultaneous confinement as a contemnor, the government argued that the case was moot. The Ninth Circuit rejected that view, stressing the importance of judicial determination of the underlying legalities.[246] Its opinion did not raise an additional point which favors decision: Even if Bacon would be able to obtain review of the legality of her confinement, she would remain confined pending that review. Given the high value our society places on personal liberty, the case should be decided at the earliest opportunity to minimize the amount of possibly unjust confinement.[247]

Another interest which arguably deserves special recognition in the context of the social costs of continued uncertainty in the law is the interest of social welfare benefit recipients in due process prior to termination of those benefits. The Supreme Court has recognized that "[t]ermination of aid pending resolution of a controversy over eligibility may deprive an *elegible* recipient of the very means by which to live while he waits."[248] This factor seems to justify extra care in assuring that whatever procedural rights are required by due process be accorded at the earliest possible date. It would appear to have been influential in *California Department of Human Resources Development*

245. 449 F.2d 933 (9th Cir. 1971).

246. The court stated:

> Bacon's case presents the type of low visibility incursion by government upon personal liberty referred to in *Sibron*. Had she not refused to answer questions before the grand jury, her detention as a material witness would have ended long before this court could entertain her case. If the District Court's contempt order is dissolved in the future and Bacon is again held solely as a material witness, the completion of her testimony could not conceivably take any more than a few days. Bacon's release at that time would again moot the case, thereby precluding her from ever obtaining a ruling on the lawfulness of the restraint imposed upon her. This is precisely the result that the Supreme Court sought to avoid in *Sibron*.

Id. at 936.

247. This analysis suggests that Marchand v. Director, U.S. Probation Office, 421 F.2d 331 (1st Cir. 1970), was wrongly decided. See text accompanying notes 192-219, 233-34 *supra*. The court's refusal to recognize the matter as a continuing controversy because the issue could be determined when raised by some later petitioner ignores the fact that a number of alleged parole violators, including the later petitioner, will be imprisoned without bail pending revocation hearings before an appellate decision is made. It seems preferable to determine this issue when first raised to minimize incarcerations of questionable validity unless there exists a serious adversity problem. Since the party whose interest the court doubts desires to continue the litigation and has already taken the trouble to appeal, the adversity problem may well be insubstantial.

248. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

v. Java.[249] The social costs of postponing decisions on the due process rights of those receiving benefits also afford an additional basis for questioning the result in *Indiana Employment Security Division v. Burney.*[250]

Numerous cases suggest that determining questions of law for the future guidance of parties and others is desirable.[251] The rationale behind them is that a decision now will serve both to forestall future litigation and to afford greater protection to all concerned during the period preceding a new challenge. This is not surprising, for the goal of maximizing protection is not restricted to the paramount interests discussed above, although it becomes less influential when the interests involved are less highly valued.[252]

D. A Special Privilege for Government-Initiated Litigation?

As we have seen, courts have been properly willing to entertain cases in which the factual dispute at issue has terminated if some public interest is served by a judicial decision. There have been some suggestions that this rule is limited to actions brought by the government.[253] The most explicit differentiation between suits brought by private parties to interpret, invalidate, or enforce public laws and those brought by government agencies was made in a footnote to Mr. Justice Stewart's dissent in *Powell v. McCormack*:

> The principle that voluntary abandonment of an illegal practice will not make an action moot is especially, if not exclusively, applicable to public law enforcement suits . . . by the government or its agencies to halt illegal conduct . . . .[254]

It is difficult to confront this position, because none of the cases which suggest it offers any reason for the distinction. Since all of the cases in which it appears except *Powell* were government-brought, any statement as to the position in which a private party bringing a similar suit would find himself was necessarily dictum. Indeed, it is not clear that any of the opinions except the *Powell* dissent mean to distinguish between government-brought and privately-brought actions, as such a distinction was irrelevant to any of the issues raised in those cases. It may well be that the extremely brief comments on the standard in gov-

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249. 402 U.S. 121 (1971).

250. 409 U.S. 540 (1973). See text accompanying notes 93-104 *supra.*

251. *See, e.g.,* Terminal Freight Handling Co. v. Solien, 44 F.2d 699 (8th Cir. 1971); Dyer v. SEC, 266 F.2d 33 (8th Cir. 1959).

252. At least one court has gone to rather dubious lengths to decide a legal question for guidance purposes. Collier v. Lindley, 203 Cal. 641, 266 P. 526 (1928) (sham case challenging the validity of a trust decided on the merits).

253. *E.g.,* Walling v. Haile Gold Mines, 136 F.2d 102, 105 (4th Cir. 1943).

254. 395 U.S. 486, 562 n.5 (1969) (dissenting opinion).

ernment-brought cases are intended to distinguish such cases as *Campbell Soup Co. v. Martin.*[255]

The defendant in *Campbell Soup* was a tomato grower who contracted to sell his entire crop to the plaintiff. Thereafter the price of tomatoes rose rapidly, and the defendant, asserting that the contract was unenforceable, began selling tomatoes to others. Plaintiff then obtained an injunction compelling defendant to comply with the contract. Though defendant, in compliance with the injunction, sold the remainder of his crop to plaintiff, he appealed, invoking what he called the "public interest exception"[256] to the mootness doctrine.[257] The court held the case moot on the ground that even if the exception were recognized in the federal courts, this case did not fall within it.[258]

Even assuming *Campbell Soup* is correct,[259] special rules based on the parties to the litigation are unnecessary to decide such cases. Cases involving the interpretation of contracts differ from those turning on the interpretation of statutes or regulations for a number of reasons. First, the probability of recurrence will generally be lower, both because the terms of instruments governing the relations of private parties are more easily and frequently altered than are governmentally prescribed rules, and because private instruments are more likely to be changed in response to interpretation than are many types of governmental rules. Second, the need to provide a forum for short-lived disputes is diminished because damages will generally be available if private conduct was wrongful; this is not true when government regulation is at issue.[260] Third, the social costs of uncertainty concerning the interpretation and validity of private instruments will generally, though not always, be less than those involved in situations affected by govern-

255. 202 F.2d 398 (3d Cir. 1953).

256. Such a doctrine is recognized by many state courts. *See, e.g., In re* William M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970), in which the California Supreme Court wrote:

> [I]f a case raises an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot.

Id. a 23, 473 P.2d at 741, 89 Cal. Rptr. at 37. There are also occasional mentions of such an "exception" in federal cases, but upon examination the language appears explicable solely in terms of the analysis herein suggested. This is generally true even of the state cases examined, although the availability of this convenient exception has resulted in courts' cloaking whatever analysis is undertaken in the magic words "public interest."

257. If the contract is indeed invalid, defendant would appear to have a damage claim against plaintiff for the profits lost by selling at the contract price. This possibility, and its effect on the mootness question, is not adverted to by the court.

258. 202 F.2d at 399.

259. The opinion is arguably incorrect, since the damage question may be sufficient to keep the case alive. See note 257 *supra.*

260. Consider, for example, the effect of sovereign immunity.

mental actions or regulations.[261] Thus, to the extent that the suggested privilege for governmentally brought actions is based on a desire to exclude certain essentially "private" matters from the scope of the continuing controversy doctrine or other doctrines limiting mootness, it is simply unnecessary.

No other consideration appropriate to mootness decisions seems related to any special privilege for the government as litigator, except that the government will always be an affected party should conduct challenged by it recur. The Court has seemingly rejected this distinction insofar as it turned solely on the character of the parties rather than upon the issues being litigated. In *Southern Pacific Terminal Co. v. ICC* the Court held that the interests of private plaintiffs attacking an ICC order were as much of "a public character" as those presented in *Trans-Missouri Freight Association* and the fact "that the government is respondent, not complainant, does not lessen or change the character of the interest involved in the controversy."[262] The cases discussed throughout this Article appear to follow this view so consistently that it must be taken as established, at least in suits where the government is a defendant. Surely this view is correct, for the importance of deciding a question is the same regardless of the identity of the party raising it.

The situation is less clear, and there are fewer relevant cases, where both parties are private. Similar considerations would appear to be applicable to large institntions such as unions and major corporations which are virtually private governments. Moreover, litigation between purely private parties may involve questions whose current resolution would serve the public interest provided that adequate assurance of adversity is supplied.

E. Judicial Resources Already Invested and Still Required

A straightforward weighing of the judicial resources already invested in resolution of the controversy against those required to completely resolve the case is the final factor which must be considered when determining whether a finding of mootness will be consonant with the goal of judicial economy. While it may seem that to hold a case moot is to "waste" the judicial resources already invested in its resolution, a more rigorous analysis suggests that this consideration is irrelevant to judicial economy as such. The resources in question have already been expended and may not be redirected to other uses. Judi-

261. This follows from the lesser ability of most private parties (as compared to governments) to impose costs on others or coerce the actions of others.

262. 219 U.S. 498, 516 (1911).

cial economy is concerned with the best allocation among competing claimants of resources which have not been used. Despite this analysis, however, the intuitive reaction does have a sound analytical basis. Prior expenditures of judicial resources are irrelevant as such, but they constitute a highly reliable estimate of the savings in future effort which would result from resolving the questions presented in this case rather than in a future case. When this estimate is discounted by the probability of nonrecurrence—and adjusted for the possibility that recurrence may result in parallel litigation of the same question at an increased cost in judicial resources—the result is a rough measure of the degree to which judicial economy will be promoted by a decision now. A similar calculation involving the estimated resources still required to resolve this case yields a measure of the degree to which judicial economy will be promoted by finding the case moot.

A few examples will suffice to illustrate this point. At one extreme, the question of mootness may be raised in the answer to the complaint. Since the judicial efforts already expended are nil, judicial economy has little to gain from a current decision even if the probability of recurrence is great. On the other hand, a substantial amount of judicial resources will be wasted should the case be continued to a final decision that does not forestall relitigation because the problem does not recur. A holding of mootness, therefore, seems indicated unless decision is necessary to preserve the availability of judicial review or to obviate the social costs of uncertainty in the law.[263]

At the other extreme, a claim of mootness could be made during oral argument in the court of last resort. Here there has been a maximum investment of judicial resources which will necessarily be duplicated should the case be found moot and similar litigation occur in the future. Relatively little remains to be done to achieve a final resolution, however, so little is wasted if the issue does not recur. Thus in *Powell v. McCormack*[264] the Court was correct in rejecting Mr. Justice Stewart's suggestion[265] that the case be held moot and *Powell* remitted to the Court of Claims for consideration of his claim for back salary. While the suggested course of action would have avoided the serious remedial problems presented in *Powell*, the cost would have been a full reconsideration of the underlying issues. A declaratory judgment could have settled those issues without creating remedial problems and without the waste of judicial resources caused by a finding of mootness.[266]

263. See text accompanying notes 216-52 *supra*.
264. 395 U.S. 486 (1969). See text accompanying notes 29-31 *supra*.
265. *Id.* at 572.
266. When faced with a similar situation the California Supreme Court remarked

On the basis of this analysis, the dissenters were correct in objecting to the disposition of *Richardson v. Wright*,[267] a class action challenging failure to provide a hearing prior to suspension or termination of Social Security benefits. The three-judge district court held that the existing procedures were inadequate but found that differences in the relevant circumstances justified less rigorous procedural protections than those required by *Goldberg v. Kelly*[268] for termination of welfare benefits. Pending appeal, the defendant Secretary of Health, Education and Welfare adopted new regulations providing greater procedural protections than previously afforded though not so great as required by the judgment of the district court. After oral argument the Court exercised its discretion to remand the case for reprocessing the claims under the new regulations, expressing its belief that "[i]f that process results in a determination of entitlement to . . . benefits, there will be no need to consider the constitutional claim . . . ."[269] The dissenters observed that probable jurisdiction had been noted in order to determine whether the standards applied to termination of Social Security benefits were different from those applied to termination of welfare benefits, a question which was still very much alive.[270] Mr. Justice Brennan objected vigorously to the serious diseconomy involved in forcing a virtually certain full relitigation of the issues presented in *Wright* in the context of the new regulations.[271]

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that "[n]o purpose but delay would be served" by such a procedure. De Giorgio Farms Fruit Corp. v. Department of Empl., 56 Cal. 2d 54, 58, 362 P.2d 487, 489, 13 Cal. Rptr. 663, 665 (1961).

267. 405 U.S. 208 (1972).

268. 397 U.S. 254 (1970).

269. 405 U.S. at 209.

270. *Id.* at 211 (Douglas, J., dissenting).

271. Mr. Justice Brennan's arguments deserve to be quoted at some length:

> Avoidance of unnecessary constitutional decisions is certainly a preferred practice when appropriate. But that course is inappropriate, indeed irresponsible, in this instance. We will not avoid the necessity of deciding the important constitutional questions presented by claimants even should they prevail upon the Secretary's reconsideration. The question is being litigated all over the country. . . .
>
> . . . Because we may imminently be confronted with another case presenting the same question, and because its resolution is vitally essential to the administration of an important Governmental program, today's action in avoiding decision of the constitutional question is not a responsible exercise of that practice. We gain a brief respite for ourselves while the Secretary, state agencies, and beneficiaries continue confused and uncertain. Moreover the issue has been thoroughly and ably argued and briefed on both sides. . . . Today's disposition results in an unjustified waste, not only of our own all too sparse time and energies, but also of the time and energies of the three judges of the District Court who must again suspend their own heavy calendars to assemble for what can only be an empty exercise.

Id. at 212-14.

IV

THE *DeFunis* CASE

In *DeFunis v. Odegaard*,[272] the plaintiff challenged aspects of the admission policy of the University of Washington Law School that gave special consideration to applicants who were members of certain minority racial groups.[273] DeFunis, a rejected white applicant, claimed that the policy denied his constitutional right to have his application considered without regard to race. He was admitted pursuant to a temporary restraining order, which was made permanent after trial.[274] On appeal the Supreme Court of Washington reversed, holding that the racial classification was justified by a compelling state interest.[275] The mandate of the Supreme Court of Washington was stayed pending final disposition of the case by the United States Supreme Court. Plaintiff remained in law school and had enrolled for his final quarter of his third year before the Supreme Court heard the case.[276] The school informed the Court that plaintiff's registration for this quarter "would not be canceled unilaterally by the university regardless of the outcome of this litigation."[277] Were plaintiff to fail to graduate at the end of that quarter, however, he "would have to take some appropriate action to request admission for the remainder of his law school education, and some discretionary action by the University . . . would have to be taken."[278]

On these facts, the Court held that the case was moot. The majority first asserted that plaintiff no longer had any personal stake in the litigation:

> The respondents have represented that without regard to the ultimate resolution of the issues in this case, DeFunis will remain a student in the law school for the duration of any term in which he has already enrolled. Since he has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case.[279]

It then noted that voluntary cessation of challenged conduct would not moot the case because the mooting circumstance was not a voluntary

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272. 94 S. Ct. 1704 (1974).

273. DeFunis v. Odegaard, 82 Wash. 2d 11, 21, 507 P.2d 1169, 1175-76 (1973), *vacated as moot*, 94 S. Ct. 1704 (1974).

274. 94 S. Ct. at 1705.

275. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

276. 94 S. Ct. at 1705.

277. *Id.* at n.2.

278. *Id.* at 1721 (dissenting opinion) (emphasis omitted).

279. *Id.* at 1706.

change in admissions procedure,[280] but rather the "unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled."[281] Finally it considered the suggestion that the case presented a question "capable of repetition, yet evading review," and found that it was not "capable of repetition" as to this plaintiff, and that any repetition as to a different plaintiff would "come with relative speed"[282] to the Supreme Court now that the Washington courts had spoken, so that the issue was not likely to be evasive of review. It therefore felt compelled to hold the case moot.

Mr. Justice Brennan's dissent first took issue with the assertion that plaintiff had no remaining personal stake in the litigation:

> Many weeks of the school term remain, and petitioner may not receive his degree despite respondents' assurances that petitioner will be allowed to complete this term's schooling regardless of our decision. Any number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term.[283]

Because such a misfortune would subject the plaintiff to a discretionary decision on his continued education,[284] the university had not met the burden of showing the absence of even a "mere possibility"[285] that he would be subjected once again to the challenged practices. Since the Court could protect plaintiff from the need to undergo such scrutiny, there was still some relief which it could grant. Moreover, DeFunis retained some personal stake in the litigation—but even assuming, *arguendo*, that plaintiff had lost this stake, the loss occurred only after the case had been fully litigated, including oral argument in the Supreme Court.[286] Consequently, there was no want of an adversary contest to sharpen the issues and ensure adequate presentation of the arguments.[287] The case was therefore "ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues."[288] Mr. Justice Brannan's dissent closed with this argument:

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280. The admissions procedures still gave special consideration to applicants from certain ethnic groups. *Id.* at 1707 n.3.

281. *Id.* at 1707.

282. *Id.*

283. *Id.* at 1721 (Brennan, J., dissenting, joined by Douglas, White, and Marshall, JJ.). A lengthy separate dissent by Mr. Justice Douglas addressed itself to substantive issues rather than to the determinative question of mootness.

284. *Id.* at 1721.

285. *Id.* at 1722, *quoting from* United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). See text accompanying notes 160-63 *supra.*

286. 94 S. Ct. at 1722.

287. *Id.* For a discussion of the functious of the requirement of a persoual stake, see text accompanying notes 139-41 *supra.*

288. *Id.* at 1722.

> [I]n 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 . . . . Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return . . . to this Court. . . . Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations as here not compelled by the record. . . . 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.[289]

On the issue of personal stake, the majority rejoined that the "speculative contingencies" suggested by the dissent afforded "no basis for . . . passing on the substantive issues . . . [the petitioner] would have us decide" absent "evidence that this is a prospect of 'immediacy and reality.' "[290] For this proposition it cited *Hall v. Beals*[291] and *Golden v. Zwickler.*[292]

None of the cases cited by the Brennan dissent[293] or the majority's rejoinder are apposite to the question of personal stake in *DeFunis.* They all concern the likelihood of recurrence of a similar dispute and would be in point only if DeFunis faced the prospect of again being subjected to the challenged admissions process. What he actually faced was the possibility that he would be required to apply for ad hoc

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289. *Id.* (citations omitted).

290. *Id.* at 1707 n.4.

291. 396 U.S. 45 (1969). *Hall* is dubious authority, even apart from the problem discussed in text accompanying notes 293-99 *infra.* It was a challenge to a six-month durational residency requirement for voting. After the district court discussed the complaint, the election in question occurred *and* the legislature reduced the requirement to two months. None of the plaintiffs would have been prevented from voting by such a requirement, and the Court therefore found that they had no standing to challenge the new requirement. The case has been virtually limited to such a situation in the past. See text accompanying notes 66-67 *supra.* In contrast, the policy that had affected DeFunis' admission continued to exist, and any refusal to allow him to complete his studies would almost surely be based, in part, upon the fact that he had not been regularly admitted.

In addition, none of the fact situations presented in *Hall* would necessarily illuminate the effect of the shorter requirement. Problems of concreteness which would render the challenge to the shorter requirement unripe for adjudication might therefore arise. See text accompanying notes 130-32 *supra.*

292. 394 U.S. 103, 109 (1969). Also cited was Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941). The latter case presented an action by an insurance company against a policyholder for a declaration that a particular tort claim, if valid, was not covered by the policy. The Court held that, despite the contingent nature of the potential tort plaintiff's claim against the insurer, he could be joined in the action to prevent relitigation by him at a later date. It appears totally inapposite in the present context.

293. *See* 94 S. Ct. at 1721-22.

special permission to enroll for one or more additional quarters to complete his studies. Most American universities permit a student to continue his studies until graduation as a matter of course provided that the student's work is satisfactory and he remains in continuous attendance. Presumably this was the case at the University of Washington. If, therefore, DeFunis had been regularly admitted no special permission would have been required if he failed to graduate at the end of the quarter for which he was registered. The necessity to seek "discretionary action"[294] if he did fail to graduate then was a collateral consequence [295] of the initial refusal to admit DeFunis. It follows that we must look to cases concerning such collateral consequences[296] to determine the proper legal standard.

The leading case on collateral consequences is *Sibron v. New York*,[297] which held that a misdemeanor conviction was not rendered moot by completion of the sentence imposed. There the Court held that "a criminal case is moot only if it can be shown that there is *no possibility* that any collateral legal consequenses will be imposed on the basis of the challenged conviction."[298] Applying this standard to *DeFunis*, it is obvious that there is some possibility that DeFunis might be prevented from completing his studies because of the initial refusal to admit him which resulted from the challenged admissions process.

Thus DeFunis retains a personal stake in the outcome of the original dispute over the legitimacy of the admissions procedure.[299] As we have previously noted,[300] *any* personal stake, in the determination of

294. 94 S. Ct. at 1721. See text accompanying note 278 *supra*.

295. *See* Sibron v. New York, 394 U.S. 40, 55 (1968).

296. See text accompanying notes 37-60 *supra*.

297. 394 U.S. 40 (1968).

298. *Id.* at 57. See text accompanying note 44 *supra*.

299. In contrast, consider a case relied upon by the majority, Golden v. Zwickler, 394 U.S. 103 (1969). *Golden* involved a challenge to a prohibition of anonymous handbilling in an election campaign. Plaintiff alleged a desire to circulate anonymous handbills against a particular political candidate and sought a declaration that such conduct could not be prohibited. *See* Zwickler v. Koota, 389 U.S. 241 (1967). The election in question was held, and the target politician was appointed to the bench before the case was decided. The Supreme Court reversed the grant of a declaratory judgment, noting that the candidate in question was unlikely to seek election again.

The dispute in *Golden* would resume only if the plaintiff sought to circulate anonymous handbills concerning another political candidate or if the former target returned to politics. Either of these situations might present a somewhat different factual dispute than that involved in the case as litigated. Since the facts presented in the initial litigation might not adequately illuminate the legal principles relevant to the situation presented by such recurrence, there is a potential ripeness problem. See text accompanying notes 130-38, *supra*. Any exclusion of DeFunis from a future quarter of study, however, would almost certainly turn upon the validity of the initial denial of admission, the very issue presented in the case before the Court.

300. See text accompanying notes 139-58 *supra*.

the present dispute is sufficient to preserve a case. The dissent, therefore, would appear to have the better of the argument on this point despite its erroneous choice of authority.

Even assuming *arguendo* that DeFunis had lost his personal stake, the inquiry is not at an end. The Brennan dissent noted[301] that this did not occur until *after* oral argument in the Supreme Court, so that there was no problem of functional competence to adjudicate[302] since the full rigors of the adversary process had been present at all relevant stages.[303] The Court should therefore have considered whether as a matter of policy the case should have been adjudicated despite the arguable loss of petitioner's personal stake. To some extent the Court did take public policy into account by passing on the suggestion that the case presented problems "capable of repetition yet evading review." It decided, however, that the existing determination of the issue by the Washington courts would allow future cases to reach it before they became moot.[304] Even if this were true as to the University of Washington itself,[305] it is palpably untrue as to similar situations in any other state.[306] If a determination of a disputed issue of federal law by the Supreme Court can only be had after sequentially litigating multiple cases over a period of years, it seems fair to regard such an issue as evasive of review. Since all of the considerations calling for

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301. 94 S. Ct. at 1722.

302. See text accompanying notes 286-88 *supra*.

303. Even if it were argued that DeFunis lost his personal stake when the Court granted certiorari because he could reasonably expect to complete his education during the course of litigation, there would be no problem with developing the facts or sharpening the issues, since both took place prior to the grant of certiorari. The only remaining functional problem would be obtaining full presentation of the arguments to the Court. Even if petitioner did not fulfill this requirement, his position was supported by diligent and able amici who could certainly be expected to present the relevant arguments exhaustively. For a list of participating amici see 42 U.S.L.W. 4578, 4589 (U.S. April 23, 1974).

304. *See* 94 S. Ct. at 1707. If the subsequent case were litigated in the Washington state courts, the entire difficulty would be avoided because those courts would presumably rely on the decision of the Washington Supreme Court in *DeFunis* to deny any relief. Therefore, there would be no admission under judicial order to moot the case. For this reason, however, any future litigation in Washington will probably take place in the federal courts, in the hope of obtaining earlier relief. The total time required to obtain jurisdiction in the Supreme Court would not appear to be significantly less than in *DeFunis* if only federal litigation were not appropriate for a three-judge district court. *See* New Left Educ. Project v. Board of Regents, 326 F. Supp. 158 (W.D. Tex. 1970), *vacated* 404 U.S. 541 (1972). If the case is one for a three-judge court, the issue could then reach the Court with "relative speed." Reliance on such procedures (or the willingness of a plaintiff to forego any prospect of early relief by litigation in the state courts) seems unsatisfactory.

305. But see note 304 *supra*.

306. The exceptions are cases in which relief is initially denied. See note 304 *supra*.

special attention to such cases[307] relate to the entire judicial system or all of society, it is inappropriate to focus only upon the situation in Washington. If the entire system is considered, the point turns on an evaluation of the time normally required to obtain review in the Supreme Court. If this were normally significantly shorter than in *DeFunis*, the need to review brief controversies would not add significantly to the arguments for adjudication now, but the time required in *DeFunis* seems relatively typical. Consequently this aspect of the case does suggest adjudication, though less strongly than it would in a briefer controversy.

Turning to the other factors in this determination, it becomes necessary to determine the probability that the situation will recur in a similar form. Arguably this point is disposed of by the university's concession that the challenged procedure is still in use.[308] Moreover, many law schools have similar programs.[309] The changing character of the applicant pool—especially the minority applicant pool—might, however, result in a de facto change in standards that are formally the same.[310] Since the nature and justification for the use of such standards is at the heart of the case, a finding of de facto change could lead to the conclusion that future occurrences would not be sufficiently similar to warrant adjudication.

The circumstances favoring adjudication, however, would seem to outweigh the possibility of a changed applicant pool.[311] An examination of the social costs of continued uncertainty in the law reveals that if DeFunis is correct in his constitutional position, many other people will be subjected to unconstitutional racial discrimination by the states. Freedom from such discrimination is one of the most highly valued of all constitutional interests,[312] and our legal system has gone to considerable lengths to extirpate such discrimination by all instrumentalities of government.[313] Thus, the social cost of continued uncertainty ap-

307. See text accompanying notes 220-38 *supra.*

308. 94 S. Ct. at 1707 n.3.

309. *E.g.*, University of California, Berkeley, Announcement of the School of Law (Boalt Hall), University of California, Berkeley 9, June 21, 1974.

310. However, at least at one law school even though the objective academic qualifications of minority applicants are rising, the gap between the grades and test scores of whites and racial minorities shows no appreciable decrease. Interview with Fran Layton, Admissions Officer, School of Law, University of California, Berkeley, November 18, 1974.

311. Strictly speaking, a finding that future occurrences would not be sufficiently similar to warrant adjudication would not necessarily be required if the other factors do no more than weakly suggest adjudication. Under those circumstances a substantial doubt might well be sufficient.

312. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

313. *E.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (state courts may not enforce racially restrictive covenant between private parties); Green v. Connally, 330 F. Supp.

pears to be high. Moreover, from the standpoint of judicial resources already expended and still required,[314] *DeFunis* should not have been held moot.

The judicial role in the particular area of substantive law is the final factor to be considered. Surely the courts have not been restrained in dealing with racial discrimination in education,[315] but this case presents exceptionally difficult constitutional questions. Given the reluctance of the judiciary to resolve such questions in advance of strict necessity,[316] an argument could be made for awaiting a case where the decision is unavoidable.[317]

The balance of all factors seems to favor adjudication in *DeFunis* unless one is strongly convinced either that changing standards will sharply diminish any value a decision might have in forestalling litigation and protecting potential victims of the challenged practices or that the value of avoiding difficult constitutional questions is sufficiently important to dominate the determination.

CONCLUSION

The doctrine of mootness has been immensely confused by an approach that mechanistically centers upon the totemistic concept of case or controversy and seldom analyzes the functions served by mootness. This confusion can be ended by the realization that mootness serves two primary functions: protecting the functional competence of the courts to make law by ensuring adequate adversity of the parties, and rationing scarce judicial resources among competing claimants. The rationing function is the more important in most cases where mootness questions are litigated, and it is in this area that courts have generally failed to articulate the criteria for decision that they apply largely by intuition. The courts can clarify this area of the law by forthrightly recognizing the role of discretion and articulating the reasons for its exercise, thus reducing the number of cases in which mootness is used in any unprincipled manner to avoid deciding a difficult question of law.

1150, *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (racially discriminatory private organization may not receive a federal tax exemption as a charity; constitutional question of permissibility of such exemptions for such groups avoided by statutory construction).

314. Indeed, *DeFunis* is almost identical to the second hypothetical case in our discussion of judicial resourees. See text accompanying notes 263-64 *supra*. Here as there, the argument strongly suggests review.

315. *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

316. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625, 633-34 (1972). See especially the noted concurring opinion of Mr. Justice Brandeis in Ashwander v. TVA, 297 U.S. 288, 341, 346-48 (1936).

317. Of course, if DeFunis retains his personal stake, this would appear to be such a case. Sce text accompanying note 283 *supra*.

Perhaps the factors we have subsumed under the rubric of judicial economy could be elevated to the level of constitutional imperatives, but this would only attach a conclusionary label to the analysis. In our view, maintaining the analysis at a subconstitutional level will promote the flexibility these problems require. On the other hand, we believe that the traditional analysis of these problems as solely matters of case or controversy tends to promote the mistaken attitude that there is a sharp demarcation between moot and live cases. Our analysis suggests instead that cases in which the mootness argument is raised are points on a continuum. It is to be hoped that future cases will engage in finer balancing than we have hitherto seen.[318]

318. A similar point is made in Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 597 n.275 (1966).