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# The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions

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*In this Article, Professor Fletcher proposes that state courts adjudicating questions of federal law be required to adhere to the federal Constitution's article III "case or controversy" requirement. Such a requirement would be consistent with the apparent expectation of the Constitution's drafters and would serve three important purposes. First, it would ensure that state courts adjudicating federal questions satisfy what the Supreme Court has declared to be the essential preconditions for wise adjudication. Second, it would make all state court decisions on matters of federal law subject to Supreme Court review, thus enabling the Court to fulfill its role as the final arbiter of all questions of federal law. Finally, it would make the federal and state courts jointly responsible for articulating and enforcing jurisdictional requirements for adjudicating questions of federal law, just as they are now jointly responsible for articulating and enforcing the substantive federal law itself.*

## INTRODUCTION

For most of this century state courts have not been thought bound by the "case or controversy" requirement of article III of the federal

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Constitution.[1] This way of thinking about state court jurisdiction has had two linked and anomalous consequences. First, state courts have been able to decide questions of federal law when, under the standards of article III, a litigant has no standing, or a dispute is moot or unripe. Second, the United States Supreme Court has been unable to review state court decisions of federal law rendered under such circumstances because the Court's jurisdiction is confined to disputes that constitute "cases or controversies."

The Supreme Court has recently begun to reform this area of law, "touch[ing] on essential aspects of the proper relation between state and federal courts."[2] In *Asarco Inc. v. Kadish*,[3] decided last Term, the Court reaffirmed that the state courts are not bound by article III, even when they decide questions of federal law.[4] But it permitted Supreme Court review where a plaintiff without article III standing had obtained a state

1. The United States Supreme Court has repeatedly stated that state courts are not bound by the federal "case or controversy" requirement, even when adjudicating federal questions. *See, e.g.*, New York State Club Ass'n, Inc. v. City of New York, 108 S. Ct. 2225, 2231 n.2 (1988) ("[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free . . . to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution.") (citation omitted); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 971 (1984) (Stevens, J., concurring) ("Nothing in Art. III of the Federal Constitution prevents the Maryland Court of Appeals from rendering an advisory opinion concerning the constitutionality of Maryland legislation if it considers it appropriate to do so. Thus, the decision of the Maryland Court of Appeals that it had jurisdiction to decide this case is one we have no power to review.") (footnote omitted); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) ("Although as a matter of Washington state law it appears that this case would be saved from mootness by 'the great public interest in the continuing issues raised by this appeal,' the fact remains that under Art. III '[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction.' ") (citations omitted) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)). The cases cited in these three examples all involved federal constitutional challenges to either state laws (*New York State Club Ass'n, Inc.* and *Joseph H. Munson Co.*) or the policies of a state institution (*DeFunis*).

State courts are quite aware that they are free to disregard the federal "case or controversy" requirement, even when adjudicating questions of federal law. *See, e.g.*, Bowers Office Prods., Inc. v. University of Alaska, 755 P.2d 1095, 1096 (Alaska 1988) (" '[C]ase o[r] controversy' is a term of art used to describe a constitutional limitation on federal court jurisdiction. But as this court has observed for many years, 'Our mootness doctrine . . . is a matter of judicial policy, not constitutional law.' . . . Thus, instead of looking to federal courts . . . this court should first look to its own precedent and statutes." (quoting RLR v. State, 487 P.2d 27, 45 (Alaska 1971))); Salorio v. Glaser, 82 N.J. 482, 490-91, 414 A.2d 943, 947 ("New Jersey State courts are not bound by the 'case or controversy' requirement governing federal courts. . . . This Court remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration."), *cert. denied*, 449 U.S. 874 (1980); Provo City Corp. v. Willden, 768 P.2d 455, 456 (Utah 1989) ("[T]he federal rules on standing, as such, are not binding on state courts, and the article III constitutional restrictions and federalistic prudential considerations that have guided the evolution of federal court standing law are not necessarily relevant to the development of the standing rules that apply in Utah's state courts.").

2. Asarco Inc. v. Kadish, 109 S. Ct. 2037, 2041 (1989).

3. 109 S. Ct. 2037 (1989).

4. *Id.* at 2045 ("[T]he constraints of Article III do not apply to state courts, and accordingly

court judgment imposing material disadvantage on a defendant-appellant.[5] As will be more fully explained below, the Court's decision in *Asarco* effectively permits review when a state court sustains the asserted federal claim, but denies review when the state court rejects the federal claim.[6]

In this article, I propose a more thoroughgoing reform: State courts should be required to adhere to article III "case or controversy" requirements whenever they adjudicate questions of federal law.[7] If my proposal is adopted, state courts will be able to decide questions of federal law only when the parties are sufficiently adverse and the dispute sufficiently concrete to satisfy what the Supreme Court has told us are the essential preconditions for wise adjudication. Further, Supreme Court review will be available not only where the state court has sustained the federal claim, as under *Asarco*. It will also be available where Supreme Court review of state court decisions has traditionally been thought the most essential—where the state court has denied the federal claim and there is therefore reason to suspect state court bias against the interests of the national government.

## I
## HISTORICAL ANTECEDENTS

### *A. The Eighteenth and Nineteenth Century Understanding*

It is clearer than most matters of original intent that the adopters of the Constitution did not intend the state and federal courts to have different definitions of "judicial power" in suits where resolution depended on

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the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . . .").

5. *Id.* at 2045-46.

6. *See* text accompanying notes 84-89.

7. A few others have made suggestions along these lines. The most famous is Professor Freund's comment on *Doremus v. Board of Education*, 342 U.S. 429 (1952). In *Doremus*, the Supreme Court declined to review a judgment of the New Jersey Supreme Court upholding public school prayer against a first amendment challenge, on the ground that the plaintiffs did not have standing under article III. Professor Freund's suggestion did not cover the entire "case or controversy" doctrine, but he recommended that standing to raise a federal question be itself a federal question binding on the state courts: "Would it not be sounder practice in such cases to treat the standing of the complainants as itself a federal question and order the action in the state court dismissed, thus vacating the judgment?" Freund, *The Supreme Court, 1951 Term—Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89, 95 (1952); *see also* SUPREME COURT AND SUPREME LAW 35 (E. Cahn ed. 1954) (remarks of Professor Freund); Gordon & Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145 (1984) (state courts almost always have an obligation to hear suits that federal courts would hear); Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis*, 25 ST. LOUIS U.L.J. 473 (1981) (arguing for a uniform justiciability standard in state and federal court, based on article III); Varat, *Variable Justiciability and the* Duke Power *Case*, 58 TEX. L. REV. 273, 311-12 & nn.174, 176 (1980) (same).

federal law. As a preliminary matter, the words "case" and "controversy" in article III were terms of art that were not intended to have significance for the relation between the federal and state judicial systems. The words are used at the beginning of phrases that describe subject matter jurisdiction authorized by the Constitution. For example, article III authorizes jurisdiction for "all *Cases,* in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority; . . . all *Cases* of admiralty and maritime Jurisdiction; . . . *Controversies* to which the United States shall be a Party; [and] . . . *Controversies* . . . between citizens of different States."[8]

The earliest explanation of the terms is found in St. George Tucker's appendix to his American edition of Blackstone's *Commentaries,* published in 1803.[9] According to Tucker, the words were used in article III to distinguish between two kinds of disputes. The term "case" referred to "all cases, whether civil or criminal."[10] The term "controversy" meant only disputes "of a *civil* nature."[11] Thus, for example, the jurisdiction over "cases" arising under federal law included both civil and criminal cases, but the jurisdiction over "controversies" between citizens of different states included only civil disputes. Justice Iredell, writing in *Chisholm v. Georgia*[12] ten years earlier, had not mentioned the term "cases" but had indicated that his understanding of "controversies" matched that later spelled out by Tucker.[13] Thirty years after Tucker, Justice Story defined "case" and "controversy" as Tucker had, and cited Tucker as his authority.[14]

The agreement among these more or less contemporary witnesses seems conclusive on the then-understood technical definitions of "case" and "controversy." Moreover, these men held different views about the proper role of the federal courts, which indicates that they did not understand the words to have any consequence for the distribution of power between the federal and state judiciaries. Tucker, a Virginia republican, argued vigorously against the exercise of national power through the federal courts.[15] Iredell, a North Carolinian, was a somewhat reluctant federalist who dissented from his federalist colleagues when they held in *Chisholm* that a state could be sued in federal court on a contract obliga-

8. U.S. CONST. art. III, § 2 (emphasis added).

9. 1 S. TUCKER, BLACKSTONE'S COMMENTARIES app. note E at 420-21 (Philadelphia 1803).

10. *Id.* at 420.

11. *Id.* (emphasis in original).

12. 2 U.S. (2 Dall.) 419 (1793).

13. *Id.* at 431-32 (Iredell, J., dissenting) ("[I]t cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases . . . .").

14. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 536 n.2 (Boston & Cambridge 1833).

15. S. TUCKER, *supra* note 9, at note E.

tion.[16] Story, a New Englander and nominally a republican, was a more ardent proponent of federal judicial power than all but the most enthusiastic federalists.[17]

Although the words "case" and "controversy" undoubtedly carried the connotation of judicially resolvable disputes, the language in article III that most directly imposed on the federal courts what we now call the "case or controversy" requirement was the phrase "judicial power." Article III vests the "judicial power" in the Supreme Court and "such inferior Courts as the Congress may . . . establish."[18] Contemporary authorities saw the need to act "judicially" as a genuine limitation on the power of the federal courts, performing a role similar to that of the "case or controversy" limitation today. For example, in *Correspondence of the Justices* in 1793 the Justices refused to answer questions posed in a letter from Secretary of State Jefferson on the ground that it was improper for them to decide the questions "extrajudicially."[19] Similarly, in *Hayburn's Case*[20] a year earlier, several Justices on circuit had refused to undertake the task assigned to them by statute of certifying to the Secretary of War their determination of the disabilities of war veterans, on the ground that "the business assigned to th[e] court" was not "judicial, nor directed to be performed judicially."[21]

State courts generally shared the federal courts' view of what was, and was not, an exercise of "judicial power." For example, in 1808 the Pennsylvania Supreme Court prepared, at the legislature's direction, a report on the English statutes then a part of Pennsylvania law, together with the court's recommendations of which statutes should be incorporated into the state's law.[22] Horace Binney included this document as an appendix to his case reports, but carefully noted that the court had not acted judicially. In his words, "In many respects [this important docu-

16. Chisholm v. Georgia, 2 U.S. (2 Dall.) at 429-50 (Iredell, J., dissenting). The only thing approaching a biography of Iredell is G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL (New York 1857).

17. For Story's papers, see W. STORY, LIFE AND LETTERS OF JOSEPH STORY (London 1851). For two biographies of Story, see G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970); R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985).

18. U.S. CONST. art. III, § 1.

19. *See* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (H. Johnston ed. 1891) (letter from Secretary of State Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793) and letters from Chief Justice Jay and Associate Justices to President Washington (July 20, 1793 and Aug. 8, 1793)); 10 THE WRITINGS OF GEORGE WASHINGTON app. at 542-45 (J. Sparks ed. New York 1847) (questions submitted by President Washington to the Justices), *partially reprinted in* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-67 (3d ed. 1988) [hereinafter HART & WECHSLER].

20. 2 U.S. (2 Dall.) 409 (1792).

21. *Id.* at 410 n.(a).

22. The Report of the Judges of the Supreme Court of the Commonwealth of Pennsylvania, 3 Binn. app. at 595 (1808) [hereinafter Report of the Judges].

ment] deserves to be placed by the side of judicial decisions . . . . It may not perhaps be considered as authoritative as judicial precedent; but it approaches so nearly to it, that a safer guide in practice, or a more respectable, not to say decisive, authority in argument, cannot be wanted by the profession."[23]

Similarly, the Massachusetts Supreme Judicial Court has issued advisory opinions at the request of the state's political branches since the 1780s.[24] But the Massachusetts court has never considered itself to be acting judicially on such occasions. As the court has put it, "In giving such opinions, the Justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity."[25] In other words, such advisory opinions were not judgments in litigated cases, but rather were issued only in response to formal solicitations by the political branches.[26] While they may have been useful in predicting what the state court might later do, they had neither the force of precedent nor of res judicata.

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23. *Id.* at n.*.

24. *See, e.g.*, Opinions of the Justices to the Senate and House of Representatives (Feb. 22, 1781), *reprinted in* 126 Mass. 547 (1880) (responding to a request from the Massachusetts Senate and House of Representatives and offering the court's opinion that under the Massachusetts Constitution, the Senate as well as the House of Representatives could review the valuation returns submitted by the towns in order to assess taxes).

25. Opinion of the Justices to the Senate and House of Representatives (Dec. 31, 1878), *reprinted in* 126 Mass. 557, 566 (1880) (interpreting the scope of the House of Representatives' exclusive authority to originate "money bills").

26. For example, the original Massachusetts Constitution provided, "Each branch of the Legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." MASS. CONST. pt. II, ch. iii, art. II (1780). The language of the original New Hampshire constitution was virtually identical. N.H. CONST. pt. II, art. 74 (1784, amended 1958).

At the time the United States Constitution was adopted, it appears that only the state courts in Massachusetts, New Hampshire, and Pennsylvania issued advisory opinions in response to requests from the political branches of their states. Massachusetts' and New Hampshire's constitutions authorized their advisory opinion practices. There was no comparable provision in the Pennsylvania state constitution, but as *Report of the Judges, supra* note 22, makes clear, the practice existed in Pennsylvania even without explicit constitutional authorization. Other states that adopted the practice in the early to mid-1800s include Maine, which adopted the practice after it split off from Massachusetts to form a separate state, ME. CONST. art. VI, § 3 (1820, amended 1964); Rhode Island, which adopted the practice in 1842, R.I. CONST. art. X, § 3 (1842); and North Carolina, which first employed the practice in 1849, Resolutions of the Senate (Jan. 17, 1849) and Communication from Chief Justice Ruffin in Reply (Jan. 18, 1849), *reprinted in* 31 N.C. (9 Ired.) app. at 361 (1849).

For a still useful summary of the early advisory opinion practices in the state courts, see J. THAYER, *Advisory Opinions*, in LEGAL ESSAYS 42 (1908); *see also* Edsall, *The Advisory Opinion in North Carolina*, 27 N.C.L. REV. 297 (1949) (description and critique of the practice in North Carolina); Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203 (1949) (description of the modern practice generally).

Until the end of the nineteenth century, both state and federal courts appear to have had a common understanding of the limits of judicial power in litigated cases, and no one questioned the Supreme Court's constitutional authority to review all state court decisions in litigated cases dealing with federal law. The Court lacked the power to review state court advisory opinions, even when those opinions addressed questions of federal law.[27] But those opinions were clearly recognized as having a different character from judgments in litigated cases, and the Supreme Court's inability to review them had no bearing on its power to review state court judgments

A number of early sources demonstrate that the framers intended to give the Supreme Court broad appellate power, but none of them affirmatively states that the framers did not intend for the state courts to escape Supreme Court review by a broad state court definition of judicial power. Indeed, there is a complete absence of any direct discussion of the point, a silence that persists throughout the nineteenth century. But the most plausible—indeed, in my view, the only plausible—explanation for the absence of discussion is that the issue never came up. State court decisions in litigated cases were simply assumed to be exercises of the judicial power, and, as such, reviewable by the Supreme Court.

In *The Federalist* Number 82, Hamilton argued that the great principle governing the relationship between the state courts and the Supreme Court would be that the Court could review state court decisions on questions of federal law:

> [T]he national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.[28]

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27. It was not uncommon for a state court to give an advisory opinion on a question of federal law, even in the early to mid-1800s. *See, e.g.*, Answer of the Justices of the Supreme Judicial Court To his Excellency the Governor, and the Honorable Council of the Commonwealth of Massachusetts (1812), *reprinted in* 8 Mass. supp. at 548 (1853) (construing U.S. CONST. art. I, § 8, cl. 15, conferring on Congress the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); Opinion of the Justices of this Court upon a question referred to them by His Excellency, Edward Everett, Governor of the Commonwealth (Oct. 18, 1838), *reprinted in* 39 Mass. (22 Pick.) supp. at 571 (1850) (construing federal statutes passed in 1792 and 1803 concerning state militias); Opinion of the Justices of the Superior Court of Judicature (Nov. 1852), *reprinted in* 25 N.H. supp. at 537 (1855) (construing, inter alia, U.S. CONST. art. IV, § 2, cl. 2 (privileges and immunities), U.S. CONST. amend. IV (unreasonable searches and seizures), and U.S. CONST. amend. VI (confrontation with witness against the accused)).

28. THE FEDERALIST No. 82, at 494 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton continues,

> The evident aim of the plan of the convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions giving appellate jurisdiction to

Section 25 of the Judiciary Act of 1789[29] partially implemented the role envisioned for the Court in *The Federalist* by authorizing Supreme Court review of state court decisions that denied an asserted federal right.[30] The Act did not grant the power to review state court decisions upholding a federal right, but no one argued that the constitutionally authorized power was so restricted.

Moreover, and more significant for our purposes, no one argued that state court decisions in litigated cases could escape Supreme Court review on the ground that they were not exercises of "judicial power." The two great cases in which the Marshall Court upheld the exercise of Supreme Court appellate power over state court decisions on questions of federal law contain no hint of such a limitation on the Court's power. Justice Story's opinion in *Martin v. Hunter's Lessee*[31] assumes the Supreme Court's power to review all state court cases involving questions of federal law. Story argued that if the Constitution were construed to permit the state courts to avoid Supreme Court review in cases involving federal law, "the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution."[32] Justice Marshall's opinion in *Cohens v. Virginia*[33] is similarly emphatic in its conclusion that Supreme Court review of state court decisions on federal law is critical to the constitutional scheme: "The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of [objects of vital interest to the nation]."[34]

This expansive view of the Supreme Court's constitutionally authorized appellate power over state court decisions in litigated cases remained unchanged throughout the nineteenth century. The statements (and silences) of James Bradley Thayer provide a useful window into the prevailing understanding of this appellate power at the end of the century. Thayer was a prominent and unusually reflective scholar in his generation, and his views are worth considering in their own right. But his

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> the Supreme Court to appeals from the subordinate federal courts, instead of allowing their extension to the State courts would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

*Id.*

29. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789).

30. *Id.*

31. 14 U.S. (1 Wheat.) 304 (1816).

32. *Id.* at 339.

33. 19 U.S. (6 Wheat.) 264 (1821).

34. *Id.* at 415; *see also id.* at 418 ("[Article III extends federal appellate jurisdiction over the state courts in] cases arising under the constitution, laws and treaties of the United States. . . . Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws or treaties of the United States, from this appellate jurisdiction.").

views are of particular interest here because he has been used by twentieth century scholars[35] and judges[36] to support their arguments for restraint by the Supreme Court in deciding constitutional questions and, by implication at least, to support the Court's use of the case or controversy rationale to avoid reviewing state court judgments.

In 1885, Thayer wrote an essay on advisory opinions in which he described the practice in England and in the four states in which the state constitutions then authorized advisory opinions.[37] Thayer nowhere suggested that the power to give advisory opinions existed except under the precise terms of a state constitution authorizing the formal solicitation of the state supreme court's opinion by the political branches of the state government, nor did he claim that the state court advisory opinion power was relevant to the power of courts in litigated cases. Specifically, he nowhere suggested that a state court could render an advisory opinion in a litigated case on a question of federal law that the Supreme Court would then be powerless to review.

In his famous essay on judicial review, published in 1893,[38] Thayer briefly discussed the relation between state courts and the United States Supreme Court. This discussion follows a short description of state court advisory opinion practice,[39] during which Thayer stressed the fact that "the giving of advisory opinions . . . is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority."[40] Immediately after his discussion of advisory opinions, Thayer analyzed the relationship between state and federal courts in litigated cases where the constitutionality of state laws was at issue. Thayer pointed out that this relationship "[f]undamentally . . . involves the allotment of power between the two governments,"[41] and suggested that state courts should defer to the judgments of the state legislatures in these cases, partly on general principles of deference to popularly elected bodies and partly to preserve the right of appeal to the Supreme Court.[42]

The second ground for Thayer's suggestion may require some expla-

35. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 35-37 (1962); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003-04 (1924).

36. *See, e.g.*, Coleman v. Miller, 307 U.S. 433, 462 n.4 (1939) (Frankfurter, J., concurring); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 354 n.12 (1936) (Brandeis, J., concurring).

37. J. THAYER, *supra* note 26. This essay was part of a book of essays published in 1908. The essay itself was first published in 1885 as an appendix to a pamphlet written by Thayer's cousin, Charles Bradley, the former Chief Justice of Rhode Island, entitled "The Methods of Changing the Constitutions of the States, especially that of Rhode Island." *Id.* at 42.

38. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

39. *Id.* at 153-54.

40. *Id.* at 153.

41. *Id.* at 154.

42. *Id.* at 155.

nation for the modern reader. At the time Thayer was writing, the original form of section 25 of the Judiciary Act of 1789[43] was still in effect, which meant that Supreme Court review was available only when the state court sustained a state statute against a federal challenge. If the state court struck down a state statute on federal grounds, there was no statutory authorization for Supreme Court review. Thus, by deferring to the state legislatures' judgments that state laws were constitutional, the state court preserved the Supreme Court's right of review. In Thayer's words,

> It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the co-ordinate legislature has adopted. At any rate, under the existing legislation it seems proper in the State court to do this, for the practical reason that this is necessary in order to preserve the right of appeal.[44]

This passage is remarkable not so much for what it says as for what it does not say. It seeks to preserve to the fullest possible extent the power of the Supreme Court to review state court judgments, going so far as to suggest that the judgment on the merits of the case should be influenced by the desire to ensure reviewability by the Supreme Court. Even in this setting (immediately following a description of state court advisory opinion practice), Thayer says nothing about the possibility that a state court in a litigated case might decide a federal question that was unreviewable because it constituted an advisory opinion.

### *B. Development of the Modern Practice*

The advisory opinion found in state court practices and discussed by Thayer, and earlier at issue in *Correspondence of the Justices*, was what one might call a true advisory opinion—the answer to a legal question formally posed by a coordinate branch of government. The advisory opinion that has become an issue in the twentieth century is different. This new form of advisory opinion is not given in response to a formal request by a coordinate branch of government; rather, it is an opinion rendered in a litigated dispute in which a party is thought not to have a sufficient, or sufficiently immediate, stake in the matter being litigated to make the court's decision anything but advisory.

For reasons that are not entirely clear, such advisory opinions were not a noticeable part of the legal landscape until the end of the nineteenth century.[45] The early view that a party in a litigated case must have a legal stake in the matter being litigated appears in the opening paragraph

43. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789).

44. Thayer, *supra* note 38, at 155.

45. Professor Winter provides helpful insight into the origins of such cases in his description of

of Joseph Chitty's *A Practical Treatise on Pleading,* first published in the United States in 1809:

> There are no rules connected with the science of pleading so important, as those which relate to the persons who are to be the parties to the action .... The general rule is, that the action should be brought in the name of the party whose *legal* right has been affected, against the party who committed the injury ....[46]

In 1868, Judge Thomas M. Cooley, in his famous *Constitutional Limitations,* applied this concept to constitutional litigation, noting that a court could not "listen to an objection made to the constitutionality of [a legislative] act by a party whose rights it does not affect, and who has consequently no interest in defeating it."[47] Although neither Cooley nor the cases he cited relied directly upon pleading rules or Chitty for support,[48] Cooley's ideas obviously drew on the traditional pleading requirements that Chitty had articulated.

At the turn of the century, the Supreme Court encountered for the first time a case in which a state court had entertained a suit brought by someone who, in the Court's view, lacked an interest sufficient to litigate the question decided by the state court. In *Tyler v. Judges of the Court of Registration,*[49] the plaintiff had sued in Massachusetts state court to prevent the registration of a parcel of land adjacent to his own property. The gravamen of the plaintiff's complaint was that the registration certificate misdescribed the boundary line between his and the adjacent land. Although he acknowledged receiving proper notice of the hearing, the plaintiff argued that the proceeding violated the due process clause of the fourteenth amendment because the other adjacent property holders had not received proper notice. The Massachusetts Supreme Judicial Court, in an opinion by then-state court Chief Justice Holmes, reached the plaintiff's constitutional claim and held that the notice provisions of the statute were constitutionally sufficient.[50]

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the development of standing law. Winter, *The Metaphor of Standing and the Problem of Self-Governance,* 40 STAN. L. REV. 1371, 1425-52 (1988).

46. 1 J. CHITTY, A PRACTICAL TREATISE ON PLEADING 1 (New York 1809) (emphasis in original).

47. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 163 (Boston 1868). Professor Winter points out that the United States Supreme Court resisted citing Cooley for this proposition until the turn of the century. Winter, *supra* note 45, at 1429-30.

48. *See, e.g.,* Wellington et al., Petitioners, 33 Mass. (16 Pick.) 87, 96 (1834) (Shaw, C.J.), *cited in* T. COOLEY, *supra* note 55, at 164 n.3, referring to the "well established principle[] of law" that a "[legislative] act is not void, but voidable only; and it follows as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of, by those only who have a right to question the validity of the act, and not by strangers."

49. 179 U.S. 405 (1900).

50. Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N.E. 812, *error dismissed,* 179 U.S. 405 (1900).

A five-person majority of the United States Supreme Court dismissed the writ of error to the Massachusetts court. Quoting Chitty, the Court wrote, "The very first general rule . . . is that 'the action should be brought in the name of the party whose legal right has been affected . . . .' "[51] The Court then noted that under section 25 of the Judiciary Act a litigant could bring a writ of error only if he "has a right to draw [a state statute] in question by reason of an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute."[52] Since Tyler himself had notice of the registration proceedings, and since he could present evidence to the registering court about the location of his own boundary line, his legal rights were not affected by the provisions of the act that he was seeking to challenge.[53]

The Court's opinion in *Tyler* does not translate easily into modern jurisdictional language. The Court nowhere mentioned article III, nowhere used the word "standing," and appeared to treat the case as involving solely the construction of section 25 of the Judiciary Act. But the case clearly posed a problem with which we have become familiar in this century, and to which a majority of the Justices responded in something like the modern way. The plaintiff challenged a state statute in state court on the ground that it violated the federal Constitution; the state court, using a standard of justiciability that differed from the federal standard, agreed to hear the case and sustained the statute; the United States Supreme Court held that it could not review the state court decision because the plaintiff had not shown a stake in the legal question he sought to have litigated; and the judgment of the state court sustaining the statute against a federal constitutional challenge was left undisturbed.

In 1927, the Court took the first recognizably modern approach to the problem in *Fidelity National Bank & Trust Co. v. Swope*.[54] In *Swope*, a state court had granted a declaratory judgment[55] holding a municipal

51. *Tyler*, 179 U.S. at 407 (quoting J. CHITTY, PLEADING 1). The Court did not give a full citation, but it is likely that it had in mind the sixteenth edition, 1 J. CHITTY, TREATISE ON PLEADING AND PARTIES TO ACTIONS 1 (J. Perkins 16th ed. 1892).

52. *Tyler*, 179 U.S. at 407.

53. *Id.* at 409-10. The four dissenting Justices argued that the terms of section 25 were satisfied because the plaintiff had argued that the ability of the state court to register the land depended on the validity of the act under which it proceeded, which in turn depended on whether the act required that all potentially interested parties be properly notified. "The fact that [the plaintiff] had actual knowledge of [the proceedings] did not validate them if the act was void." *Id.* at 414 (Fuller, C.J., dissenting).

54. 274 U.S. 123 (1927).

55. When *Swope* was decided, many state courts granted declaratory judgments, but there was considerable doubt whether the federal courts had the power under article III to do so. *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 363 (1911) ("[W]e are constrained to hold that [declaratory] actions present no justiciable controversy within the authority of the court . . . ."); Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289 (1928) ("What the plaintiff seeks is simply a

tax ordinance valid. A party to the state court proceeding then brought a subsequent federal court suit to cancel tax bills issued under the ordinance. The municipality defended on the ground of res judicata. The Supreme Court held that the character of the state court proceeding determined its judgment's res judicata effect in federal court: "The parties to it are concluded by the judgment if the proceeding was judicial rather than legislative or administrative in character."[56] That is, the judgment was res judicata in federal court only "if the proceeding in the state court was a 'case' or 'controversy' within the appellate jurisdiction of this Court, so that constitutional rights asserted, or which might have been asserted in that proceeding, could eventually have been reviewed here."[57] The Court found that the state court proceeding in *Swope* did satisfy the federal "case or controversy" standard, and the Court therefore held the judgment res judicata on the question of the ordinance's validity.

Twelve years later, Justice Frankfurter's concurring opinion in *Coleman v. Miller*[58] built on the assumptions underlying *Swope* and provided the first full elaboration of the principles that have led to *Asarco Inc. v. Kadish*.[59] The United States Congress had proposed a Child Labor Amendment to the United States Constitution in 1924. Both houses of the Kansas Legislature voted against ratification in 1925. Ten years later, the Kansas House of Representatives voted to ratify the amendment, and the State Senate divided eveuly on the question. The Lieutenant Governor broke the tie in the Senate by voting to ratify. The twenty losing senators, one of the prevailing senators, and three members of the House of Representatives sued for mandamus in the Supreme Court of Kansas to prevent the Secretary of State from certifying the amendment's ratification.[60] Their arguments under federal law[61] were that the amendment could no longer be ratified because too much time had elapsed since Congress had proposed it, and that the Kansas legisla-

declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary."). The United States Supreme Court eventually indicated that declaratory judgments were within the federal judicial power. Nashville, Chatt. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933) (reviewing state court declaratory judgment). Congress thereafter passed the Federal Declaratory Judgment Act of 1934, ch. 512, 48 Stat. 955 (codified as amended at 28 U.S.C. §§ 2201-2202 (1988)), whose constitutionality the Court sustained in Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937). So long as state courts could grant declaratory judgments and the federal courts could not, state courts could decide federal questions in litigated cases that the United States Supreme Court was powerless to review.

56. *Swope*, 274 U.S. at 130.

57. *Id.* at 130-31 (citation omitted).

58. 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

59. 109 S. Ct. 2037 (1989).

60. *Coleman*, 307 U.S. at 435-36.

61. *Id.* at 436. The plaintiffs also offered an argument based on state law that the Lieutenant Governor was without power to break the tie. *Id.*

ture had no power to reverse its earlier vote against ratification. The Kansas Supreme Court denied relief. The United States Supreme Court, in a complicated split opinion, granted standing but refused to disturb the judgment of the Kansas court on the ground that both the lapse of time and the prior rejection presented political questions not suitable for judicial resolution.

Justice Frankfurter concurred in the judgment, but indicated that he would have denied standing on constitutional "case or controversy" grounds.[62] His opinion sets out the essential elements of the modern practice. First, Frankfurter noted the limited power of federal courts:

> The Constitution . . . explicitly indicated the limited area within which judicial action was to move . . . by extending 'judicial Power' only to 'Cases' and 'Controversies.'. . . No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate . . . . In the familiar language of jurisdiction, these Kansas legislators must have standing in this Court.[63]

Frankfurter then noted that the states are free to use their own standards for determining justiciability, but that the United States Supreme Court remains bound by article III: "To whom and for what causes the courts of Kansas are open are matters for Kansas to determine. But Kansas can not define the contours of the authority of the federal courts, and more particularly of this Court."[64]

In the years following *Coleman,* the Court seldom denied review of a state court decision on the ground that the dispute was not a "case or controversy." But the occasions on which the Supreme Court did so suggest that the denials not only served the purpose of preventing the Court from issuing advisory opinions, but also served the further and ulterior purpose of permitting it to avoid deciding difficult or awkward cases. Between *Coleman* and *Asarco,* the issue arose only three times.

The first, *Tileston v. Ullman,*[65] decided in 1943, is an imperfect illustration, for it deals with standing but not the "case or controversy" doctrine.[66] A Connecticut doctor brought a fourteenth amendment

62. *Id.* at 460-70.

63. *Id.* at 460, 464.

64. *Id.* at 462 (footnote omitted).

65. 318 U.S. 44 (1943) (per curiam).

66. Note, however, that the Supreme Court has recently cited *Tileston* as if it were a "case or controversy" holding. *See* New York State Club Ass'n v. City of New York, 487 U.S. 1, 8 n.2 (1988):

> [The state courts need] not satisfy the more stringent requirement in the federal courts that an actual "case" or "controversy" be presented for resolution. U.S. Const., Art. III, § 2. Accordingly, this Court has dismissed cases on appeal from state court when it appeared that the complaining party lacked standing to contest the law's validity in the federal courts. *Tileston v. Ullman,* 318 U.S. 44 (1943).

(additional citations omitted).

challenge to a state statute that forbade giving advice about the use of contraceptives, and the Connecticut Supreme Court sustained the statute. In a short per curiam opinion, the United States Supreme Court dismissed the doctor's appeal on the ground that he had "no standing to litigate the constitutional question."[67] The Court claimed that it was "unnecessary" to decide whether the dispute constituted a "case or controversy,"[68] but did not explain how a lack of standing that fell short of an article III deficiency could result in a dismissal. As in *Tyler, Coleman,* and *Swope,* the Court did not question the right of the state court to use a different standard for determining justiciability; the Court's holding went only to its own ability to review such a case.

The second is *Doremus v. Board of Education,*[69] decided in 1952. Two New Jersey taxpayers, one of them the parent of a school-age child, sought a declaratory judgment from the New Jersey Supreme Court that a state statute providing for daily Bible reading at the opening of each public school day violated the first amendment. The state supreme court upheld the statute. By the time the United States Supreme Court heard the appeal, the child had graduated from school, rendering the case moot as to her. Writing for the Court, Justice Jackson noted the mootness as to the child, held that the taxpayers had no standing, and dismissed the appeal.[70] Jackson affirmed the right of state courts to use their own standing rules, but emphasized that this right could not affect the jurisdiction of the Supreme Court.[71]

Finally, in *DeFunis v. Odegaard,*[72] decided in 1974, an unsuccessful white applicant to the University of Washington law school had obtained a judgment from a Washington state trial court that the university's racially based affirmative action admissions program violated the fourteenth amendment. The Washington Supreme Court reversed, upholding the program. In the meantime, however, DeFunis had entered the university's law school pursuant to court order. When the United States Supreme Court heard the case, DeFunis was in his final term.[73] The

67. 318 U.S. at 46.

68. *Id.*

69. 342 U.S. 429 (1952).

70. *Id.* at 432-35.

71. *Id.* at 434. Justice Jackson explained,

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review . . . any procedure which does not constitute such.

*Id.*

72. 416 U.S. 312 (1974) (per curiam).

73. After finding that the University of Washington had unconstitutionally denied admission to DeFunis, the state trial court had ordered that he be admitted to law school. Though the Washington Supreme Court reversed, holding the university's admissions program constitutional, Justice Douglas, acting as Circuit Justice, stayed the judgment of the Washington Supreme Court

Supreme Court dismissed the appeal on the grounds that the case had become moot, and that the Court could not, "consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties."[74]

In all three cases, the finding of no standing or of no "case or controversy" enabled the Court to avoid addressing difficult and controversial issues—birth control, school prayer, and affirmative action. *Tileston* and *Doremus* had been within the mandatory appellate jurisdiction of the Supreme Court because state courts had upheld state statutes against federal constitutional challenges; in both of these cases, the Court could avoid review only by finding a jurisdictional defect.[75] *DeFunis* had been within the discretionary certiorari jurisdiction of the Court. But once certiorari had been granted, it was difficult to dismiss the certiorari as improvidently granted since four Justices had made it plain that they wished to decide the case on the merits.[76] The mootness holding thus permitted a dismissal that would have otherwise been difficult to achieve. Justice Brennan's dissenting opinion in *DeFunis* says as much, charging the Court with using mootness as a "device[] for sidestepping resolution of [a] difficult case[]."[77]

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pending disposition by the United States Supreme Court. As a result, DeFunis remained in law school throughout the litigation. *Id.* at 314-15.

74. *Id.* at 319-20.

75. At the time of these appeals, 28 U.S.C. § 1257(2) provided for review by appeal rather than certiorari in this type of case.

76. *DeFunis*, 416 U.S. at 320 (Douglas, J., dissenting); *id.* at 348 (Brennan, J., dissenting, joined by Douglas, White & Marshall, JJ.).

The Court ordinarily does not dismiss certiorari as improvidently granted "in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted." Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 559 (1957) (Harlan, J., concurring in part and dissenting in part). The Court often invokes the "rule of four" in support of its reluctance to dismiss certiorari as improvidently granted. *See, e.g.*, Donnelly v. DeChristoforo, 416 U.S. 637, 648 (1974) (Stewart, J., concurring):

> We are bound here, however, by the "rule of four." That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case . . . .

Recently, however, the Court dismissed the certiorari as improvidently granted in a case involving a constitutional challenge to a state criminal statute that forbade loitering for the purpose of, among other things, engaging in " 'sexual behavior of a deviate nature.' " New York v. Uplinger, 467 U.S. 246, 247 (1984) (per curiam) (quoting N.Y. PENAL LAW § 240.35(3) (McKinney 1980)). The per curiam opinion noted that the Court was "uncertain as to the precise federal constitutional issue" that the New York Court of Appeals had decided, and concluded that the case provided "an inappropriate vehicle for resolving the important constitutional issues raised by the parties." *Id.* at 248-49. Four Justices objected to the dismissal. *Id.* at 252 (White, J., dissenting, joined by Burger, C.J., Rehnquist & O'Connor, JJ.). For a general description of the Court's practice in dismissing certiorari as improvidently granted, see R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE §§ 5.4, 5.15 (6th ed. 1986).

77. *DeFunis*, 416 U.S. at 350 (Brennan, J., dissenting).

### C. Summary

From the adoption of the Constitution through the end of the nineteenth century, two assumptions about the nature of the judicial power and the relationship between the federal and state courts remained constant: first, both the federal and state courts had to act "judicially" in litigated cases; second, the Constitution authorized Supreme Court review of state court decisions on questions of federal law in all litigated cases. Shortly after the turn of the century, however, the old assumptions began to break down as state courts allowed litigants to assert unconventional interests or to seek unconventional forms of relief. The modern practice is rooted in the Supreme Court's genuine puzzlement about how to treat state court decisions in such suits. In the hands of Justice Frankfurter and those who followed, the practice became not only a means of confining the exercise of federal court jurisdiction, but a mechanism to avoid deciding awkward or difficult cases.

The modern practice is not based on any discernible intent of the adopters of the Constitution. It is, rather, a pragmatic response to problems that have arisen in this century. Given its origins, we should feel relatively free to modify or abandon the practice if it does not properly resolve existing problems in the relationship between the federal and state courts.

## II
## A COMMON "CASE OR CONTROVERSY" STANDARD IN FEDERAL AND STATE COURT ADJUDICATION OF FEDERAL QUESTIONS

Two factors have changed since the modern practice developed. First, the divergence of justiciability standards between federal and state courts has receded from the high-water mark of the 1920s and 1930s. When the Court decided *Fidelity National Bank & Trust Co. v. Swope*[78] in 1927, only state courts could grant declaratory judgments.[79] After the adoption of the Federal Declaratory Judgment Act in 1934,[80] and the Court's decision in *Aetna Life Insurance Co. v. Haworth*,[81] federal courts have also been able to grant declaratory judgments, although state and federal courts continue to apply different standing, mootness, and ripeness requirements. Second, and more important, Congress has recently repealed the mandatory appellate jurisdiction of the Supreme Court,

78. 274 U.S. 123 (1927).

79. In addition to *Swope*, see Muskrat v. United States, 219 U.S. 346 (1911), and Willing v. Chicago Auditorium Association, 277 U.S. 274 (1928).

80. Federal Declaratory Judgment Act of 1934, ch. 512, 48 Stat. 955 (codified as amended at 28 U.S.C. §§ 2201-2202 (1988)).

81. 300 U.S. 227 (1937).

making its review of state court judgments entirely discretionary.[82] Since the Court's desire to duck awkward cases within its mandatory jurisdiction largely explains the origin and continued existence of the modern practice, the new statute removes a significant obstacle to reform. The time is therefore propitious for a re-examination of the practice. In *Asarco Inc. v. Kadish*,[83] the Court embarked on such a course.

### *A.* Asarco Inc. v. Kadish: *A Partial and Perverse Reform*

In *Asarco Inc. v. Kadish*, state taxpayers and a public school teachers' association sought a declaratory judgment in state court that an Arizona statute permitting leasing of state-owned mineral rights was invalid because it did not comply with procedural requirements imposed by federal law. The Arizona Supreme Court heard the plaintiffs' federal challenge and struck down the state statute.[84] The defendants, lessees of the mineral rights, sought review in the United States Supreme Court.

The Supreme Court found that the plaintiffs lacked standing under article III, but noted that the Arizona court had acted properly in taking "no account of federal standing rules" since "the constraints of article III do not apply to state courts."[85] Although the plaintiffs had no article III standing, the Court reviewed the Arizona state court judgment because it found that the defendants had suffered " 'distinct and palpable' " injuries from the Arizona judgment.[86] The Court then upheld the Arizona judgment, with the ironic result that plaintiffs, who had no standing in an article III court, obtained a final judgment in their favor from the highest article III court in the land.

There are two severe difficulties with the Court's approach in *Asarco*. The first concerns an important justification of the "case or controversy" doctrine. The second concerns Supreme Court appellate review of state court decisions on questions of federal law.

A familiar and important justification for the "case or controversy" doctrine is that the quality and integrity of a judicial decision depends on

82. Pub. L. No. 100-352, § 3, 102 Stat. 662 (enacted June 27, 1988), codified at 28 U.S.C. § 1257 (1988).

83. 109 S. Ct. 2037 (1989).

84. Kadish v. Arizona State Land Dep't, 155 Ariz. 484, 747 P.2d 1183 (1987), *aff'd sub nom.*, Asarco Inc. v. Kadish, 109 S. Ct. 2037 (1989). That same year the Supreme Court of Alaska decided a remarkably similar case, in which it also did not feel bound by the article III "case or coutroversy" requiremeut in granting standing to state taxpayers who sought to challenge the state's mineral leasing system as inconsistent with the federal Alaska Statehood Act. Trustees for Alaska v. State, 736 P.2d 324, 327 (Alaska 1987) ("Standing in our state courts is not a constitutional doctrine; rather, it is a rule of judicial self-restraint.... The concept of standing has been interpreted broadly in Alaska. We have 'departed from a restrictive interpretatiou of the standing requirement....' ") (quoting Coghill v. Boucher, 511 P.2d 1297, 1303 (Alaska 1973)), *cert. denied*, 486 U.S. 1032 (1988).

85. *Asarco*, 109 S. Ct. at 2045.

86. *Id.* at 2046 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

the adverseness of the parties and concreteness of the dispute.[87] In *Asarco*, the dispute was concededly not a "case or controversy" in state court because the plaintiffs lacked standing under article III. On certiorari, however, the Court recharacterized the dispute, even though the parties were no more adverse and the dispute no more concrete than in state court. That the defendants were adversely affected by the state court judgment should have been beside the point, for the difficulty had always been that the plaintiffs (not the defendants) had insufficient interest to satisfy article III. Only Chief Justice Rehnquist and Justice Scalia were willing to notice that since the plaintiffs were just as much without standing in both places, the question before the Supreme Court was just as much " 'in the rarified atmosphere of a debating society' "[88] as it had been before the state court.

Even assuming that Supreme Court review of the state court decision in a non-"case or controversy" is desirable, *Asarco* makes appellate review available in a perversely asymmetrical way. Under *Asarco*, if non-article III plaintiffs successfully challenge a state statute on federal grounds in state court, defendants may seek review in the Supreme Court since they are adversely affected by the state court decision. But if such plaintiffs lose their federal challenge in state court, they may not seek review since they never had, and do not have after the state court's decision, any adversely affected interest.

It is very odd to give a right of appeal to only one party, contrary to the virtually universal practice in Anglo-American jurisprudence of granting appeal symmetrically, either to both parties or to neither. But assuming for the moment that only one side should be able to seek Supreme Court review, *Asarco* grants review to precisely the wrong side. Because of suspicions that state courts may tend to favor their own state's statutes over the commands of federal law, there has always been greater distrust of state court decisions sustaining state statutes against federal challenges than of decisions striking down state statutes.[89] Yet

87. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472-73 (1982).

88. *Asarco*, 109 S. Ct. at 2054-55 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Valley Forge*, 454 U.S. at 472).

89. This theory lay behind every statute authorizing Supreme Court review of state court judgments from the Judiciary Act of 1789 to the version of 28 U.S.C. § 1257 that existed until 1988. Section 25 of the Judiciary Act of 1789 authorized Supreme Court review of state court decisions only when the state court decided a federal question adversely to the claimed federal right. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789). For most of this century, the successor statute to section 25 differentiated between state court decisions in which a state statute was sustained against a federal challenge (within Court's mandatory appellate jurisdiction), and those in which a state statute was struck down (within Court's discretionary certiorari jurisdiction). 28 U.S.C. § 1257 (1982) (amended 1988). A new statute has finally assimilated the two categories of cases, bringing them both within the Court's certiorari jurisdiction. Act of June 27, 1988, Pub. L. No. 100-252, § 3, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 662 (codified at 28 U.S.C. § 1257 (1988)).

the effect of *Asarco* is to grant review when the state court is most to be trusted (when it strikes down a state statute), but to deny review when the state court is most to be distrusted (when it sustains a state statute).

We may take the Court's decision in *Asarco* as evidence that the Court is dissatisfied with the way the modern practice had previously resolved the problems resulting from different justiciability standards in federal and state courts. But *Asarco* is a singularly ill-conceived resolution of those problems. A requirement that the state courts adhere to the "case or controversy" standards of article III whenever they adjudicate questions of federal law would be far better.

In the sections that follow, I offer arguments in favor of applying a common "case or controversy" standard to the state and federal courts, and I refute arguments against such a standard. I devote more pages to the latter than the former, but this disparity should not be understood to indicate the relative importance of the arguments. Indeed, the opposite may be true. The affirmative arguments are stated briefly, for once stated they are rather obvious. But the refutations, particularly the second, are more elaborate, for they require an understanding of several permutations.

### *B. Arguments for a Common "Case or Controversy" Standard*

The first and most obvious argument in favor of a common standard is implicit in Chief Justice Rehnquist's assertion that the Arizona courts and the United States Supreme Court both decided the *Asarco* dispute in the " 'rarified atmosphere of a debating society.' "[90] At the core of the "case or controversy" requirement is the notion that the integrity of adjudication depends on the judicial power being exercised, in Professor Bickel's words, in the "hard, confining, and yet enlarging context of a real controversy."[91] I am skeptical that this familiar idea can bear as much weight as it is sometimes given.[92] But within some scope of opera-

90. *Asarco,* 109 S. Ct. at 2054-55 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

91. A. BICKEL, *supra* note 35, at 115.

92. For example, I have argued at length elsewhere that the Court has misconceived the nature of standing cases. *See* Fletcher, *The Structure of Standing,* 98 YALE L.J. 221 (1988). My thesis may be quickly stated: Standing determinations are decisions on the merits rather than jurisdictional decisions. Whether a plaintiff has standing depends on the particular statutory or constitutional provisions under which she brings suit. Article III imposes no standing-based "case or controversy" limitations except in feigned cases when a plaintiff lies about an injury she claims to suffer, and in cases where Congress grants standing as a mechanism to solicit a judicial opinion to which Congress desires an answer. If standing decisions are understood, as I think they should be, as decisions on the merits, it necessarily follows that state courts should be required under the supremacy clause to abide by federal standing doctrine. Although I believe this approach is correct, I have refrained from relying on it in this Article.

The *Asarco* Court may share my general skepticism about the strength of the "case or

tion, the "case or controversy" requirement is a valuable, even indispensable, limitation on the judicial power. This limitation, if taken seriously, dictates that the state courts follow the "case or controversy" doctrine when they adjudicate questions of federal law.

The conventional assumption is that the article III "case or controversy" requirement does not apply to the state courts because article III makes no mention of the state courts. But this omission means nothing beyond the obvious fact that the article is creating federal rather than state courts. A moment's thought suggests a deeper structural reality. The power to adjudicate questions of federal law and the power of judicial review do not belong only to the federal courts. These powers inhere in the courts generally, both state and federal.[93] We should free ourselves of the mistaken, perhaps largely unconscious, habit of thinking that only the federal courts are important enough to have a "case or controversy" requirement. The courts, both state and federal, are not important in themselves, but are merely means to an end. To the degree that the "case or controversy" requirement serves the values of sensitive and wise adjudication, it should apply to both state and federal courts.

Second, the Supreme Court's most important institutional function is to serve as the final appellate tribunal on questions of federal law. The Court's appellate function has been critically important in cases originating in state courts whose loyalty to national values and expertise in federal substantive law is sometimes in doubt. The Supreme Court's appellate jurisdiction over the state courts on questions of federal law was clearly described and supported in the *Federalist Papers,*[94] has been authorized since the first Judiciary Act,[95] and was emphatically affirmed in two great opinions of the Marshall Court.[96] Yet so long as the "case or controversy" doctrine applies only to the federal courts, state court judgments on important questions of federal law will be unreviewable by the Supreme Court. Moreover, to the extent that Supreme Court review

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controversy" rationale to some degree. I cannot otherwise explain the Court's willingness to review the judgment of a state court in a dispute that was never a "case or controversy" in the state court system.

93. Professor Bator employed this idea in a related context:

> Even the most eminent of constitutional authorities can fall into the mistaken habit of asserting that *Marbury v. Madison* was addressed to the powers of the *federal* courts. But in fact Marshall's opinion is in no way directed to the question of "federal judicial review" or the powers of "the federal courts." It is directed to the question of the powers and duties of *courts.*

Bator, *The State Courts and Federal Constitutional Litigation,* 22 WM. & MARY L. REV. 605, 629 n.60 (1981) (emphasis in original) (citation omitted).

94. THE FEDERALIST No. 82, *discussed at supra* note 28 and accompanying text.

95. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789), *discussed at* text accompanying notes 29-30 & 89.

96. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), *discussed at supra* notes 31-32 and accompanying text.

is now available under *Asarco*, it is available as a practical matter only for decisions upholding federal law. Thus, under current law, Supreme Court review of state court decisions is denied where review is most needed.

Third, a common "case or controversy" requirement in state and federal courts would treat the two courts as genuine partners in the business of adjudicating federal law. It may seem quixotic to impose the notoriously confused "case or controversy" doctrine on the state courts. But the very act of doing so may help clarify or improve the doctrine. That is, forcing both the state courts and the Supreme Court to confront and respond to the other system's rules of justiciability may produce some of the benefits that Professor Cover has argued result from our jurisdictional system of "complex concurrency."[97]

As things now stand, the Supreme Court is free simply to note that its justiciability doctrine differs from that of the state courts. It need not confront and consider the value of state rules. Further, since the Supreme Court does not now impose its own view of "case or controversy" on the state courts, it need not justify to outsiders, as it were, its reading of the doctrine. Conversely, a state court is now free to borrow from federal "case or controversy" doctrine, as most, in fact, do. But a state court may depart from the federal doctrine any time it thinks that doctrine is inconvenient, awkward, or wrongheaded; and as things now stand, a state court need not answer to any tribunal but itself when it does so.

### *C. Arguments Against a Common Standard*

There are two arguments against applying a uniform "case or controversy" standard to federal and state courts. First, state court power to decide litigated disputes that are not "cases or controversies" is indistinguishable from the power to give advisory opinions in response to formal requests by other branches of state government. Second, the autonomy of the state court systems should be respected.

#### *1. Litigated Disputes and True Advisory Opinions*

It is sometimes argued that a state court acts in the same way in deciding litigated disputes that do not satisfy article III as it does in giving formally requested advisory opinions. For example, Chief Justice Rehnquist in his separate opinion in *Asarco* treated the two kinds of state court actions as largely indistinguishable.[98] Both kinds of decisions are

97. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) (arguing that "jurisdictional redundancy" may lead to less jurisdictional bias and greater innovation and fairness).

98. Asarco Inc. v. Kadish, 109 S. Ct. 2037, 2055 (1989) (Rehnquist, C.J., concurring in part

often called advisory opinions, but the common label obscures critical differences.

The true advisory opinion formally solicited by another branch of the state government serves much the same function in the states employing it that an advisory opinion of the United States Attorney General serves in the federal government.[99] When rendering such advisory opinions, state court judges are acting "individually as men [or women] learned in the law furnishing the legislature or the executive with a legal opinion rather than as a court deciding a dispute by an authoritative pronouncement of the law."[100] They offer important advice that often guides government action, but they offer only advice. Even though rendered by the supreme court of the state, an advisory opinon is not binding precedent in any court in subsequent litigation.[101] Nor does it have the force of res judicata (claim preclusion) or collateral estoppel (issue preclusion) for any party. Indeed, there are no parties in the ordinary sense of the term.

Different, and greater, consequences flow from a state court decision in a litigated case than from a state court advisory opinion given in response to a formal request from another branch of the government. State court adjudication in a litigated case that does not constitute a "case or controversy" by article III standards will have precedential effect within the state court system that decided it, and it may have such effect in other states as well. Moreover, the decision will have both claim preclusion and issue preclusion consequences for the parties within the state system that decided the dispute, and probably within other state court systems. The federal courts will not accord res judicata consequences to the decision under *Fidelity National Bank and Trust Co. v. Swope,*[102] but as a practical matter this is a rather minor limitation on the impact of the decision.

It should be a matter of indifference to the federal government that a few states have chosen to constitute their state supreme courts as legal advisors to the state governments, even if that advice extends to ques-

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and dissenting in part); *see also* HART & WECHSLER, *supra* note 19, at 137 ("Article III's definition of judicial power applies only to the federal courts. The state courts are thus free to adjudicate federal questions even when there is no 'case or controversy' within the meaning of Article III; *some state courts, for example, issue advisory opinions.*") (emphasis added).

99. *See* 28 U.S.C. § 511 (1988) (advisory opinions in response to President); *id.* § 512 (advisory opinions in response to executive department head). *See generally* Nealon, *The Opinion Function of the Federal Attorney General,* 25 N.Y.U. L. REV. 825 (1950) (description of practice); HART & WECHSLER, *supra* note 19, at 71-72 (same).

100. Note, *Advisory Opinions on the Constitutionality of Statutes,* 69 HARV. L. REV. 1302, 1303 (1956).

101. *See supra* notes 18-27 and accompanying text.

102. 274 U.S. 123 (1927) *discussed at supra* text accompanying notes 54-57.

tions of federal law.[103] But it is not a matter of indifference if a state court decides a federal question in a litigated dispute that does not meet the standards of article III. Since such a state court decision will have binding consequences similar to those of a normal judicial decision, it should be rendered only under circumstances that satisfy the constitutional minimum for the exercise of judicial power, and it should be reviewable by the Supreme Court.

### 2. *State Court Autonomy*

The argument that the Supreme Court should respect the autonomy of the state court systems is both familiar and elusive. The importance of state sovereignty, and state court autonomy, has long been invoked when the federal judiciary has attempted to control state judiciaries, but state sovereignty arguments have been notoriously difficult to reduce to principled statements.[104] In the context of the problem before us, we may make the analysis manageable by examining the two ways the "case or controversy" issue can arise. First, state courts may have a more liberal standard of what constitutes a "case or controversy," with the consequence that the state courts will decide disputes that the federal courts would not hear. Second, the state court may have a more stringent standard for a "case or controversy," with the consequence that the state court will refuse to hear cases that federal courts would decide.

#### a. *State Court "Case or Controversy" Standard More Liberal than that of the Federal Courts*

To the extent that state court justiciability standards differ from those of article III, state courts almost always have the more liberal definition. In such cases, the state courts will decide questions of federal law in disputes that federal district courts could not decide originally, and the Supreme Court will be able to review only some of these state court decisions. If a common "case or controversy" standard were imposed on state courts deciding questions of federal law, it would prevent state courts from deciding disputes that article III prevents federal courts from deciding.

Preventing the state courts from deciding disputes is less offensive to state sovereignty than requiring them to decide disputes that they would otherwise decline to hear. For example, we do not consider it an interfer-

103. *See supra* notes 22-26 and accompanying text.

104. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (upholding state sovereignty in areas of "traditional governmental functions"), *overruled,* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (finding that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental functions" is unworkable and inconsistent with principles of federalism).

ence with state court autonomy when federal statutes confer exclusive rather than concurrent jurisdiction on the federal courts, thereby forbidding the state courts to decide cases coming within the exclusive grant of jurisdiction to the federal courts.[105] Moreover, to the degree that the concept of preserving the autonomy of the state courts implies an ideal of respect for state courts, the imposition of a common "case or controversy" standard is even less threatening than the exclusive jurisdiction statutes. Those statutes say, in effect, that the federal courts can be trusted to adjudicate the specified kinds of cases, but that the state courts cannot. By contrast, a common "case or controversy" standard treats state and federal courts alike: It forbids both from deciding federal questions where there is no "case or controversy."

The state court autonomy argument when state justiciability standards are more liberal than those of article III may be elaborated further by examining the consequences for Supreme Court review. I divide my discussion into two parts: The state court decides against the federal right asserted, or it decides in favor of the federal right.

### *i. State Court Finds Against the Asserted Federal Right*

Until recently, state court decisions upholding state statutes against federal challenges have posed a particularly troublesome problem because they have been at the convergence of two powerful and countervailing federal interests. On the one hand, there was (and is) a very strong interest in permitting, even requiring, Supreme Court review of state court decisions sustaining state law against federal constitutional challenges, for in such cases there is reason to suspect the disinterestedness of state courts. Responding directly to this concern about possible state court bias, section 25 of the Judiciary Act of 1789 conferred appellate jurisdiction on the Supreme Court in this, and only this, kind of case.[106] Congress amended the original form of section 25 in 1914 to extend Supreme Court review over decisions favorable to the claimed federal right by writ of certiorari;[107] but state court decisions contrary to the asserted federal right remained within the Court's mandatory appellate jurisdiction until 1988, and they are still within its discretionary certiorari jurisdiction.[108]

105. *See, e.g.*, 15 U.S.C. §§ 15, 26 (antitrust); 15 U.S.C. § 78aa (securities); 28 U.S.C. § 1333 (admiralty); 28 U.S.C. § 1334 (bankruptcy); 28 U.S.C. § 1338(a) (patent, copyright, plant variety protection).

106. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789), *discussed at supra* text accompanying notes 29-30 & 89.

107. Act of March 3, 1911, ch. 231, §§ 236-241, 36 Stat. 1087, 1156-57 (1911), *amended by* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (1914) (codified as amended at 28 U.S.C. § 1257 (1988)).

108. Pub. L. No. 100-352, § 3, 102 Stat. 662 (enacted June 27, 1988) (codified at 28 U.S.C. § 1257 (1988)).

On the other hand, the Court has sometimes used the "case or controversy" doctrine as a mechanism to practice the "passive virtues"[109] of avoiding or postponing decision of difficult or controversial issues. The three cases in which the Court has used the difference between federal and state justiciability standards to avoid review can be at least partially explained on that basis. In *Tileston v. Ullman,*[110] the Court avoided addressing the issue of birth control; in *Doremus v. Board of Education,*[111] school prayer; and in *DeFunis v. Odegaard,*[112] affirmative action.

So long as the Court's appellate jurisdiction over such state court decisions remained mandatory, as it was in *Tileston* and *Doremus,* there was no wholly satisfactory resolution to the problem. The strong and legitimate claims of a statutory structure that granted review as of right where the impartiality of state court judgments was suspect conflicted with the Court's equally strong, though perhaps less legitimate, desire to avoid addressing controversial issues. Happily, this dilemma no longer exists now that Congress has made the Court's appellate docket over state court decisions entirely discretionary.[113] Before the change in statute, the Court would have been unlikely to adopt my proposal, for to do so would have been to surrender an important device for declining review of awkward cases. But because this device is no longer needed, what was once the most troublesome kind of case has now become the easiest: The argument for facilitating the exercise of the "passive virtues" by retaining dual standards of justiciability has disappeared, leaving only the argument for Supreme Court review of state court decisions denying federal claims.

### *ii. State Court Finds in Favor of the Asserted Federal Right*

The converse situation—when a state court finds in favor of an asserted federal right in a dispute that does not meet the requirements of article III—appears at first glance to pose no significant threat to the integrity of federal law and the federal system. There is no threat, as above, that the state court may favor the state's interest at the expense of federal claims. Rather, the problem is that a state court may strike down a state statute or practice based on the supposed command of federal law when, in fact, federal law does not so require. There may seem to be little wrong with leaving unreviewable a mistaken state court decision on

109. A. BICKEL, *supra* note 35, at 111-98.

110. 318 U.S. 44 (1943), *discussed at supra* notes 65-68 and accompanying text.

111. 342 U.S. 429 (1952), *discussed at supra* notes 69-71 and accompanying text.

112. 416 U.S. 312 (1974), *discussed at supra* notes 72-74 and accompanying text.

113. Pub. L. No. 100-352, § 3, 102 Stat. 662 (enacted June 27, 1988) (codified at 28 U.S.C. § 1257 (1988)).

a federal question when the only consequence is to allow the state court to overread the protection provided by federal law. In fact, however, such a resnlt threatens the federal-state structure and damages the integrity of the state lawmaking processes. An analysis of two recent cases illustrates the point.

In *Oregon v. Hass,*[114] decided in 1975, the Supreme Court reviewed a judgment in which the Oregon Supreme Court had given an expansive reading to the protections that *Miranda v. Arizona*[115] afforded to a criminal defendant. In response to an argument that state courts may read more criminal procedural protections into the federal Constitution than does the United States Supreme Court,[116] the Court wrote: "[O]f course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[117] The Court noted, however, that the state court could impose greater protections if it did so based on an interpretation of the state constitution.[118] In *Michigan v. Long,*[119] decided eight years later, the Supreme Court reviewed a judgment of the Michigan Supreme Court even though an independent and adequate state ground might have supported the state court judgment. The Court abandoned what had become its usual presumption favoring remand for clarification by the state court in such cases,[120] and stated that if a state court wished to insnlate a judgment from review, it would have to "indicate[] clearly and expressly that [its decision] is . . . based on bona fide separate, adequate, and independent [state] grounds . . . ."[121]

I think both *Oregon v. Hass* and *Michigan v. Long* were properly decided, but for reasons of judicial accountability and integrity of state lawmaking processes that the Court did not articulate.[122] *Oregon v. Hass* required the Oregon court to rely explicitly on Oregon law if it wished to provide more protection to criminal suspects than the Supreme Court

114. 420 U.S. 714 (1975).

115. 384 U.S. 436 (1966).

116. This argument was apparently based on the view of the Oregon Supreme Court. The United States Supreme Court rejected both the argument about state court power to interpret the federal Constitution and the Oregon Supreme Court's substantive interpretation of the federal Constitution. 420 U.S. at 719-20, 719 n.4.

117. *Id.* at 719 (emphasis in original).

118. *Id.* at 719 & n.4.

119. 463 U.S. 1032 (1983).

120. *See* Minnesota v. National Tea Co., 309 U.S. 551 (1940) (Minnesota Supreme Conrt decision holding a graduated income tax unconstitutional remanded by Conrt because unclear whether based on U.S. or Minnesota Constitution).

121. *Long,* 463 U.S. at 1041.

122. The closest the Court came to such an articulation was Jnstice O'Connor's opinion for the Court in *Michigan v. Long*: "We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference . . . ." *Id.*

saw fit to do under the federal Constitution.[123] *Michigan v. Long* required the Michigan court to specify clearly that Michigan law, rather than federal law, compelled the result. The obvious consequence of, and in my view the compelling rationale for, the holdings in these two cases is that the state courts are thereby made responsible to the lawmaking processes of their states. After these decisions, they can no longer hide behind the supposed commands of the federal sovereign. If they wish to reach a result not compelled by federal law, they must make clear that state law provides the basis for their decision. They will thereby make it correspondingly clear that the states, through their own lawmaking processes, may change any decision thus reached by the state courts.[124]

Under this accountability rationale, a state court decision on a question of federal law in a suit that does not constitute a "case or controversy" is improper, even when the state court upholds the federal right, because the state court's decision is largely immune to corrective process. Since the decision is based on federal law, state entities generally cannot change it.[125] And unless the decision is reviewable, the United States Supreme Court cannot change it. Only if the state and federal courts are governed by a common "case or controversy" standard will the Supreme Court have the power to review. And only if the Court has the power to review and to declare that federal law does not require the result reached by the state court will the state political bodies be given the control that is rightfully theirs.[126]

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123. *Hass*, 420 U.S. at 719 & n.4.

124. This argument has been advanced in the academic literature to support *Oregon v. Hass*. *See, e.g.*, Ginsburg, Book Review, 92 HARV. L. REV. 340, 343 (1978) (reviewing L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978)):

> [A] state court that curbs state officials by relying exclusively on federal constitutional interpretation differing from that of the Supreme Court would indeed have the 'last word.' Not only would the state court, by its larger view of the federal constitutional requirement, avoid Supreme Court review; it would also immunize its decision against overruling through state political processes.

Professor Tribe, who initially argued against *Oregon v. Hass*, has come to agree with this position in the second edition of his treatise. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 40-41 (2d ed. 1988).

125. I do not say that such decisions are impossible for state voters or lawmaking bodies to change. For example, contested election of state supreme court justices may result in part from disputes about rulings based on federal law. Three justices of the California Supreme Court were defeated in 1986, in substantial part because of unpopular procedural due process rulings in death penalty cases. *See* J. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 93-98, 175-79 (1989) (describing the California Supreme Court's unpopular rulings in death penalty cases and their use in the election); Wold & Cover, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987) (discussing the use of death penalty decisions in the campaign and in voters' decisionmaking).

126. It is important to note that imposing the federal "case or controversy" requirement on state courts does nothing to deprive the states of the ability to rely on, and build upon, federal law in myriad useful ways in passing state laws and in granting standing under state law. *See, e.g.*, Moore v. Chesapeake & Ohio Ry., 291 U.S. 205 (1934) (Kentucky had power to create statute providing that railroad workers employed in *intra* state commerce had cause of action for injuries suffered as a

### b. *State Court "Case or Controversy" Requirement More Stringent than that of the Federal Courts*

State courts rarely employ a more stringent "case or controversy" requirement than the federal courts; that is, they rarely decline, on state court justiciability grounds, to decide a federal question in a dispute that the federal courts could have decided. The infrequency with which this issue arises makes it of limited practical importance, but the theoretical interest of the problem is sufficient to merit analysis.

The Supreme Court has heard one case in which a state court had a more stringent definition of mootness than the federal courts, and in one other case the Court has invited a state court to employ a more stringent standing definition. In *Liner v. Jafco, Inc.*,[127] a Tennessee trial court granted an injunction against labor picketing at a construction site. While the appeal was pending, the construction project was completed, and the state appellate court found the appeal moot.[128] The United States Supreme Court found the case justiciable under federal standards because of financial consequences of the injunction: "[I]n this case the question of mootness is itself a question of federal law upon which we must pronounce final judgment."[129] The Court then reversed, holding that the injunction had been improperly issued, refusing to allow the state court's finding of mootness to interfere with the Court's enforcement of the labor union's federal right to picket. *Liner* left unanswered the question whether the Supreme Court, in addition to deciding the issue that the state appellate court had avoided, could have required the state court to decide it in the first place. In other words, could the Court have required the state court to abide by the federal mootness standard and reach the merits any time a federal court would do so?

The Supreme Court answered this question in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[130] The Court granted standing in federal court to permit a developer to challenge municipal zoning practices under the fourteenth amendment, but remarked in a footnote that a state court could deny standing to such a

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result of violation of standard of conduct established by Federal Safety Appliance Acts, even though the Federal Employers' Libability Act ouly provided cause of action for injuries suffered in *inter*state commerce). And it is important to remember the approach does nothing to prevent a state court from relying on state law to accomplish any result it thinks desirable, so long as it breaches no federal constitutional prohibition. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (describing and applauding state court activism under state constitutions). These two examples suggest the scope of the freedom available to the states; but it is a freedom—and this is the crucial point—subject to the corrective processes of state law.

127. 375 U.S. 301 (1964).

128. *Id.* at 303-04.

129. *Id.* at 304.

130. 429 U.S. 252 (1977).

developer: "Illinois may choose to close its courts to applicants for rezoning unless they have an interest more direct than [the plaintiff's], but this choice does not necessarily disqualify [the plaintiff] from seeking relief in federal courts for an asserted injury to its federal rights."[131] Thus, the Court answered the question left unresolved in *Liner* by declaring that a state court is not required to decide a federal question if a dispute does not satisfy the state court's justiciability rules. Unfortunately, this is the wrong answer.

The question can be seen as a variation of that presented in *Testa v. Katt*.[132] In *Testa*, Rhode Island had sought to close its courts to treble damage actions brought under federal wartime price controls. The Supreme Court held that Rhode Island courts could refuse to hear the federal suit only if they did not have "jurisdiction adequate and appropriate under established local law" to adjudicate "this same type of claim."[133] If *Testa* provides the controlling question, we must ask whether a state court's standing, ripeness, and mootness rules are jurisdictional in the sense intended by *Testa*.

Insofar as the scope of *Testa*'s jurisdictional exception can be derived from the decided cases, it is relatively narrow. The Court has upheld only three kinds of jurisdictional restrictions: those based on the geographic area in which the incident giving rise to the suit occurred;[134] those based on a state's forum non conveniens rule that would apply to a similar case brought under state law;[135] and those based on a restriction on the state court's power to grant a certain remedy.[136] None of the Court's decisions comes very close to holding that a state court can refuse to hear a case because of the nature of the litigant's stake in the controversy, and it is possible to conclude that "case or controversy" justiciability rules are not jurisdictional within the meaning of *Testa*.[137]

But treating the question as a narrow definitional matter of whether justiciability rules are jurisdictional within the meaning of *Testa* may

131. *Id.* at 262 n.8.

132. 330 U.S. 386 (1947).

133. *Id.* at 394.

134. Herb v. Pitcairn, 324 U.S. 117 (1945) (Illinois city court without jurisdiction to hear Federal Employers' Liability Act case because the accident had occurred outside the city, and the court's jurisdiction was limited to cases in which the cause of action had arisen within the city limits).

135. Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1, 4 (1950) (state court can dismiss on grounds of forum non conveniens "if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially").

136. Testa v. Katt, 330 U.S. 386 (1947) (dictum).

137. Professors Gordon and Gross make a more elaborate argument in support of this conclusion, applying it to all state justiciability rules more stringent than those in federal court. Gordon & Gross, *supra* note 7, at 1151 (arguing that because the supremacy clause of the Constitution requires state courts to vindicate federal rights, "state courts may not reject suits based on federal law by applying state justiciability standards").

miss what is essentially at issue in *Liner* and in the *Arlington Heights* footnote. At issue in both cases is the obligation of the state courts under the supremacy clause to follow and enforce federal law. In *Liner,* the state trial court issued an injunction against the union, and the state appellate court denied review on mootness grounds even though the unreversed injunction would have led to adverse financial consequences for the union. If the state court could follow its own definition of mootness in such a case, the defendant union would be seriously disadvantaged by the employer's choice of forum. If the plaintiff had sued in federal court, the union would have been entitled to appellate review of the denial of his federal right in a federal court of appeals. But if the plaintiff had sued in state court, the union would have been entitled to no appellate review as a matter of right. Rather, it could only have sought certiorari in the United States Supreme Court which, in the vast majority of cases, would have meant that it would have had no appellate review at all. Under this circumstance, the ability of the state court to follow its own justiciability rules would have resulted in a failure adequately to protect the federal right.

In *Arlington Heights,* the Court held that the would-be developer had a right under the fourteenth amendment to be free from intentional discrimination through exclusionary zoning. If a state court may refuse to hear the suit permitted under *Arlington Heights* because the plaintiff has no "standing" under state law, the state court may close its courts to a federal cause of action. To put it another way, if the *Arlington Heights* footnote is taken seriously, the state is permitted to close its courts on the ground that it does not wish to provide judicial protection under the fourteenth amendment to someone whom the Supreme Court has found to have a valid claim under that amendment.[138] Understood in this way, the *Arlington Heights* plaintiff has a relatively straightforward supremacy clause argument in favor of state court enforcement of its fourteenth amendment right.

### c. *Summary*

An autonomy-based argument against a common "case or controversy" standard cannot bear close scrutiny. Forbidding state courts to adjudicate disputes does not interfere with autonomy in the ordinary sense of the term, for no affirmative obligation is placed on the state courts; and since the federal courts are forbidden to adjudicate the same disputes, the prohibition cannot be construed as any kind of insult to the state courts. Moreover, the Supreme Court review of state court deci-

138. The argument in this paragraph is essentially that standing to assert a federal right is a question of substantive federal law rather than a question of jurisdiction. For an elaboration of this argument, see Fletcher, *supra* note 92.

sions that is thereby ensured should not be seen as intrusive. When a state court finds against an asserted federal right, the propriety—sometimes, the necessity—of Supreme Court review is unquestioned. When a state court finds in favor of the federal right, Supreme Court review promotes state autonomy by ensuring that the state courts are accountable to state lawmaking processes. Finally, requiring the state courts to adjudicate disputes that satisfy the "case or controversy" standard helps ensure that the state courts faithfully follow and enforce federal law.

## III
## IMPLEMENTING A COMMON "CASE OR CONTROVERSY" STANDARD

Implementing a common "case or controversy" standard would be relatively straightforward. State courts would be required to follow article III standards of standing, ripeness, and mootness when deciding federal questions. If a state court decides a dispute that does not constitute a "case or controversy," the Supreme Court would vacate that decision and require that the state court dismiss the suit, much as the Court now does for such decisions rendered by the lower federal courts. The details of implementation would vary, however, depending on whether standing, ripeness, or mootness is at issue.

### *A. Standing, Ripeness, and Mootness*

Professor Monaghan has called justiciability questions under article III the "who" and the "when" of federal adjudication.[139] Standing addresses the "who." Ripeness and mootness address the "when."

#### *1. The "Who"—Standing*

Standing determines who may bring suit to enforce a particular statutory or constitutional duty.[140] As currently structured, the doctrine requires that the party seeking to invoke the power of the court have suffered concrete injury to ensure that the dispute will be presented in particularized rather than theoretical form, and that the party's interest in the litigation be sufficient to guarantee that the case will be vigorously presented. If the state and federal courts were bound by a common stan-

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

140. Since sometime in the 1930s, standing has been termed "jurisdictional" in the federal courts. *See* Coleman v. Miller, 307 U.S. 433, 460-70 (1939) (Frankfurter, J., concurring), *discussed at supra* text accompanying notes 58-64. In recent years, the Court has increasingly treated the core standing requirement as part of the article III "case or controversy" limitation. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III.").

dard, state courts would be treated like the lower federal courts.[141] A plaintiff without standing to assert a particular federal right in federal district court could not gain standing to assert that right by going to state court. Conversely, a plaintiff with standing to assert a federal right in federal court would not lose standing by going to state court. Article III standing to assert a federal right would be a matter of federal law, binding on federal and state courts alike.[142]

But requiring state courts to follow federal standing rules in adjudicating questions of federal law would not prevent state courts from following their own standing rules in deciding questions of state law.[143] A pair of New Jersey cases illustrates the point. In *Southern Burlington County NAACP v. Township of Mount Laurel,*[144] the New Jersey Supreme Court held that under the state constitution a municipality could not adopt an exclusionary zoning policy. The plaintiffs in *Mount Laurel* included town residents who had been forced to move because of inadequate housing, as well as nonresidents living in central city substandard housing who wished to live in affordable housing elsewhere.[145] Following this decision, the United States Supreme Court made it relatively clear that the plaintiffs in *Mount Laurel* would not have satisfied article III.[146] The Supreme Court of New Jersey responded, in *Home Builders League of South Jersey, Inc. v. Township of Berlin,*[147] that it was not

141. In certain respects unrelated to the thesis of this Article, state court judgments would continue to be treated differently from judgments of the lower federal courts. For example, the Court would continue its practice of refusing to review a state court decision on a question of federal law if the decision rests on an independent and adequate state ground. Michigan v. Long, 463 U.S. 1032 (1983). Also, a final judgment by the highest state court in which judgment could be had would continue to be necessary for Supreme Court review of state court decisions under 28 U.S.C. § 1257 (1988). *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-87 (1975) (interpreting "final judgment or decree" language of § 1257).

142. Although it is beyond the scope of this Article, I note that if standing determinations are questions of law on the merits, *see* Fletcher, *supra* note 92, state courts should follow all federal standing decisions in cases based on federal law, whether denominated "prudential" or "article III" standing decisions. This is not current law, however. *See* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 243 (1983) (state court may grant "prudential" standing on different criteria than federal court).

143. Further, under my theory of standing as a matter of substantive law, *see* Fletcher *supra* note 92, state standing law should be binding on the federal courts, just as other substantive state law currently binds the federal courts under the *Erie* doctrine. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Thus, a state court determination of standing to enforce *state* substantive law should be binding on the *federal* courts.

144. 67 N.J. 151, 336 A.2d 713 (1975).

145. *Id.* at 159, 336 A.2d at 717.

146. Warth v. Seldin, 422 U.S. 490, 508 (1975) ("[A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him,* and that he personally would benefit in a tangible way from the court's intervention.") (emphasis in original); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 (1977) (holding that a minority plaintiff who seeks and would qualify for housing in an intended project has standing to challenge restrictive zoning practices).

147. 81 N.J. 127, 405 A.2d 381 (1979).

bound by federal standing rules in exclusionary zoning suits.[148] If article III standing rules were imposed on state court adjudications of federal law, this conclusion would be quite wrong. But the conclusion would also be unnecessary if the source of the exclusionary zoning prohibition is the state constitution, as it is in New Jersey. So long as state law governs the decision, state standing rules would govern.

### 2. *The "When"—Ripeness and Mootness*

Ripeness and mootness are concerned with the timing of litigation rather than the identity of who may bring suit. The doctrines assume that the plaintiff either will have, or once had, standing. At the outer boundaries of the two doctrines, unripe and moot cases both fail to satisfy article III's "case or controversy" requirement. If the article III standards were applied to state courts, the consequences of that failure would be somewhat different, depending on whether the case was unripe or moot.

#### a. *Ripeness*

Ripeness would be the simpler of the two doctrines in which to implement a common "case or controversy" standard. I will not try here to redefine or alter the currently articulated boundaries of the ripeness doctrine under article III.[149] I will simply take it as it has been given in cases such as *Seatrain Shipbuilding Corp. v. Shell Oil Corp.*,[150] *Babbitt v. United Farm Workers National Union*[151] and the *Regional Rail Reorganization Act Cases.*[152] Ripeness doctrine under article III prevents adjudication when the prematurity of the dispute or the abstractness of the issues would oblige the court to decide more questions than might ultimately turn out to be necessary, and to decide those questions in a form that makes judicial resolution awkward or untrustworthy. Thus understood, the doctrine does not lose its relevance merely because a different court is asked to decide the dispute. To the extent that ripeness is essential to the sound adjudication of federal law, it should be just as important in state court as in federal court adjudications of federal

148. *Id.* at 131, 405 A.2d at 383 ("[W]e are not bound by *Warth*, and insofar as its requirements are more restrictive than what we have traditionally demanded of plaintiffs to establish standing, we have chosen not to follow it.").

149. Others have argued for such redefinitions. For example, Professor Nichol has recently asserted that the article III "case or controversy" requirement should not be read to include a ripeness component. Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987).

150. 444 U.S. 572 (1980) (finding request for determination of Secretary of Commerce's powers to be sufficiently live and concrete to constitute a "case or controversy" under article III).

151. 442 U.S. 289 (1979) (ripeness based on possibility of future actions of farmworkers and growers a matter of degree of likelihood).

152. 419 U.S. 102 (1974) (discussion of ripeness in context of Regional Rail Reorganization Act of 1973).

questions.[153]

The passage of time between state court adjudication and United States Supreme Court review does not complicate an implementation of a common article III ripeness standard. (As will be seen in a moment, this is not true for mootness.) If a case is unripe at trial, later events cannot save the case from that defect, for the case will have been framed and the record made while the case was unfit for adjudication. Implementing a common ripeness standard is thus a relatively simple matter. If the suit did not satisfy article III at the time of trial in the state court, a state appellate court would be required to vacate the trial court decision and to remand with instructions to dismiss, or in some circumstances, for a determination whether the case had become ripe since the initial trial court proceedings. The Supreme Court would simply require that the state appellate court act in this fashion.

The argument that the state and federal courts should have a common "case or controversy" standard for ripeness should not be understood, however, as extending to nonconstitutional ripeness judgments. In many cases, the ripeness argument is discretionary, or "prudential." Under *Abbott Laboratories v. Gardner,*[154] a court, without encountering the "case or controversy" prohibition of article III, may weigh the harm that delay would cause the litigants against the gain in specificity that waiting until the case ripened would achieve.[155] In such cases—those in which article III is not an issue—the state and federal courts need not be governed by a common standard.

For example, a state case may involve a challenge to state agency action on a federal ground. In such a case, the state court should have freedom to balance the factors articulated in *Abbott Laboratories* after its own fashion, with a sensitivity to the institutional realities of the state agency whose practices are at issue. There must be outer limits to such discretion: That is, the state could not decide the question sooner than article III would permit, nor could it decline to decide the case once it was clear that the supremacy clause required the state court to give effect to the commands of federal law. But so long as the state court stayed within these limits, its action by definition would be neither so threaten-

153. This is not current doctrine, of course. *See* State v. Fields, 67 Haw. 268, 686 P.2d 1379 (1984), in which a criminal defendant appealing her sentence sought a declaration that a condition of her probation violated the fourth amendment. The Hawaii Supreme Court noted that "the courts of the State of Hawaii are not bound by a 'case or controversy' requirement," *id.* at 274, 686 P.2d at 1385, and decided the merits of the challenge despite its conclusion that if the "precepts" of federal ripeness cases "were strictly applied to the situation at hand, we could only conclude that problems of prematurity preclude an adjudication of the issue raised on appeal." *Id.* at 275, 686 P.2d at 1386.

154. 387 U.S. 136 (1967).

155. *See id.* at 149 ("[The ripeness] problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

ing to the quality of adjudication as to violate article III, nor so hostile to the enforcement of federal law as to violate the supremacy clause. Moreover, since the case would have satisfied article III, the Supreme Court would be able to review the decision even if a federal district court could have declined to decide the matter on non-article III "prudential" grounds.

*b. Mootness*

A common article III standard would be more complex to implement for mootness than for standing or ripeness.[156] A case can become moot at three different times: before or during trial, between trial and state court appellate review, and between state court appellate review and Supreme Court review. Each case requires a different response.

The first is both the rarest and the easiest case. A state trial court should not have the power to decide a federal question in a dispute that is moot under the standards of article III because mootness at this stage means that the issues are framed, the record made, and the trial judge's decision rendered when the case is moot. We therefore have reason to believe that the quality of the process is fatally deficient. If a state trial court does decide a federal question in a moot case, the state appellate court should vacate the trial court's judgment, and the United States Supreme Court should have the power to require that the state appellate court so act.[157]

More often, a dispute is live at trial but becomes moot during the appeal process, either while on appeal to a state appellate court or to the United States Supreme Court.[158] In both of these variations, the trial

156. For a very thorough exploration of mootness questions, see Greenbaum, *Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition,* 17 U.C. DAVIS L. REV. 7 (1983). *See also* Comment, *Disposition of Moot Cases by the United States Supreme Court,* 23 U. CHI. L. REV. 77 (1955).

157. An example of current practice can be seen in Ramirez v. Brown, 9 Cal. 3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137 (1973), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974). In *Ramirez,* the state court felt free to apply its own standard of mootness, and the Supreme Court in turn used federal standards to decide if it could review the state court decision. The California Supreme Court heard the case despite a possibility that it was moot at the trial phase, on the ground that the case "poses a question which is of broad public interest, is likely to recur, and should receive uniform resolution throughout the state." 9 Cal. 3d at 203, 507 P.2d at 1347, 107 Cal. Rptr. at 139. The United States Supreme Court decided the case on the merits, but only after finding that the case was not moot under federal standards. 418 U.S. at 36-40.

158. In this respect, lack of standing or ripeness on the one hand, and mootness, on the other, have very different consequences. If a suit is unripe or a plaintiff lacks standing to enforce a particular statutory or constitutional provision at the time of trial, that defect will exist in both the trial and appellate courts; thus, a decision by the Supreme Court to dismiss for lack of ripeness or standing necessarily entails a dismissal by the trial court. By contrast a case moot on appeal may not have been moot at trial. *Cf.* Morris, *Equal Educational Opportunity, Constitutional Uniformity and the DeFunis Remand,* 50 WASH. L. REV. 565, 588-93 (1975) (arguing that the Washington Supreme Court should not have reinstated its judgment in *DeFunis v. Odegaard,* 416 U.S. 312 (1974)).

court proceeding was a live controversy at the time it was decided. Examining the practice used for comparable cases litigated entirely within the federal courts will aid our understanding of the issues presented by these cases. *United States v. Munsingwear*[159] sets out the procedure for cases that become moot after decision by the district court but before the court of appeals' decision. If one of the parties so requests, the court of appeals will vacate the district court decision and remand with directions to dismiss. If the parties make no such request, the court of appeals will dismiss the appeal as moot, leaving the district court judgment intact.[160] This practice lets the parties decide whether to leave the judgment intact and preserve its collateral consequences, or to vacate the judgment and avoid them.[161]

The federal practice is less clearly established when a case becomes moot after decision by the federal or state appellate court but before the Supreme Court has granted review. For many years, the Court vacated and dismissed all decrees rendered by the lower federal courts in actions that had since become moot, and vacated and remanded all such decrees of the state courts.[162] This practice proved burdensome for the Court, and in *Velsicol Chemical Corp. v. United States,*[163] the Solicitor General suggested an alternative approach. If the Court would have denied review in any event, it should deny review in a mooted case;[164] if it would have granted certiorari or noted probable jurisdiction, it should vacate the decision of the court of appeals if the case is clearly moot, or remand for resolution of the mootness issue by the court of appeals if mootness is "uncertain or disputed."[165] The Solicitor General's suggestion was designed to apply a *Munsingwear*-like approach by relieving parties of the collateral consequences of judgments in moot cases when the

159. 340 U.S. 36 (1950).

160. *Id.* at 39-40.

161. I note in passing that the *Munsingwear* practice may not be optimally structured. Under *Munsingwear,* the default rule is that the judgment remains intact; that is, if neither party requests that it be vacated, it stands. The Court might consider adopting the opposite default rule, under which both parties would have to agree affirmatively to leave the judgment intact if the case becomes moot on appeal. I make this suggestion because I suspect that it is a rare case in which both parties wish to leave a lower court judgment intact, and because I suspect further that the *Munsingwear* rule is little enough known that the right to vacation of a lower court judgment is often lost through inadvertence.

162. R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 76, § 18.5; R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 320 (R. Wolfson & P. Kurland 2d ed. 1951).

163. 435 U.S. 942 (1978).

164. Brief for the United States in Opposition to Certiorari at 6, Velsicol Chem. Corp. v. United States, 561 F.2d 671 (1977), *cert. denied,* 435 U.S. 942 (1978) (No. 77-900) [hereinafter Velsicol Brief]. The Solicitor General repeated the suggestion in Memorandum for the United States in Opposition to Certiorari at 4 n.4, Local 102, International Ladies Garment Workers' Union v. United States, 586 F.2d 832 (2d Cir. 1978), *cert. denied,* 439 U.S. 1070 (1979) (No. 78-633).

165. Velsicol Brief, *supra* note 164, at 6.

Supreme Court would have reviewed the lower court decisions,[166] while at the same time relieving the Court's burden by allowing judgments to become final and binding when the Court would not have reviewed them. The Court has never announced either its agreement with or rejection of the Solicitor General's *Velsicol* suggestion, but the Court's pattern of behavior suggests that it may now be acting in accordance with the proposal.[167]

The *Munsingwear* practice in the courts of appeals, and what appears to be the post-*Velsicol* practice of the Supreme Court, make it clear that a judgment rendered in a case that was live during the trial phase is not so fatally weakened by its subsequent mootness and its resulting immunity from review that it must necessarily be vacated. The core insight of *Munsingwear* and *Velsicol* is that any doubts about the soundness of the trial court's decision go to its lack of reviewability rather than to its failure to satisfy article III. We may apply the *Munsingwear/Velsicol* insight to cases coming up from the state courts.

Consider first the case that becomes moot under article III after the trial court decision but before the decision of the state intermediate appellate court or the state supreme court. Assume that the state court decided the appeal, probably under the state's "continuing public importance" exception to mootness. In this case, the state appellate court would have decided an appeal that could not have been heard under current federal mootness standards.

My initial response is, in a narrow sense, irrelevant to the current discussion. In my view, the article III mootness standard as presently formulated is too grudging. I would prefer that the Supreme Court forthrightly adopt the "continuing public importance" exception that is virtually universal in state courts.[168] In such cases, the state appellate

166. The Solicitor General's suggestion in *Velsicol* does not make clear whether one of the parties must affirmatively ask that the judgment of the lower court be vacated, as is required by *Munsingwear, see* Velsicol Brief, *supra* note 164, at 6, and the Supreme Court has not specifically addressed the question.

167. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 76, § 18.5, at 723 ("[S]ince 1978, the Court has seemingly accepted the suggestion of the Solicitor General [in *Velsicol*] that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review.").

168. Almost all state courts have some version of this exception to mootness. *See, e.g.,* Liberty Mut. Ins. Co. v. Fales, 8 Cal. 3d 712, 715-16, 505 P.2d 213, 215, 106 Cal. Rptr. 21, 23 (1973) ("If an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot."); *In re* Geraghty, 68 N.J. 209, 212, 343 A.2d 737, 738-39 (1975) ("[W]e have often recognized that courts may hear and decide cases which are technically moot where issues of great public importance are involved."); People *ex rel.* Guggenheim v. Mucci, 32 N.Y.2d 307, 310, 298 N.E.2d 109, 110, 344 N.Y.S.2d 944, 946 (1973) ("[A]n appeal should not be dismissed as moot if a question of general interest and substantial public importance is likely to recur."); *In re* Recall of Certain Officials of the City of Delafield, 63 Wis. 2d 362, 366-67,

court is deciding a matter that is of great and current concern to the state's public officials, that was litigated and decided when the case was indisputably live, and in which the parties retain sufficient interest to argue the case in the appellate court. In such circumstances, it seems unlikely that the quality of adjudication by the state appellate court—or by the United States Supreme Court, for that matter—is so seriously threatened that the appeal must be considered nonjusticiable under article III. Indeed, the Supreme Court's exception to article III mootness doctrine for matters that are "capable of repetition, yet evading review"[169] appears to be close to an open admission that this is so.

If the United States Supreme Court were explicitly to incorporate the "continuing public importance" notion into the mootness standards of article III, then the judicial power of the state appellate court would have been properly exercised. In that case, the Court would never reach the *Munsingwear* or *Velsicol* issues. Since the dispute would have satisfied article III, the state court would have acted properly and the Supreme Court would have the power to review the judgment on the merits. But if the United States Supreme Court declines to adopt the "continuing public importance" exception, or if the case is moot even under that standard, the state court should not decide the appeal. This is a straightforward application of the common "case or controversy" standard. For the state appellate court to decide a dispute that was moot under article III at the time of the appellate court's decision would be constitutionally impermissible.

Next, consider the case in which the mooting event takes place after the decision of the highest state appellate court. If the Court has granted certiorari in such a case,[170] it should follow what has become its standard procedure in all moot cases and dismiss the writ of certiorari.[171] The

217 N.W.2d 277, 279 (1975) ("[T]he great weight of authority supports the proposition that an appellate court may retain an appeal for determination if it involves questions of public interest even though it has become moot as to the particular parties involved.") (footnote omitted).

169. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 179 (1968); Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911).

170. A moot case will be before the Court in two situations: the case became moot after the Court granted certiorari or the Court granted certiorari under *Velsicol*.

171. The Court in *Asarco* noted, "[T]he regular practice [in cases coming up from the state courts] has been to dismiss the *case* and leave the judgment of the state court undisturbed . . . ." 109 S. Ct. at 2047 n.1 (emphasis added). Technically, the Court should have said dismiss the *appeal* or *certiorari*, for as the Court notes, the judgment of the state court remains intact. Of course, now that the Court's appellate jurisdiction is entirely certiorari, only dismissal of certiorari will be at issue.

In the same footnote, the Court stated that its "settled disposition" in a case coming up from the federal courts is to vacate and dismiss under *Munsingwear*. *Id.* I regard this statement as an inadvertent error. The "settled" practice of *Munsingwear* has applied only to appeals to the federal courts of appeals, and even then only upon request of one of the parties. *See discussion supra* text accompanying notes 159-61. Given that the footnote is purporting to describe a "settled" practice, I think we should not read it as announcing a new policy under which a case coming up from a federal

Supreme Court might wish to remand to the state appellate court in order to give that court the opportunity to apply a *Munsingwear*-like rule to its own decision. But since there is no article III defect in the state court's decision, there is nothing in article III that would require the Supreme Court to remand to the state court, and certainly nothing that would require the state court to vacate its decision after such a remand.

### *B. Enforcement of the State Courts' Obligation—Direct Review and Refusal to Give Collateral Effect*

The federal courts have two enforcement mechanisms available to ensure that the state courts apply the article III "case or controversy" standard when adjudicating questions of federal law. The first is for the Supreme Court to require, on direct review, that the state court adhere to the federal standard. The second is for the federal courts as a whole to refuse to give collateral effect to state court judgments rendered in disputes that did not meet the requirements of article III.

Direct review by the United States Supreme Court is the most familiar and straightforward way to ensure that state courts follow the requirements of federal law. It treats the state and federal courts as parts of a single court system for adjudicating federal questions, permitting the Supreme Court to review directly not only the substantive decisions on questions of federal law but also the conditions under which those decisions are reached. But the Court cannot possibly reverse or vacate each erroneous decision of a state court, whether the error was in rendering a mistaken decision of substantive law or in deciding a dispute that was not a "case or controversy."[172] Thus, while the Supreme Court's power of direct review can, on occasion, be a useful enforcement mechanism, it is hardly a panacea.

The second mechanism was first articulated in *Fidelity National Bank & Trust Co. v. Swope*,[173] where the Court indicated that the federal courts should refuse to give collateral effect to a state court decision rendered in a proceeding that was not a "case or controversy."[174] The *Swope* approach is sound as far as it goes, but its reach is limited. It leaves the state court judgment on the question of federal law intact.

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court of appeals and mooted on certiorari will automatically have the appeal dismissed and the judgment below vacated.

172. During the 1988 Term, Supreme Court review was sought in 4,806 cases. The Court disposed of 170 of those by written opinion, and of an additional 86 by per curiam or memorandum decision. The remaining 4,550 cases were disposed of by "denial, dismissal, or withdrawal of appeals or petitions for review." Note, *Leading Cases*, 103 HARV. L. REV. 137, 398 (1989) (Table II). Some of the 4,806 cases were appeals rather than petitions for certiorari because the effects of the new certiorari statute had not been fully felt.

173. 274 U.S. 123 (1927).

174. *Id.* at 130.

Moreover, the state court decision will continue to have both precedential and collateral effect in the court system of the state that rendered it, and may well have such effect in other state court systems. Finally, I think it would be unusual for a case to come to the federal courts for a second round after an initial adjudication in the state courts.

The limited reach of these two enforcement mechanisms is not a reason to discard them. Although direct review by the Supreme Court is likely to be the more powerful of the two, both should have their place. But focusing on federal court enforcement of a common "case or controversy" standard misses what would be the central characteristic of such a standard: It would be a requirement of federal law, and the state courts would be obliged to follow it, just as they are obliged to follow any applicable and valid federal law. The power of the federal courts to enforce all state court obligations to obey federal law is limited. But we may trust the good faith of the state courts here, as we generally do elsewhere, to follow the commands of federal law, and we may expect that the limited enforcement mechanisms available to the federal courts will suffice to police those occasional cases in which the state courts fail in their obligation.

## CONCLUSION

Under present doctrine, state courts are not bound by the standards of the federal "case or controversy" requirement, even when they adjudicate questions of federal law. Further, even after *Asarco Inc. v. Kadish*,[175] the Supreme Court is severely limited in its ability to review the judgments of state courts rendered in disputes that do not constitute "cases or controversies." The present doctrine, including the reform effectuated by *Asarco*, is fundamentally misconceived. Is has no foundation in the original understanding of those who adopted the Constitution, and is supported by no sound reasons of policy. It is time for the Supreme Court to recognize that the values served by the "case or controversy" doctrine, and by Supreme Court review of state court decisions on questions of federal law, require the adoption of a common "case or controversy" standard by the state and federal courts when adjudicating questions of federal law.

The state and federal courts are not, and cannot be, identical. But so long as they share a large concurrent jurisdiction over questions of federal law, they will necessarily share a joint responsibility for its articulation and enforcement. As they fulfill that responsibility, the state and federal courts should both be governed by the doctrine that is "founded in concern about the proper—and properly limited—role of the courts in

175. 109 S. Ct. 2037 (1989).

a democratic society,"[176] and that ensures that "legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[177]

176. Warth v. Seldin, 422 U.S. 490, 498 (1975).

177. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).