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Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition

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I. INTRODUCTION: THE PROBLEM IN CONTEXT — MOOTNESS ON APPEAL[1]

It is axiomatic in federal jurisprudence that a case must present a live controversy throughout the entire course of the litigation.[2] This rule, predicated upon article III of the United States Constitution and prudential concerns, assures that throughout all stages of the litigation a case retains both a concrete adversariness between the parties and remediability by the courts.[3] Loss of either of these qualities renders a

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[1] An extended discussion of mootness itself is beyond the scope of this Article, which focuses on the appellate disposition of cases after a determination of mootness has been made. Mootness doctrine in the federal courts has been discussed in numerous treatises and law review commentaries. *See, e.g.*, 6A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 57.13 (2d ed. 1983) [hereafter 6A MOORE'S]; R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 18 (5th ed. 1978) [hereafter STERN & GRESSMAN]; 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3533 (1975 & Cum. Supp. 1980) [hereafter 13 WRIGHT, MILLER & COOPER); Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897 (1983); Kates & Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 CALIF. L. REV. 1385 (1974); Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974) [hereafter Note, *The Mootness Doctrine*]; Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970).

[2] *See, e.g.*, Kremens v. Bartley, 431 U.S. 119, 128, 134 n.15 (1977); Preiser v. Newkirk, 422 U.S. 395, 401 (1975); STERN & GRESSMAN, *supra* note 1, § 18.1; 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 224 (Cum. Supp. 1980).

[3] *See* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 264-69 (and cases cited therein); Kates & Barker, *supra* note 1, at 1401-02. In recent years, it appears that the constitutional dimension of mootness has been predominant. *See, e.g.*, STERN &

case moot.[4]

A case may become moot during litigation for any number of reasons. Primary examples include abandonment of the claim,[5] settlement,[6] voluntary cessation of the offending conduct,[7] and intervening events beyond either party's control.[8] Often a case becomes moot while on appeal.[9]

When a claim before a trial court becomes moot, the court loses ju-

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GRESSMAN, *supra* note 1, § 18.2, at 886; 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 111-12 (Cum. Supp. Pocket Part 1982).

[4] *See* DeFunis v. Odegaard, 416 U.S. 312, 319-20 (1974); *see also supra* note 2. However, even if the challenged action has ceased, a case nonetheless may be heard if it raises issues "capable of repetition yet evading review" or involves conduct with "continuing collateral consequences" for the party raising the claim. *See* Kates & Barker, *supra* note 1, at 1391-94, 1425-29. *See generally supra* note 1.

[5] *See, e.g.*, Lunz v. Preiser, 524 F.2d 289, 290 (2d Cir. 1975).

[6] *See, e.g.*, Stewart v. Southern Ry., 315 U.S. 784 (1942) (per curiam); ITT Rayonier v. United States, 651 F.2d 343, 345 (5th Cir. 1981); Kodiak Oil Field Haulers v. Teamsters Union Local 959, 611 F.2d 1286, 1289 (9th Cir. 1980).

[7] Although voluntary cessation of offending conduct does not automatically moot a case, it will do so if there is no reasonable expectation that the wrong will be repeated. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 486-87 (1980); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 538 n.7 (1978); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203-04 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953). Making this assessment often may prove a difficult task. *See* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 282-83 (stating that "[n]o general rules are available to guide decision"). Nevertheless, when the standard is met mootness will be found. *See, e.g.*, County of Los Angeles v. Davis, 440 U.S. 625, 631-34 (1979); Williams v. Alioto, 549 F.2d 136, 142 (9th Cir. 1977); Sanders v. Wyman, 464 F.2d 488, 491 (2d Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973); United States v. San Diego County Veterinary Medical Ass'n, 1976-2 Trade Cas. ¶ 61,131 (S.D. Cal. 1976); Kates & Barker, *supra* note 1, at 1414-16.

[8] *See, e.g.*, Weinstein v. Bradford, 423 U.S. 147 (1975) (challenge to parole procedure mooted upon prisoner's release); Brockington v. Rhodes, 396 U.S. 41 (1969) (challenge to election mooted after election held); Local 8-6, Oil Workers Int'l Union v. Missouri, 361 U.S. 363 (1960) (injunction expires by its own terms).

[9] The federal judiciary does not compile statistics concerning cases which become moot on appeal. Therefore, a direct measurement of this phenomenon is unavailable. However, the proposition that mootness on appeal is frequent may be supported indirectly. For example, in 1982, only 53% of those cases in which the appellate process was initiated in federal courts of appeals culminated in a decision on the merits after oral hearing or submission of briefs. *See* 1982 UNITED STATES JUDICIAL CONFERENCE REPORT 190 Table B-1 (calculations exclude terminations by consolidation). While the remaining 47% terminated early for various reasons, it is likely that a number turned on mootness grounds, particularly settlement. *Cf.* J. HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 38 (1981); T. MARVELL, APPELLATE COURTS & LAWYERS 303 n.15 (1978); Goodrich, *A Case on Appeal — A Judge's View*, in A CASE ON APPEAL 1, 4 (4th ed. 1967).

risdiction and must dismiss the claim.[10] If mootness arises while an appeal is pending, however, the situation becomes more complex. The appellate court, like the trial court, loses jurisdiction over the substance of the appeal. Nevertheless, it retains authority to fashion a decree clarifying the effect of this mootness on the trial court's initial determination.[11]

Potentially, the mooted trial court decision could affect subsequent litigation under the doctrines of res judicata, collateral estoppel, law of the case and stare decisis.[12] Yet there is general agreement that mooted

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[10] *See, e.g.*, Quern v. Mandley, 436 U.S. 725, 733 n.7 (1978).

[11] While mootness bars the court from considering the merits of the appeal, appellate courts retain supervisory authority to "require such further proceedings to be had as may be just under the circumstances," under 28 U.S.C. § 2106 (1976). Pursuant to this authority, federal appellate courts may appropriately dispose of mooted appeals, which often involves vacation of the lower court decision, rather than dismissal of the appeal. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950); Aetna Casualty & Sur. Co. v. Hunt, 466 F.2d 1203, 1204 n.2 (10th Cir. 1972); DeFunis v. Odegaard, 84 Wash. 2d 617, 626 n.2, 529 P.2d 438, 443 n.2, *on remand after vacation as moot*, 416 U.S. 312 (1974); *cf.* Walling v. James V. Reuter, Inc., 321 U.S. 671, 676-77 (1944); United States v. Hamburg-American Co., 239 U.S. 466, 478 (1916). *But cf.* DeFunis v. Odegaard, 84 Wash. 2d 617, 624, 629-30, 529 P.2d 438, 442, 445 (questioning the Supreme Court's power to vacate a decision when mootness intercedes to strip the Court of the constitutional authority to decide the case), *on remand after vacation as moot*, 416 U.S. 312 (1974); 48 MICH. L. REV. 1208, 1211 (1950). Exercise of such authority "is not . . . review, in any proper sense of the term." Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

Others have suggested that the authority to vacate mooted appeals flows from equitable powers of the Court. *See* DeFunis v. Odegaard, 84 Wash. 2d 617, 625-26, 529 P.2d 438, 443, *on remand after vacation as moot*, 416 U..S. 312 (1974).

[12] *See generally* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.401 (2d ed. 1983) (describing the four doctrines) [hereafter 1B MOORE'S]. General definitions for each of these doctrines are set forth below. More refined aspects of each are treated throughout the Article where warranted.

When a valid final judgment is entered in an initial suit, the doctrine of res judicata bars further litigation of the same claim in subsequent litigation between the parties or those in privity. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18-19 (1982) [hereafter RESTATEMENT (SECOND)]; 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4406 (1981) [hereafter 18 WRIGHT, MILLER & COOPER]; Note, *Collateral Estoppel*, U. RICH. L. REV. 341, 343-44 (1982). As described by the Supreme Court in Cromwell v. County of Sac, 94 U.S. 351, 352 (1876):

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

decisions should not support the application of these doctrines in full measure.

One possible approach, set forth in the Restatement (Second) of Judgments, would automatically deny collateral estoppel effect to mooted decisions.[13] In contrast,[14] in federal courts the continued force of a trial court decision depends on the appellate court's disposition of the appeal after mootness arises. If the appellate court simply dismisses the appeal, the lower court decision continues to have legal force. If the appellate court vacates the decision and remands with directions to dis-

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This doctrine is also referred to as claim preclusion, and the terms are used interchangeably in this Article. *See also infra* notes 356, 359 (discussing how the term "res judicata" sometimes has been used to encompass both res judicata and collateral estoppel).

In contrast, collateral estoppel, or issue preclusion, bars relitigation of specific *issues* of fact or law resolved in the initial suit, rather than entire claims. *See* Lawlor v. National Screen Serv., 349 U.S. 322, 326 (1955); 1B MOORE'S, *supra*, ¶¶ 0.405[1], at 178-80, 0.405[3]; 18 WRIGHT, MILLER & COOPER, *supra*, § 4402, at 6; Note, *Collateral Estoppel, supra*, at 352. As the Restatement (Second) defines the concept, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action . . . whether on the same or a different claim." RESTATEMENT (SECOND) § 27, at 250 (1982); *see generally* 18 WRIGHT, MILLER & COOPER, *supra*, § 4416. Again, use of the doctrine is limited. It only may be invoked to defeat relitigation of an issue by one who was a party or a privy to the initial proceeding.

Under the doctrine of stare decisis, or precedent, a rule of law established in one adjudication is followed in subsequent proceedings by all tribunals which owe allegiance to the first. *See* 1B MOORE'S, *supra*, ¶¶ 0.401, at 3, 0.402[1], at 5. This doctrine applies in later lawsuits whether or not the parties were involved in the initial proceeding.

Law of the case has been described as the "twin brother" of stare decisis; it is a case-specific application of the latter doctrine. Thus, when a court applies a rule of law to an issue in a case, that rule of law becomes law of the case. It must be applied to the same issue in subsequent proceedings in a lower court when a higher court has made the ruling, and normally will be applied even if the ruling was made previously by the same court. Unlike stare decisis, law of the case applies only to the case at bar. *See* 1B MOORE'S, *supra*, ¶ 0.401[1]. *See generally* 18 WRIGHT, MILLER & COOPER, *supra*, § 4478.

[13] RESTATEMENT (SECOND) § 28(1) (1982); *see infra* note 341.

[14] Although this article focuses on the federal approach to the disposition of judgments moot on appeal, the somewhat different treatment of the issue advocated in the Restatement (Second) provides a convenient contrast. RESTATEMENT (SECOND) § 28(1) (1982). As illustrated below, the two may differ as to (1) the theory underlying a policy of purging judgments of their legal consequences; (2) the legal consequences to be expunged when mootness blocks appellate review; (3) the procedure to be employed to achieve the desired end; and (4) the steps required to invoke the procedure.

miss the action, the decision is stripped of its legal consequences.[15]

The seminal case in this area, and the starting point for understanding problems posed by mootness on appeal in the federal system, is the Supreme Court's opinion in *United States v. Munsingwear, Inc.*[16] In that litigation, the United States brought suit against Munsingwear for alleged violations of price regulations established under the Emergency Price Control Act of 1942.[17] The Government sought injunctive relief from ongoing violations and treble damages for past violations. Pursuant to a pretrial order, the damage claim was held in abeyance pending determination of the injunction request.[18] The district court denied injunctive relief, finding that Munsingwear's commodity pricing policies did not violate the regulations, and the Government appealed.[19] While the appeal was pending the commodity was decontrolled, mooting the action.[20] Upon Munsingwear's request, which the Government did not oppose, the Eighth Circuit dismissed the appeal as moot.[21] Subsequently the Government sought to prosecute the damage action. Munsingwear moved to dismiss, raising the district court's earlier decision as res judicata. The district court granted the motion and the court of appeals affirmed.[22]

As viewed by the Supreme Court, the issue was whether "dismissal of the appeal on the ground of mootness and the deprivation of the United States of any review of the case in the Court of Appeals war-

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[15] *See infra* text accompanying notes 323, 352-420.

[16] 340 U.S. 36 (1950). *Munsingwear* culminated a trend in the Supreme Court's disposition of mooted cases from simply dismissing the appeal to vacating the lower court judgment and remanding with directions to dismiss the case as moot. Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77, 79-83 (1955) [hereafter Comment, *Disposition of Moot Cases*]. In Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 n.* (1979), the Court reaffirmed the *Munsingwear* approach and termed the decision "perhaps the leading case on the proper disposition of cases that become moot on appeal."

[17] The district court's opinion is reported as Bowles v. Munsingwear, Inc., 63 F. Supp. 933 (D. Minn. 1945).

[18] A second treble damage action also was stayed pending resolution of the injunction claim. This suit alleged violations of the same regulations during the year subsequent to the period covered in the first action. *See* United States v. Munsingwear, Inc., 178 F.2d 204, 205 (8th Cir. 1949).

[19] Bowles v. Munsingwear, Inc., 63 F. Supp. 933, 938 (D. Minn. 1945).

[20] The President, by executive order, annulled most price control regulations under the Economic Price Control Act, including the one at issue. *See* Fleming v. Munsingwear, Inc., 162 F.2d 125, 127 (8th Cir. 1947).

[21] *Id.* at 125, 127-28.

[22] United States v. Munsingwear, Inc., 178 F.2d 204, 209 (8th Cir. 1949).

rant an exception to the established rule [of res judicata]."[23] The Court declined to follow the Restatement and create a per se exception to res judicata principles for cases moot on appeal.[24] Rather, the Court indicated that any hardship could have been prevented by invoking the Court's "established practice" of vacating the lower court judgment and remanding with directions to dismiss.[25] The Government's failure to move for vacation of the district court's judgment, and its acquiescence in the dismissal of the appeal, constituted a waiver of its right to purge the judgment of its legal consequences.[26]

Of particular interest is the Court's discussion of the "established practice" for treating cases mooted on appeal. Quoting from its previous decision in *Duke Power Co. v. Greenwood County*, the Court termed the vacation/dismissal practice "the duty of the appellate court," at least when review "was prevented through happenstance."[27] In describing the effect of this procedure the Court indicated:

> [It] clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.
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> . . . [It] prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences.[28]

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[23] 340 U.S. at 38. Although the Court speaks in terms of res judicata throughout its opinion, the case poses an issue of collateral estoppel. *See infra* note 356.

[24] The Government relied on § 69(2) of the Restatement of Judgments and related federal authority for the view that when mootness arises on appeal "the judgment is not conclusive against [a party] in a subsequent action on a different cause of action." 340 U.S. at 39 n.1.

[25] 340 U.S. at 39 & n.2. This procedure was adopted pursuant to the Court's general supervisory appellate authority conferred in 28 U.S.C. § 2106 (1976). 340 U.S. at 40-41; *see supra* note 11. For ease of reference, this practice at times will be referred to as the vacation/dismissal procedure or the *Munsingwear* procedure.

[26] 340 U.S. at 40-41. While the government's action may have constituted a waiver, it is not clear from the facts that it was a knowing one. Although there was Supreme Court precedent concerning the appellate court's duty to vacate and remand for dismissal, there was no definitive precedent as to the effect of the underlying judgment when, duty notwithstanding, the appeal was merely dismissed. *See* 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 546 & n.33; 30 B.U.L. REV. 426, 430 (1950); 50 COLUM. L. REV. 716, 718 (1950); 48 MICH. L. REV. 1208, 1209 (1950). Case notes critiquing the lower court decision that the judgment would retain its vitality for collateral estoppel purposes (subsequently affirmed by the Supreme Court), split on the issue. *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 84 n.37.

[27] 340 U.S. at 39-40.

[28] *Id.* at 40-41.

While forcefully stating a federal approach to mootness on appeal, distinct from the Restatement approach, the Court's opinion leaves a number of issues unresolved.

> (1) In what instances of mootness on appeal does the doctrine apply?[29] The case itself involved an appeal of (a) a final judgment, (b) of a federal district court, (c) in federal question litigation, (d) in which mootness arose by happenstance. Does an alteration of any of these factors warrant the use of a different procedure, with a different effect on the original judgment's legal consequences? Further, may a court, in its discretion, decline to follow the *Munsingwear* approach when it might otherwise apply?
> (2) How is the doctrine to be invoked?[30] Should courts follow the *Munsingwear* procedure sua sponte, or must they await a motion by a party?[31]
> (3) What is the intended scope of the Court's pronouncement that a judgment handled under the vacation/dismissal procedure would be prevented "from spawning any legal consequences"?[32] Does this encompass res judicata, collateral estoppel, law of the case and precedential consequences, or a more limited subset of these doctrines?[33]

Substantial confusion remains in the federal system about the prevailing answers to these questions and about the correctness of their current resolution. This Article addresses these questions in the light of the traditional justifications for limiting the effect of decisions which become moot on appeal.[34]

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[29] *See infra* Part III.

[30] *See infra* Part IV.

[31] If a motion usually is required, as seems likely, *see infra* note 322, research in the area becomes very difficult. Absent an express statement by the court, it is difficult to determine whether its resolution of a case by means other than the *Munsingwear* procedure reflects a conscious choice or the failure of the parties to make a *Munsingwear* request.

[32] *See infra* Part V.

[33] Although the *Munsingwear* doctrine may affect a variety of legal consequences flowing from a decision, it is discussed primarily in terms of its impact on the res judicata and collateral estoppel effects of mooted judgments. While the Article explores the wider concerns as well, the relationship of the *Munsingwear* procedure and the preclusion doctrines serves as its central focus.

[34] The general question of the appropriate appellate response to cases which become moot on appeal has been addressed by numerous treatise writers and law review commentators. Most of this material dates back to the 1950's, however, and fails to reflect

II. Restricting the Effect of Judgments Mooted on Appeal: Theoretical Justifications

When a case becomes moot on appeal the prospect of appellate review is lost. That the lower court judgment will remain unreviewed triggers concern over its continued effect. Two principal justifications have been advanced to support limiting the reach of such judgments. One view is that appellate review assures that a judgment has a sufficient probability of correctness to justify its continued use. Thus, when mootness precludes appellate review, an unreviewed judgment should not be afforded all the usual legal consequences.[35] This rationale underlies the position of the Restatement (Second) of Judgments on mootness on appeal.[36] "The availability of review for the correction of errors" is

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the doctrinal developments of the past 30 years. The more general treatises on federal practice address the issue, but generally do so in a cursory, outdated, or unorganized fashion. This Article seeks to fill the need for a thorough, up-to-date analysis of the questions arising in this area.

For previous commentary addressing the general concerns of this Article, see P. Baxtor, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 113 (2d ed. 1973) [hereafter Hart & Wechsler]; 1B Moore's, *supra* note 12, ¶ 0.416[6]; 6A Moore's, *supra* note 1, ¶ 57.13, at 57-127; R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 273 (R. Wolfson & P. Kurland 2d ed. 1951) [hereafter Robertson & Kirkham]; Stern & Gressman, *supra* note 1, § 18.4; 13 Wright, Miller & Cooper, *supra* note 1, § 3533; 18 Wright, Miller & Cooper, *supra* note 12, § 4433, at 315-17; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 15-16 (1942); *Developments in the Law — Res Judicata*, 65 Harv. L. Rev. 818, 847-48 (1952) [hereafter *Developments*]; *The Supreme Court, 1950 Term*, 65 Harv. L. Rev. 107, 173-74 (1951); Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946 (1980) [hereafter Note, *Supreme Court Disposition*]; Comment, *Disposition of Moot Cases*, *supra* note 16; Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772, 793-95 (1955) [hereafter Note, *Cases Moot on Appeal*]; 30 B.U.L. Rev. 426 (1950); 50 Colum. L. Rev. 716 (1950); 47 Iowa L. Rev. 774 (1962); 48 Mich. L. Rev. 1208 (1950); 35 Minn. L. Rev. 506 (1951); 26 N.D. Bar Briefs 423 (1950); 7 Wash. & Lee L. Rev. 230 (1950); Annot., 95 L. Ed. 42 (1951); Annot., 157 A.L.R. 1038 (1945).

[35] *See* Restatement (Second) § 28 comment a (1982); 18 Wright, Miller & Cooper, *supra* note 12, § 4433, at 315 (stating that "[w]e have become accustomed to the reassurance of quality that results from review . . . . Decisions that could not have been tested by appeal may seem suspect candidates for preclusion."); Note, *Supreme Court Disposition*, *supra* note 34, at 952.

[36] Section 28(1) of the Restatement (Second) provides an exception from issue preclusion when "the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." Judgments moot on appeal fall within this provision. Restatement (Second) § 28(1) comment a (1982).

the core concern of the Restatement (Second).[37]

The other major justification turns on a desire to honor the legislative scheme which affords the opportunity for appellate review.[38] Adherents of this view assert that the legislature has determined that appellate review, if requested, is an essential part of a truly final decision.[39] Loss of this opportunity because of mootness leaves a judgment preliminary within the statutory scheme. As such, it should not spawn legal consequences.[40] Fairness to the parties, particularly to the appellant, presents a related concern. If the legislature has provided an opportunity to appeal, it may be considered unfair to bind a party to a judgment if that appellate opportunity is lost.[41] This statutory prematurity argument is the driving force behind the federal approach in this area.[42]

The response to whether judgments moot on appeal should have con-

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That appealability should be a *sine qua non* of a judgment's use for issue preclusion represents a shift from the position asserted in the original Restatement of Judgments. There the exception to issue preclusion was limited to instances in which appellate review was unavailable, either because the matter in the first suit was immaterial or because the case had become moot. *Compare* RESTATEMENT OF JUDGMENTS § 69(2) (1942) *with* RESTATEMENT (SECOND) § 28(1) (1982). *See* RESTATEMENT (SECOND) § 28(1) reporter's note at 284 (1982).

It can be inferred from the silence of the Restatement (Second) on the effect of mootness on the doctrine of claim preclusion that, under that approach, mootness has no effect. *Cf.* RESTATEMENT (SECOND) § 20 (1982). Such a position is consistent with the general view that res judicata applies to a judgment regardless of the availability of appellate review. *See infra* text accompanying notes 367-68.

[37] RESTATEMENT (SECOND) § 28(1) comment a & reporter's note at 284 (1982); *see id.* at § 27 comments h, i.

[38] *See* United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950); 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 542.

[39] It is unclear whether the concern is over the loss of an opportunity to appeal, which arises regardless of whether appellate consideration is discretionary or of right, or is limited to the loss of a right to appellate review. *See infra* text accompanying notes 178-97.

[40] *See* United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950); 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 542.

[41] *See* United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950) (expressing concern that no party be "prejudiced" by a judgment premature within the statutory scheme).

[42] *See id.* at 40-41. As a general rule, the federal appellate court should vacate the judgment below and remand to the lower court for dismissal of the proceeding as moot. *Id.* at 39. This action may strip the judgment not only of its collateral estoppel effect, but of its res judicata, law of the case, and stare decisis qualities as well. *See infra* text accompanying notes 360-420. The broad sweep of the federal approach, as compared to that of the Restatement (Second), appears to follow from the different focus of each. *Id.*

tinued legal effect may well differ depending upon which justification is adopted. Further, these justifications are both open to question, and may be outweighed by other concerns.

The proposition that review often is necessary to assure correctness certainly has some support. That American court systems generally provide at least one appeal of right suggests a concern with the significant possibility of error in lower court determinations.[43] Substantial reversal rates lend credence to this view.[44] Recently, in *Standefer v. United States*,[45] the United States Supreme Court raised fear of error as an important consideration in denying collateral estoppel use of a judgment from which there had been no possibility of appeal.[46]

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[43] In the federal system, and in virtually every state, an appeal of right is allowed from most final judgments. *See* R. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 1.5 (1981). Among the primary concerns underlying such appellate jurisdiction is "review for correctness." *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 2 (1976).

[44] Within the federal system the circuit courts of appeals are more concerned with the correction of individual error below than is the Supreme Court, which responds primarily to institutional concerns. *See* Note, *Supreme Court Disposition*, *supra* note 34, at 954-57. Thus, within the federal system, reversal rates in appeals from district courts to circuit courts appear to provide the best measure of the necessity of appellate review for the correction of errors. For the fiscal year ending June 30, 1982, the reversal rate of cases terminated in federal circuit courts after oral hearing or submission of briefs was 16.1%. 1982 UNITED STATES JUDICIAL CONFERENCE REPORT 83. Since 1970, the rate has ranged from a high of 20.9% in 1970 to a low of 14.6% in 1977. *See* 1977 UNITED STATES JUDICIAL CONFERENCE REPORT 300; 1970 UNITED STATES JUDICIAL CONFERENCE REPORT 210. These statistics exclude cases affirmed in part and reversed in part and thus appear to understate the instances in which the appellate court identified reversible error.

Yet, by focusing on the reversal rate of cases terminated after oral hearing or submission of briefs, the problem of trial court error is significantly overstated. As a recent study indicates, only about 30% of appealable trial court decisions are appealed. *See* J. HOWARD, JR., *supra* note 9, at 39 Table 2.7. Of these, a significant number are resolved without appellate court action. *Cf. id.* at 301. Viewed from this perspective, it is interesting to note the figures presented by Professor Howard. During the period studied, while the reversal rate after oral hearing or submission of briefs was 21.5%, the percentage of appealable judgments actually reversed was only 3.6%. *Id.* at 39 Table 2.7. Although many factors account for the failure to take an appeal and sustain it through court determination, it often turns at least in part on an assessment that the trial court did not commit reversible error. *See* T. MARVELL, *supra* note 9, at 303 n.15.

[45] 447 U.S. 10 (1980).

[46] *Id.* at 23. *Standefer* involved two criminal actions arising out of the alleged bribery of an IRS agent. In the first action, the Government unsuccessfully prosecuted the agent for accepting unlawful compensation. In the second action, the individual accused of bribery sought dismissal of charges of aiding and abetting the agent, by raising the former judgment as collateral estoppel, as the agent's guilt was an element common to

This view is open to challenge, however. Not all commentators agree with the premise that risk of trial court error is high.[47] Current suggestions that discretionary appeal be substituted for appeal of right in the federal system[48] reflect a basic confidence in the quality of trial court justice. Indeed, the Restatement (Second) of Judgments increasingly leans toward denying the opportunity for relitigation, perhaps in part because of confidence in the increased reliability of modern procedural systems.[49]

Even if significant risk of error exists at the trial level, the benefits of a judgment having preclusive consequences[50] may outweigh the risks.[51] Perhaps for this reason, appealability was not historically a prerequisite to affording a judgment res judicata[52] or collateral estoppel effect.[53] Some modern courts[54] and treatise writers[55] continue in this view. The

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both offenses.

[47] *See* 48 MICH. L. REV. 1208, 1210 (1950). Doubt of this premise is implicit in one scholar's suggestion that "[w]ith the exception of cases raising constitutional issues or involving primacy of administrative adjudication, judicial review in the area of civil appeals should be abolished." Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417, 448 (1968).

[48] *See, e.g.*, HART & WECHSLER, *supra* note 34, at 1573; Lay, *A Proposal for Discretionary Review in Federal Courts of Appeal*, 34 SW. L.J. 1151 (1981). Nevertheless, these suggestions should not be read too broadly. The fact that some believe a class of nonmeritorious appeals may be segregated out before the appellate stage, to reduce the appellate caseload, really says nothing about the view of the overall correctness of the pool of decisions from which mooted cases arise.

[49] RESTATEMENT (SECOND) introduction at 10 (1982); *cf.* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4403, at 21. Yet it may be the presence of an appellate review safeguard which allows for the expansion of the preclusion doctrines.

[50] Preclusion doctrines are thought to further various public and private interests including (1) protecting both individuals and the court system from the costs and burdens of relitigating issues once determined; (2) making initial determinations binding so individuals may rely upon them in structuring future conduct; (3) encouraging individuals to pursue litigation to the fullest when it does arise; and (4) minimizing the derogation of the rule of law occasioned by inconsistent resolution of identical questions. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4403, at 11-18; *cf.* 1B MOORE'S, *supra* note 12, ¶ 0.405[1], at 186-87.

[51] At the heart of the preclusion doctrines is an attempt to strike a balance between the value of finality, with its corollary that at some point litigation must come to an end, and a desire to reach the right result. *See* RESTATEMENT (SECOND) introduction at 10-13 (1982). Reasonable persons may differ as to how that balance should be struck.

[52] *See infra* note 367.

[53] *See* 2 A. FREEMAN, LAW OF JUDGMENTS § 635, at 1339 (5th ed. 1925). *But cf.* Note, *Supreme Court Disposition*, *supra* note 34, at 949.

[54] *See, e.g.*, Winters v. Lavine, 574 F.2d 46, 62-63 (2d Cir. 1978).

[55] *See, e.g.*, 1B MOORE'S, *supra* note 12, ¶ 0.416[5], at 530-33.

Restatement (Second) position appears to represent just such a balance of the benefits of preclusion with the importance of appealability, treating the latter as transcendent with respect to collateral estoppel, but apparently of no concern for res judicata.[56]

Even if judicial review aids in assuring the correctness of a judgment, and such assurance outweighs the values of preclusion, it need not follow that review must always take place before judgments are accorded full effect. For example, when a party has the right to appeal, but fails to do so, the right to review is waived, and the unreviewed judgment retains full value.[57] Even in nonwaiver situations it may be inappropriate to impose a blanket requirement of review before a judgment is given full force, as the *Standefer* decision points out. There the Court acknowledged the importance of appellate review to assure "confidence [in] the result achieved in the initial litigation," but hastened to add, "[t]his is not to suggest that the availability of appellate review is *always* an essential predicate of estoppel."[58] The line dividing instances when appellate review is essential from those when it is not remains unexplained,[59] although there are some recent indications that the exceptions to an appealability requirement may be construed narrowly.[60]

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[56] *See supra* note 36 (concerning the different treatment of mooted appeals with respect to collateral estoppel and res judicata under the Restatement (Second)); *see also infra* text accompanying notes 367-68 (concerning the rationale underlying the differential treatment).

[57] *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 305-07.

[58] Standefer v. United States, 447 U.S. 10, 23 n.18 (1980) (emphasis added).

[59] It has been argued that appealability need not be an inevitable prerequisite to full preclusion, since frequently, in situations in which appellate review is not provided, other safeguards are present to ensure against erroneous decisions. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 315-16 (although the authors provide no suggestions as to the "alternative protections or special policies" which might be present when no right to appeal is provided). When appeal is lost because of mootness, however, there are no such outside safeguards, since the initial decision was not structured to accommodate the complete absence of review. *Id.* at 316.

[60] *See, e.g.*, Church of Scientology v. Linberg, 529 F. Supp. 945, 955-57 (C.D. Cal. 1981). In this litigation, plaintiff sought damages for alleged violations of its first and fourth amendment rights arising out of an FBI search and seizure. *Id.* at 948. In previous litigation the plaintiff had unsuccessfully sought to secure the return of its seized property, under Rule 41(e) of the Federal Rules of Criminal Procedure. This rule provides for the release of property unlawfully seized and the suppression of its use as evidence. Defendants, in the damage action, sought to raise the Rule 41(e) determination as collateral estoppel. 529 F. Supp. at 951, 955. The unappealability of the first judgment was one of the reasons the court invoked in refusing to accord it collateral estoppel effect. In doing so the court relied heavily on *Standefer*. While noting the Supreme Court's reluctance to require appealability as a prerequisite to collateral es-

The statutory prematurity argument is also subject to dispute. One may question whether Congress, by providing an appellate process, intended that judgments deprived of review by mootness should be treated as judicial nullities. Congress may have authorized appellate review without any consideration of the legal effect to be given mooted judgments.[61] Neither the Court nor commentators cite legislative history supporting the statutory prematurity position,[62] although given the longstanding nature of the *Munsingwear* practice,[63] it may be argued that Congress, by its silence, supports the interpretation.[64] Thus, neither of the traditional justifications for limiting the force of mooted judgments is beyond challenge, and the benefits of preclusion may outweigh them both.[65]

III. Application of the *Munsingwear* Doctrine to Cases Mooted on Appeal: In Search of Limits

The *Munsingwear* Court recognized the vacation/dismissal procedure as its established practice for the disposition of cases which become moot on appeal and reaffirmed[66] that it is the duty of the appel-

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toppel in all instances, the court nevertheless read the exceptions narrowly to include only instances when (1) although collateral estoppel is invoked rather than res judicata, the cases appear to have substantial identity of claims; (2) neither the first nor second action is appealable; or (3) special factors explain the lack of appellate review for the first judgment. *Id.* at 954 n.12. Conversely, perhaps the concerns expressed in *Standefer* will be limited to judgments in criminal actions.

[61] Although there are exceptions, *see, e.g.*, 28 U.S.C. § 1738 (1976), congressional regulation of the legal consequences of a judgment is rare. Its infrequency may suggest a lack of congressional concern.

[62] *See* United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950); 1B Moore's, *supra* note 12, ¶ 0.416[6], at 542.

[63] *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 79 (dating the Supreme Court's primary reliance on the vacation/dismissal procedure for mooted appeals within the federal system back to 1919).

[64] *See, e.g.*, E. Crawford, The Construction of Statutes 308 (1940); *cf.* 2A Sutherland, Statutes and Statutory Construction § 45.12 (C. Sands 4th ed. 1973) (suggesting that statutory interpretation assumes legislative knowledge of existing statutes, rules of construction, and judicial decisions); Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 Tex. L. Rev. 247, 254-55 (1947) (since silence is neither approval nor disapproval, Congress must affirmatively express disapproval).

[65] *See* 48 Mich. L. Rev. 1208, 1210 (1950); *cf.* 1B Moore's, *supra* note 12, ¶ 0.416[6], at 549 (suggesting that in most states mooted judgments are not automatically stripped of their collateral estoppel effects); *see generally supra* note 50 (on the values of res judicata and collateral estoppel).

[66] The Court had previously recognized the duty of the appellate court to use this procedure in Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936). In this

late court to use the procedure.[67] The Court acknowledged that it had itself deviated from this practice on occasion by simply dismissing mooted appeals,[68] but offered no insight as to what circumstances would warrant use of this different approach.[69]

This section of the Article addresses whether there are any limits to the appellate court's duty to apply the *Munsingwear* doctrine to cases moot on appeal. Limits might be warranted when the theoretical justifications underlying the doctrine do not apply, or when, although applicable, they are outweighed by countervailing considerations. Four major areas will be analyzed in search of such limits.

First, although the *Munsingwear* doctrine may have broader implications, traditionally it has been seen as a directive to purge mooted judgments of their preclusive effects. When the lower court judgment will have no preclusive effects, or when those effects are unlikely to be raised in subsequent litigation, should the *Munsingwear* doctrine be applied?

A second possible limit on *Munsingwear* relates to the cause of mootness. When mootness arises because of events outside the control of the parties, the need to protect the appellant from the consequences of the unreviewed judgment is high. When mootness is caused by the actions of the parties themselves, however, different considerations may come into play.

A third potential constraint upon the application of the *Munsingwear* doctrine is the setting in which the litigation arises. *Munsingwear* involved the appeal of a federal question from a federal district court to

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litigation, an appeal attacking a judgment permanently enjoining the United States from entering into a loan agreement to finance construction and operation of a power plant became moot when the parties terminated the initial agreement and entered into a revised agreement. The Supreme Court reviewed the case for its procedural irregularities; the mooted initial judgment was not vacated, although the appellant indirectly so requested. It is in this context that the Court, without analysis, enunciated "the duty of the appellate court."

[67] United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950).

[68] *Id.* at 39 n.2 (citing Schenley Distilling Corp. v. Anderson, 333 U.S. 878 (1948); Pan American Airways Corp. v. W.R. Grace & Co., 332 U.S. 827 (1947); Uyeki v. Styer, 329 U.S. 689 (1946); Cantos v. Styer, 329 U.S. 686 (1946)).

[69] The D.C. Circuit, in Acheson v. Droesse, 197 F.2d 574, 578 (D.C. Cir. 1952), discussed the Supreme Court's decision to dismiss those appeals, rather than to employ the *Munsingwear* procedure. The court of appeals suggested that the choice was predicated not upon a difference in the appropriate disposition, or upon the exercise of discretion by the Supreme Court, but rather because the standard procedure had not been requested by the parties. Whether a request is necessary to invoke the *Munsingwear* doctrine is addressed *infra* text accompanying notes 322-33.

the court of appeals. Varying these factors may present special concerns. To be addressed is whether the application of the *Munsingwear* doctrine should be affected by (1) the level of review within the federal system, (2) the forum which rendered the initial decision, be it a federal court, a state court, or an administrative tribunal, or (3) the federal or state nature of the substantive legal questions involved.

Finally, a residual category of concerns may exist which justify providing appellate courts leeway, in special circumstances, to ignore the dictates of the *Munsingwear* doctrine and allow the lower court judgment to stand.

A. The Need for Foreseeable Preclusive Consequences Flowing from the Mooted Decision

The district court decision in *Munsingwear*, a final judgment denying permanent injunctive relief, had foreseeable preclusive consequences in two pending damage suits arising out of the same conduct.[70] In subsequent litigation questions have arisen concerning whether the *Munsingwear* doctrine applies if future litigation invoking the mooted judgment is unforeseeable, or if the mooted decision simply cannot have preclusive effects.

1. The Foreseeability of Future Litigation

Shortly after the *Munsingwear* decision, the United States Court of Appeals for the District of Columbia, in *Acheson v. Droesse*,[71] was called upon to determine whether *Munsingwear* applies when future litigation of a mooted issue is unforeseeable. In *Droesse*, the Secretary of State appealed a decision declaring Droesse a citizen of the United States. The appeal became moot when Congress passed a private law declaring Droesse a citizen. Although the parties agreed the case was moot, they disagreed as to its appropriate disposition. The Secretary of State argued that the *Munsingwear* vacation/dismissal procedure should be followed, while Droesse argued that dismissal of the appeal was appropriate. In attempting to distinguish *Munsingwear*, Droesse argued that the doctrine applies only when future litigation is possible:[72] in *Munsingwear*, a second suit involving the same issues was not

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[70] *See supra* notes 16-22.

[71] 197 F.2d 574 (D.C. Cir. 1952).

[72] Many early commentators concluded that in this situation (foreseeable future litigation) the court should treat the case as a live controversy to be decided on the merits rather than applying the *Munsingwear* procedure. *See Developments, supra* note 34, at

only possible, but pending. In contrast, no future litigation was likely with respect to Droesse's citizenship. The court rejected this distinction, relying on the broad language of *Munsingwear* invoking the duty of the appellate court to follow the vacation/dismissal procedure, and the fact that *Munsingwear* cited with approval cases in which no future litigation was likely.[73]

The *Droesse* decision appears justified not only by precedent[74] but also by policy. Lack of foreseeability of relitigation of issues, while relevant to the practical importance of the *Munsingwear* disposition, provides no rationale for concluding that the doctrine should be ignored. Whether a mooted judgment has foreseeable preclusive application in the future is irrelevant to the basic policy that a mooted judgment should not have continued legal effect. Should the unforeseen occur, and future litigation arise to which the original judgment is relevant, use of the initial judgment would remain unwarranted.[75] Further, this distinction would involve the appellate court in complex questions of the foreseeability of future litigation. A per se rule would avoid this needless expenditure of resources.[76] Perhaps for these reasons the *Droesse* approach has been adopted in subsequent cases.[77]

848; 48 MICH. L. REV. 1208, 1210 (1950).

[73] Acheson v. Droesse, 197 F.2d 574, 578 (D.C. Cir. 1952). In this regard the court cited Bronlow v. Schwartz, 261 U.S. 216 (1923) (appeal of order granting building permit moot when building built) and Berry v. Davis, 242 U.S. 468 (1917) (appeal of order enjoining statutorily required vasectomy of multiple offenders moot when law repealed). The appellee cited several Supreme Court cases for the proposition that the court should merely dismiss as moot cases in which there is no likelihood of future litigation between the parties. The court rejected this proposition on the ground that in none of those cases had the parties requested the *Munsingwear* procedure. *See generally infra* text accompanying notes 322-33.

[74] The court's opinion offers no analytic or policy support for its decision. Instead it relies solely upon the manipulation of precedent presented in a string citation in *Munsingwear* supporting the general approach.

[75] The argument in the text focuses on the preclusive effects of judgments. To the extent that the abrogation of precedential value is also a core concern of the *Munsingwear* doctrine, *see infra* text accompanying notes 390-420, the vacation/dismissal procedure would uniformly be applied, as the possibility of an opinion's use as stare decisis in future litigation is almost always present.

[76] Additionally, even if application of the *Munsingwear* doctrine is unnecessary, it is still unclear what harm would arise from its application. To the extent that future litigation is unforeseeable, the interest of a party in avoiding the *Munsingwear* doctrine may turn on the judgment's potential use as precedent or on some nonlitigation value afforded by a standing judgment. That these concerns should be honored by dismissing the appeal and allowing the judgment to stand seems doubtful.

[77] *See* Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979). There the Court

2. The Possibility of Preclusive Consequences

Even if the *Munsingwear* doctrine applies whenever the possibility of preclusive consequences exists, no matter how remote, should it apply when the decision moot on appeal cannot, by its very nature, support preclusive consequences? A minimum requirement for a decision to have preclusive effects is that it involve a valid final judgment.[78] In many instances, however, interlocutory decisions, such as preliminary injunctions, which may not be final for preclusion purposes, are presented to an appellate court.[79] When mootness bars consideration of such matters, should the appeal simply be dismissed, or should the *Munsingwear* approach be followed?

Many federal courts limit the application of the *Munsingwear* doctrine to final judgments moot on appeal,[80] although the Supreme Court

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rejected sub silentio the argument that when no chance of future litigation exists in which the trial court's decision would be relevant, the appellate court has the discretion to dismiss the appeal. Brief for Respondent at 2, Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979).

[78] RESTATEMENT (SECOND) § 17 (1982). For res judicata to apply, a valid final judgment on the merits traditionally has been required. *See* RESTATEMENT OF JUDGMENTS § 48 (1942); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4427. When the final judgment entered against the plaintiff is not on the merits, but turns on some threshold matter, such as lack of subject matter jurisdiction, res judicata will not bar a second action on the same claim. RESTATEMENT OF JUDGMENTS § 49 (1942); *cf.* RESTATEMENT (SECOND) § 20(1)(a) (1982). The Restatement (Second) treats a broader class of judgments as "on the merits" than did its predecessor. As to a matter actually litigated, determined, and essential to that judgment, however, direct estoppel would lie to bar an identical suit were it brought with the same deficiency. Such a finding also might be applied in a later suit on an unrelated claim, through the doctrine of collateral estoppel. *See* RESTATEMENT (SECOND) §§ 20 comment b, 27 comment b (1982); RESTATEMENT OF JUDGMENTS §§ 45 comment b, 49 comment b (1942).

[79] *See* 28 U.S.C. § 1292 (1976).

[80] *See* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 279 n.38 (Cum. Supp. 1980) (and cases cited therein). *But see infra* note 121 (for the contrary Supreme Court practice); Barbour v. Central Cartage, 583 F.2d 335, 337 (7th Cir. 1978); Weaver v. United Mine Workers, 492 F.2d 580 (D.C. Cir. 1973). In *Weaver* the court applied the *Munsingwear* doctrine to a mooted interlocutory appeal of the denial of a motion to dismiss. Several plaintiffs had brought suit under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(b) (1976), for damages, an accounting, and restitution for alleged misappropriations of union funds. Under the statute, a request of the union to sue its officers for such violations had to be made before suits could be brought in an individual capacity. After the death of the single named plaintiff who had made such a request, the defendants moved for dismissal. They argued that the remaining plaintiffs lacked standing to maintain the action because the plaintiffs had failed to comply with the statutory provision. The district court denied the motion, but certified the issue to the court of appeals. While appeal was

has embraced no such limits. The rationale underlying this position, although often unarticulated,[81] is based on the role of the *Munsingwear* doctrine as a barrier to the future res judicata and collateral estoppel application of mooted judgments.[82] Courts have reasoned that when the appealed judgment lacks the requisite qualities to support preclusive use, no action by the court is necessary to cut off its legal consequences. Application of the *Munsingwear* procedure is simply not called for.[83]

This approach has drawbacks. Primary among them is that the appellate court may have difficulty identifying decisions that would support preclusive consequences.[84] Focusing on the final judgment requirement of the preclusion doctrines in the context of preliminary injunctions, a class of determinations often mooted on appeal, illustrates the problem.

Under the Restatement (Second) of Judgments the definition of a "final" judgment differs for claim preclusion and issue preclusion purposes.[85] For the former, a judgment will be considered final "if it is not

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pending, the union (after a new election) moved to be realigned as a plaintiff. This motion was granted, mooting the interlocutory appeal. The court applied the *Munsingwear* doctrine without discussion of the interlocutory nature of the judgment. *See also* 7 [Part 2] J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 65.21, at 65-158 (2d ed. 1983) [hereafter 7 [Part 2] MOORE'S].

[81] *See, e.g.*, United States v. Neumann, 556 F.2d 1218 (5th Cir. 1977) (interlocutory appeal of denial of layman as counsel dismissed as moot); Berg v. LaCrosse Cooler Co., 548 F.2d 211, 213 (7th Cir. 1977) (interlocutory appeal of denial of preliminary injunction on jurisdictional grounds dismissed as moot).

[82] *See, e.g.*, FTC v. Food Town Stores, 547 F.2d 247 (4th Cir. 1977); Nader v. Volpe, 466 F.2d 261, 272 n.72 (D.C. Cir. 1972); *cf.* Paramount Pacific Indus. v. Norfolk & W.R.R., 17 Fed. R. Serv. 2d 1270, 483 F.2d 1401 (4th Cir. 1973) (unreported opinion); Simonds v. Guaranty Bank & Trust Co., 492 F. Supp. 1079, 1087 (D. Mass. 1979).

[83] *See supra* note 82; *cf.* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 280 n.39 (Cum. Supp. 1980). The authors label as a "maverick decision" the affirmance of a district court's dismissal of an action to perpetuate testimony which became moot on appeal, Dresser Indus. v. United States, 596 F.2d 1231, 1238 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980). Professors Wright, Miller & Cooper point out, however, that "[n]o damage seems likely to result from affirmance in these circumstances, since it is highly unlikely that any res judicata consequences would ensue."

[84] For purposes of this discussion, the provisions of the Restatement (Second) will be relied upon as a statement of modern doctrine in this area.

[85] Under the rule set forth in the Restatement of Judgments, "The rules of res judicata [bar, merger and estoppel] are not applicable where the judgment is not a final judgment." RESTATEMENT OF JUDGMENTS § 41 (1942). In the Restatement (Second), the American Law Institute adopted a new approach to the issue, differentiating between finality for claim preclusion and finality for issue preclusion. RESTATEMENT (SECOND) § 13 (1982). While the first Restatement's strict approach to finality is re-

tentative, provisional or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement . . . ."[86] For the latter, finality is defined more expansively to include "any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."[87] In determining whether a judgment meets this standard the court assesses whether the decision was adequately deliberated, procedurally definite, and intended to be conclusive. Also to be considered, although not dispositive, are that the first court supported its decision with a reasoned opinion, and that the decision was subject to appeal.[88]

Under these criteria, preliminary injunctions are weak candidates for preclusive consequences. The collateral effect of a preliminary injunction typically is limited, because such decisions often are determined in an expedited fashion,[89] are resolved on predictions about the ultimate outcome of litigation rather than on conclusive determinations[90] and are

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tained for the former, a more flexible approach is adopted for the latter. Finality for claim preclusion purposes is defined strictly, since litigation of an entire claim, rather than an individual issue, is potentially precluded. RESTATEMENT (SECOND) § 13 comment g (1982). *But cf.* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4434, at 327-28 (acknowledging that finality rules have been relaxed only for issue preclusion, but suggesting that expanded finality concepts may come to be applied to claim preclusion as well).

[86] RESTATEMENT (SECOND) § 13 comment b (1982).

[87] *Id.* § 13. *But cf.* 1B MOORE'S, *supra* note 12, ¶ 0.441[4], at 747 (criticizing the Restatement provision).

[88] RESTATEMENT (SECOND) § 13 comment g (1982); *see* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4434. As noted in the text, one aspect of the finality determination involves the appealability of the decision in question. To the extent review on appeal is essential to a finding of expanded finality, the very act of mootness arguably destroys finality and the resulting need for the *Munsingwear* approach. *But cf. id.* at 324-25 (citing authority for the proposition that appellate review, while a factor, need not take place before a decision will be considered final).

[89] *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 2942, at 469, 471, 2950, at 494-95 (1973) [hereafter 11 WRIGHT & MILLER]; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4445, at 394.

[90] As a general matter, a court ruling on a preliminary injunction request will apply a four-factor test, weighing (1) the threat of irreparable harm to the plaintiff; (2) the harm to the defendant if the preliminary relief is granted; (3) the plaintiff's probability of success on the merits; and (4) the public interest. *See* 11 WRIGHT & MILLER, *supra* note 89, § 2948, at 430-31. As can readily be seen, in reaching such a determination the court often resolves the issue by assessing irreparable harm, or predicting the ultimate outcome, rather than by reaching a conclusive determination on the merits. In such instances the expanded finality test of the Restatement (Second) would not be met.

The Restatement (Second) rule ties finality to a determination that the judgment is

discretionary in nature.[91] Further, because the decisions usually are a preliminary step in the lawsuit, the determinations are subject to change.[92] Given these qualities, there is a reluctance to treat preliminary injunctions as binding on either the court of rendition[93] or other courts in subsequent litigation.[94] Thus, under the rationale being considered, when preliminary injunctions become moot on appeal the appellate court would simply dismiss the appeal, rather than follow *Munsingwear*.

Yet in many instances, preliminary injunctions may be sufficiently final for preclusion purposes. For example, a proceeding on a preliminary injunction request may be treated by the trial court as a hearing on a permanent injunction with the resulting determination having full preclusive consequences.[95] Even truly preliminary injunctions may turn on such factors as the court's lack of subject matter jurisdiction,[96] the legal insufficiency of the plaintiff's theory,[97] or the lack of any genuine

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"sufficiently firm to be accorded conclusive effect." RESTATEMENT (SECOND) § 13 (1982). In comment a to section 13, the general rationale of the finality rule is described as follows: "This section makes the general common-sense point that such conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it is rendered." By this standard, a predictive evaluation of the merits would not be "sufficiently firm."

[91] *See* 11 WRIGHT & MILLER, *supra* note 89, § 2948, at 427-28; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4445, at 394.

[92] Findings of fact and conclusions of law that underlie a preliminary injunction determination usually are not treated as conclusive in a later phase of the law suit. *See infra* note 93. The preliminary injunction determination itself may be reconsidered if new facts are presented to show that the original determination was unwarranted. *See* 11 WRIGHT & MILLER, *supra* note 89, § 2950, at 496; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4445, at 395.

[93] *See* 7 [Part 2] MOORE'S, *supra* note 80, ¶ 65.21, at 65-157; 11 WRIGHT & MILLER, *supra* note 89, § 2950, at 494; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4445, at 394.

[94] *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4445, at 394.

[95] *See* 11 WRIGHT & MILLER, *supra* note 89, § 2950, at 489.

[96] *See* Southern Ry. v. Brotherhood of Ry. Clerks, 458 F. Supp. 1189, 1192-93 (D.S.C. 1978). There the district court vacated a temporary restraining order it had previously entered enjoining certain strike activity. In so doing it relied in part upon the preclusive effect of an earlier decision between the same parties in a different court. In that court the railroad's TRO request had been denied on the ground that the Norris-LaGuardia Act barred the courts from exercising jurisdiction to enter restraining orders in labor disputes of this nature.

[97] *See* Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990, 995-96 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *accord* Miller Brewing Co. v. Falstaff Brewing Corp., 655 F.2d 5, 8-9 (1st Cir. 1981). Miller Brewing Company brought a number of actions in the mid-1970's against various competitors for allegedly infringing

issue of triable fact in the lawsuit.[98] Such factors are not predictions of the case's outcome, but definitive determinations. If sufficiently firm and fully deliberated, they will meet the requirements of issue preclusion.[99] Further, if successive identical preliminary injunction requests are made, without any showing of changed circumstances, a denial in the first instance may estop the later request.[100]

The problem for the appellate court is determining what preclusive effect, if any, the mooted preliminary injunction should have. This is

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the company's beer trademark, "Lite." In one of those cases, the Court of Appeals for the Seventh Circuit reversed a preliminary injunction entered on Miller's behalf holding that the injunction was improper since the term "light" was a generic word applied to beer. Neither it, nor its phonic equivalent, could be appropriated as a trademark. Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 80 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). In the instant cases the court held that the previous determination, although rendered on review of a preliminary injunction, had sufficient finality to be conclusive in a later action for trademark infringement against a different competitor.

[98] *See* Lummus Co. v. Commonwealth Oil Co., 297 F.2d 80, 89-90 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962). This case arose over a dispute between the parties concerning the validity of an arbitration clause contained in certain contracts for the construction of two oil refineries. At one juncture in this procedurally complex set of related cases, Commonwealth, in an action in Puerto Rico, obtained a preliminary injunction restraining an action brought in New York by Lummus to compel arbitration.

On review, the First Circuit overturned the preliminary injunction on the ground that Commonwealth had failed to raise a genuine issue as to the validity of the contracts, a finding necessary to void the arbitration procedure. Subsequently, Commonwealth moved for a stay of arbitration in the New York action pending resolution of Lummus's motion to compel arbitration or for a trial on arbitrability. The district court granted a stay and ordered a trial on the question of arbitrability. On appeal, the Second Circuit indicated that the First Circuit's holding that no genuine issue of triable fact existed concerning the existence of an agreement to arbitrate would control in the New York action, despite that holding's posture as a ruling in review of a preliminary injunction.

[99] *See* RESTATEMENT (SECOND) § 13 (1982); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4445.

It may also be appropriate to grant a preliminary injunction preclusive consequences when it is affirmed on interlocutory appeal, even if the entire case subsequently becomes moot before the trial court. The Seventh Circuit, in Commodity Futures Trading Comm'n v. Board of Trade, 701 F.2d 653, 657-58 (7th Cir. 1983), ruled that in these circumstances a preliminary injunction decision need not be vacated by the trial court and thus could retain preclusive consequences. It supported this position in part on the rationale that the decision had received a "stamp of reliability that comes from surviving appellate review." *Id.* at 657.

[100] *See, e.g.*, Dairyman, Inc. v. FTC, 1981-2 Trade Cas. ¶ 64,294 (W.D. Ky. 1981); Lyon Ford, Inc. v. Ford Marketing Corp., 337 F. Supp. 691, 695 (E.D.N.Y. 1971); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4445, at 395.

particularly difficult when numerous, largely judgmental factors must be applied in the particular circumstances to determine whether the decision is sufficiently firm to be used for issue preclusion in subsequent litigation.

The Fourth Circuit's opinion in *FTC v. Food Town Stores*[101] illustrates well the potential difficulties facing an appellate court that must determine if a mooted judgment will have preclusive effects to select an appropriate dispositional device. In *Food Town Stores*, the FTC sought a temporary restraining order and a preliminary injunction in federal district court to block the merger of two food store chains until administrative proceedings concerning the legality of the merger could be completed.[102] The district court denied the FTC relief, but granted a temporary stay of the merger to allow the FTC to apply to the circuit court for an injunction pending appeal. This injunction subsequently was granted.[103] Before the appeal could be decided, the corporations formally abandoned the planned merger, mooting the action. The FTC then moved, in the appellate court, for vacation of the district court judgment and remand of the case for dismissal. The corporations acquiesced in this motion, but additionally moved that the appellate court's injunction be vacated.[104]

With respect to the district court's denial of a preliminary injunction of the merger pending completion of the administrative adjudication, the court of appeals agreed that the *Munsingwear* procedure should be

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[101] 547 F.2d 247 (4th Cir. 1977).

[102] The Commission sought to invoke Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1976), which provides:

> (b) Whenever the Commission has reason to believe —
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> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof . . . until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon becomes final, would be in the interest of the public — the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . .

[103] FTC v. Food Town Stores, 539 F.2d 1339, 1347 (4th Cir. 1976). Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, the court granted an injunction pending appeal.

[104] Respondent's Cross-Motion to Vacate Both the District Court's and the Fourth Circuit's Orders, FTC v. Food Town Stores, 547 F.2d 247 (4th Cir. 1977).

applied, implicitly finding the judgment final.[105] That determination, however, is not clear cut. Had a similar injunction request been made in connection with an ongoing judicial proceeding, the decision would not have been considered final for claim preclusion purposes, because further steps would remain within the lawsuit. In this case, however, the court's role was ancillary to the administrative adjudication. The ruling on the preliminary injunction provided the complete judicial relief available under the statutory scheme.[106] Only if the court proceeding were viewed as separate from the underlying administrative adjudication was the district court action a final judgment for claim preclusion purposes.

Even if the preliminary injunction is considered a final judgment, its preclusive effect is still unclear. Given the limited nature of the relief the court could afford — a temporary injunction in support of the administrative proceeding — the court's judgment would not bar subsequent litigation for forms of relief unavailable in the initial action.[107]

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[105] FTC v. Food Town Stores, 547 F.2d 247, 249 (4th Cir. 1977). The court refused to apply the *Munsingwear* doctrine to the appellate court's injunction because it was not a final adjudication. *See infra* text accompanying note 113. It follows from the court's application of the *Munsingwear* doctrine to the district court's judgment that the court considered that judgment final.

This conclusion is also supported by Judge Winter's ruling in his consideration of the appellate injunction application that the district court's order was an appealable final judgment under 28 U.S.C. § 1291 (1976). *Food Town Stores*, 539 F.2d at 1346. While finality for purposes of appellate review differs somewhat from finality supporting the preclusion doctrines, substantial overlap exists between the two. *See* RESTATEMENT (SECOND) § 13 comment b (1982); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4432.

[106] Under the relevant statutory provision, the Commission can request a TRO or preliminary injunction of actions believed to be in violation of a law enforced by the FTC, pending completion of administrative hearings concerning the conduct. 15 U.S.C. § 13(b) (1976). As the court pointed out, granting of the § 13(b) relief is an end in itself. No additional relief is requested. FTC v. Food Town Stores, 539 F.2d 1339, 1342 (4th Cir. 1976); *cf.* DeSimone v. Linford, 494 F.2d 1186 (5th Cir. 1974) (applying the *Munsingwear* doctrine to a mooted appeal from the denial of a preliminary injunction requesting an employee's reinstatement in a job, pending resolution of his administrative hearing).

It should be noted that it is difficult to determine from the reported opinions whether the district court ruled on two motions before it (one for a TRO and the other for a preliminary injunction), or only one, the TRO. Regardless, the court treated the trial court disposition as a final judgment as to all relief requested. *Food Town Stores*, 539 F.2d at 1346; *cf.* 11 WRIGHT & MILLER, *supra* note 89, § 2962, at 616-20 (discussing the treatment of temporary restraining orders as preliminary injunctions in appropriate circumstances).

[107] RESTATEMENT (SECOND) § 26(1)(c) (1982).

Additional suits for identical relief might even be available under the FTC statute.[108]

As to issue preclusion, if the district court's judgment suffered from the infirmities common to preliminary injunctions,[109] it might be that the quality of the proceeding,[110] or the opportunity to obtain a full and fair adjudication of the issues,[111] was insufficient to warrant issue preclusion. Certainly the Government did not concede that the preliminary injunction denial would support preclusive effects,[112] and the court identified no future impact the judgment might have had if the *Munsingwear* procedure not been invoked.

With respect to the circuit court's enjoining the merger pending appeal, the court denied the *Munsingwear* request because the injunction could have no preclusive consequences. In contrast to the district court's action, the appellate court's action was an interim step in the judicial proceeding, not a final one.[113] Further, the views on the merits articulated there were "only a prediction as to the likelihood of how [the merits] will be resolved" and thus were of suspect quality to support issue preclusion.[114] While the court appears correct in its assessment of the appellate injunction's future value,[115] the respondents harbored genuine concern that the appellate court's interpretation of the legal standards to be applied in assessing section 13(b) injunction requests, set forth in the opinion granting interim injunctive relief, might be given

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[108] *Id.* § 26(1)(d).

[109] *See supra* text accompanying notes 89-92.

[110] RESTATEMENT (SECOND) § 28(3) (1982).

[111] *Id.* § 28(5).

[112] Petitioner's Brief in Support of Motion to Vacate District Court Order and Remand at 3, FTC v. Food Town Stores, 547 F.2d 247 (4th Cir. 1977).

[113] FTC v. Food Town Stores, 547 F.2d 247, 249 (4th Cir. 1977). Clearly this is so. The injunction, by its terms, only preserved the status quo while the appeal was pending.

[114] FTC v. Food Town Stores, 539 F.2d 1339, 1346 (4th Cir. 1976). The circumstances surrounding the adoption of the appellate injunction further support this view. The district court denied the FTC's request for a temporary restraining order on August 10, 1976, but entered a stay until 5:00 p.m., August 11, to allow application to the appellate court for a Rule 8 injunction. Given the shortness of time, it was impossible to convene a panel of the circuit, so Judge Winter decided the motion as a single circuit judge. His ruling was based upon "[t]he motion and the supporting documents, including a brief, and a memorandum in opposition thereto, including supporting papers, . . ." and a hearing of counsel in chambers. 539 F.2d at 1341. The injunction was entered effective 4:30 p.m., August 11, 1976. Due to the accelerated schedule, the injunction may not have received adequate deliberation to be accorded finality for collateral estoppel purposes. *Cf.* RESTATEMENT (SECOND) § 13 comment g (1982).

[115] *See generally* RESTATEMENT (SECOND) § 13 and comments a, g (1982).

collateral estoppel effect in a later proceeding.[116]

Given the difficulties which can arise in differentiating those preliminary injunctions which may support preclusive effects, to which the *Munsingwear* doctrine would be applied, from those injunctions that would not, is the complexity the approach entails justified?[117] Whether the *Munsingwear* procedure or dismissal is employed, the goal is the same — to assure that unreviewed judgments have no preclusive consequences. When an appeal is dismissed, the mooted judgment retains whatever preclusive effect it inherently commands, which is none for judgments that will not support res judicata or collateral estoppel applications. In granting a *Munsingwear* request, the court signals that the mooted judgment will have no preclusive effects, regardless of the power it might have had absent the court's order.[118] Under either procedure the result is the same.[119] Thus, to say that a *Munsingwear* dis-

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[116] Respondents' Reply to FTC's Brief in Opposition to Respondents' Cross Motion to Vacate Both the District Court's and the Fourth Circuit's Orders at 2, FTC v. Food Town Stores, 547 F.2d 247 (4th Cir. 1977). In ruling on the *Munsingwear* request, the court described Judge Winter's opinion on the appellate injunction pending appeal as "only a prediction" of the outcome of the appeal. That conclusion is open to question. In granting the interim injunction Judge Winter explicitly found: "In denying a temporary restraining order, the district court applied erroneous legal standards in determining whether or not the TRO should issue. When the correct legal standards are applied, I think that FTC has demonstrated that it is in the public interest that interim injunctive relief should be granted." FTC v. Food Town Stores, 539 F.2d 1339, 1346 (4th Cir. 1976).

[117] Two potential justifications have been articulated: (1) the dismissal procedure is necessary to protect the mooted judgment's precedential effect, *see infra* note 119, and (2) potential confusion may arise if the *Munsingwear* procedure is applied to judgments without preclusive consequences, *see infra* note 118.

[118] It has been argued that the application of the *Munsingwear* doctrine might be misleading because it implies that the mooted judgment had preclusive consequences when in fact it did not, and therefore under such circumstances the doctrine should not be applied. *See* Petitioner's Brief in Support of Motion to Vacate District Court Order and Remand at 4, FTC v. Food Town Stores, 547 F.2d 247 (4th Cir. 1977). However, as the text suggests, the *Munsingwear* procedure should be considered neutral as to the inherent preclusive value of the mooted judgment. Further, at least with respect to the particular judgment at issue, any preclusive effect which might erroneously be implied will be purged when the vacation/dismissal order is entered.

[119] To the extent that application of the *Munsingwear* procedure affects other legal consequences of the judgment, such as the judgment's precedential value, which dismissal would not affect, then the procedure chosen will lead to different results. *See generally infra* text accompanying notes 390-420. On just these grounds, it has been argued that dismissal, rather than the *Munsingwear* procedure, is appropriate for judgments that cannot spawn preclusive effects. Thus the mooted judgment's precedential value will remain unimpaired. *See* Petitioner's Brief in Opposition to Respondents' Cross-

position is inappropriate when a judgment can have no future res judicata or collateral estoppel application really suggests no more than that it is unnecessary to secure the desired end.

Further, the *Munsingwear* approach has two decided virtues. First, the result is reached with the minimum judicial effort. No extended analysis of the possible preclusive effect of the mooted judgment is required. Second, any chance of erroneously allowing a judgment with preclusive effects to remain outstanding is avoided.[120] Perhaps for these reasons, the Supreme Court has repeatedly applied the *Munsingwear* procedure to preliminary injunctions, and to related matters moot on appeal, without discussing whether the underlying judgment would have supported preclusive consequences.[121]

Motion to Vacate Both the District Court's and the Fourth Circuit's Orders at 2, FTC v. Food Town Stores, 547 F.2d 247 (4th Cir. 1977). However, if the *Munsingwear* procedure leads to the elimination of a judgment's precedential value, then unless that is an unintended consequence, the distinction between dismissal and the *Munsingwear* approach points to the opposite conclusion. The underlying goal of protecting parties from the legal consequences of unreviewed judgments would be fulfilled only by application of the *Munsingwear* procedure.

[120] If the dual approach remains, notions of judicial comity suggest that a subsequent court should honor the appellate court's determination that the mooted judgment could spawn no preclusive consequences, even if that judgment is erroneous.

[121] In the *Munsingwear* opinion itself, the Court cited with approval several preliminary injunction cases in which mooted decisions were treated by the vacation/dismissal procedure. United States v. Munsingwear, Inc., 340 U.S. 36, 39 n.2 (1950) (citing, *e.g.*, SEC v. Long Island Lighting Co., 325 U.S. 833 (1945); Retail Food Clerks & Managers Union, Local 1357 v. Union Premier Food Stores, 308 U.S. 526 (1940); Leader v. Apex Hosier Co., 302 U.S. 656 (1937); Hargis v. Bradford, 283 U.S. 781 (1931) (the court of appeals affirmed a "temporary injunction," although by its terms the injunction appears permanent); United States v. Alaska S.S. Co., 253 U.S. 113 (1920)). The Court has continued to follow this approach in subsequent cases. *See, e.g.*, Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 465 (1982); University of Texas v. Camenisch, 451 U.S. 390, 394, 398 (1981); Building & Constr. Trade Council v. Samoff, 414 U.S. 808 (1973); Baker v. Pennsylvania, 401 U.S. 902 (1971); Los Angeles Herald Examiner v. Kennedy, 400 U.S. 3 (1970); Sears Roebuck & Co. v. Carpet Layers Local 419, 397 U.S. 655 (1970); Publishers' Ass'n v. New York Mailers' Union No. 6, 376 U.S. 775 (1964); Brotherhood of R.R. Trainmen v. Chicago & Ill. Midland Ry., 375 U.S. 18 (1963). *But see* Penn-Central Merger & N & W Inclusion Cases, 389 U.S. 486, 503 (1968); *cf.* Alabama v. Davis, 446 U.S. 903, 904 (1980) (mem.) (Stevens, J., dissenting) (Justice Stevens, in dissent, suggests that applying the *Munsingwear* doctrine to the moot appeal in that case may be unwarranted because "it is difficult to see what harm would flow to the State if we were simply to let the judgment of the Court of Appeals stand [since] [t]here is no realistic possibility that the judgment could 'spaw[n] any legal consequence.' ").

B. The Cause of Mootness

A second possible limitation on the *Munsingwear* doctrine turns on who is responsible for the case becoming moot. In *Munsingwear*, the Government lifted price regulations, mooting the Justice Department's suit. The Court found that review was "prevented through happenstance," because price decontrol was outside the control of the parties.[122] Under these circumstances the Court found the vacation/dismissal procedure an appropriate prophylactic to protect the parties from being "prejudiced by a decision which in the statutory scheme was only preliminary."[123] When mootness is caused by the appellant, the appellee, or joint action of the parties, countervailing considerations arise which might warrant treating the unreviewed judgment differently.

The strongest case for according collateral effect to a judgment moot on appeal arises when mootness is caused by the appellant. For example, assume that *X* sues *Y* to enjoin use of an allegedly discriminatory test for employment. The district court finds for *X*. If *Y* abides by the decision and does not appeal, the judgment becomes conclusive and res judicata and collateral estoppel attach.[124] If *Y* first appeals, and then, while the appeal is pending, agrees to permanently refrain from using the test, the appeal may be moot.[125] If the *Munsingwear* procedure were employed, the judgment would lose its legal consequences.

Y should not be treated differently in the two situations. Rather than losing a statutory right to appeal through no fault of its own, *Y* voluntarily waives its right to pursue the appeal. Whether waiver arises by acquiescence in the judgment immediately after it is entered, or while appeal is pending, is not a material difference.[126]

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[122] United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950). As one author has noted, since the United States was a party to the action and an agency of the United States instituted decontrol, the United States, rather than happenstance, might be seen as the cause of mootness. However, the Court apparently did not take this view in *Munsingwear*. *See* 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 541 n.11.

[123] United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950).

[124] As the Restatement (Second) makes clear, failure to take an appeal does not strip a valid, final judgment of its collateral estoppel effect except when appeal is precluded as a matter of law. RESTATEMENT (SECOND) § 28 comment a (1982).

[125] *See supra* note 7.

[126] *See* Ringsby Truck Lines v. Western Conference of Teamsters, 686 F.2d 720 (9th Cir. 1982); 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 543-44. One could argue that applying the *Munsingwear* approach in these circumstances facilitates a form of unilateral settlement by encouraging appellants to forego their right to appeal in exchange for a diminution in the effect of the original judgment. But if that were the system's goal, it would be more efficient to simply limit the legal consequences of unappealed judgments.

Further, applying the *Munsingwear* doctrine in these circumstances could have unjust consequences. If there were a risk of subsequent use of the adverse judgment,[127] a sophisticated appellant could first appeal, then moot the action and request a *Munsingwear* disposition.[128] To countenance such action would encourage frivolous appeals to secure *Munsingwear* protection, and would allow the appellant unilaterally to deprive the lower court victor of the full value of the judgment it had received.[129]

Mootness caused by actions of the appellee presents similar considerations. Using the previous example of a suit to enjoin the use of an employment test, assume that *Y* wins and *X* appeals. *Y*, if an institutional litigant, may be more concerned with the precedential or collateral estoppel effects of the judgment than use of the particular test.[130] If mootness caused by appellees falls outside the *Munsingwear* doctrine,[131] *Y* might abandon the test, thus mooting the appeal, to insulate the judgment from review. Allowing the initial judgment to stand (1) encourages a form of compromise (the appellee retains the judgment but foregoes its direct application), (2) does not encourage frivolous appeals

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[127] If, in our example, *Y* feared monetary exposure in suits by those who took the test, *Y* would be quite interested in overturning a finding that the test was impermissibly discriminatory. To accomplish that result by filing an appeal and then mooting the case might be more advantageous than submitting to the uncertainty of review, particularly if the damage actions were to be tried in a forum more favorable to *Y*'s position.

[128] *Cf.* Finberg v. Sullivan, 658 F.2d 93, 97 n.6 (3d Cir. 1980).

[129] In winning a judgment a party, through merger or bar, receives binding assurance of protection should the same suit arise again between the parties. A measure of protection is accorded in factually related proceedings through collateral estoppel. And, for institutional litigants, precedent is created for use in factually and legally similar situations. Each of these components of value may be jeopardized if the *Munsingwear* approach is applied.

[130] For example, public interest groups, or the government, often will be involved in litigation as much to develop the law as to secure the particular object of the litigation or defend against it. *See, e.g.*, Rabin, *Lawyers for Social Change: Perspective of Public Interest Law*, 28 STAN. L. REV. 207, 222-23 (1976); *cf.* Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337, 343 (1978); Note, *In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice*, 90 YALE L.J. 1436, 1438-39 (1981). Thus it may be advantageous to insulate a particular decision from review, particularly if the opinion is strong or the appellate forum hostile. This assumes, of course, that the opinion's continued precedential effect will turn upon whether or not the *Munsingwear* approach is taken. *See infra* text accompanying notes 390-420.

[131] While there appears to be scant discussion of treating mootness by appellees as outside the scope of the *Munsingwear* doctrine, Justice Stevens's dissent in Alabama v. Davis, 446 U.S. 903, 904 (1980) (mem.) (Stevens, J., dissenting), may be read to support such an approach.

(the appellant is given no incentive to pursue the appeal other than to seek reversal of the initial judgment, or to pressure the appellee as in all appeals), and (3) does not deprive a party of something it had won (the appellant does not lose the value of a positive judgment as it was the loser in the court below). Nevertheless, the harm to the appellant of saddling it with the consequences of the adverse judgment, when its statutory right to appeal has been denied through the actions of the opposing party, seems too harsh.[132] If an appellant acts to moot the appeal, it has waived its right to appellate consideration. The same is not true when its adversary intercedes to prematurely end the litigation.[133]

Mootness caused by the joint action of the parties is typified by settlement. As used here, settlement connotes a bargained agreement to end the litigation, not the unilateral acquiescence of one of the parties to its opponent's position.[134] In this situation, perhaps the parties

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[132] *See* Wisconsin v. Baker, 698 F.2d 1323, 1330 (7th Cir.), *cert. denied*, 103 S. Ct. 3537 (1983); FTC v. Food Town Stores, 547 F.2d 247, 249 (4th Cir. 1977); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 316.

[133] Applying the *Munsingwear* doctrine to mootness caused by the appellee is not without risks for the appellant. If the appellee secures a favorable judgment, but is sufficiently unhappy with aspects of the court's opinion, the appellee might moot the appeal in order to have the judgement purged of its precedential effect, assuming the *Munsingwear* procedure purges cases of their precedential value. *See infra* text accompanying notes 390-420.

Of course, appellants always run the risk that favorable aspects of an opinion below might be lost on appeal, but the usual risk is a loss on the merits. If appellants' interests also can be affected by judgment-sacrificing appellees, an additional concern arises. To insulate appellants from this latter concern, one might require that the *Munsingwear* doctrine be raised by appellants. An appellant would have to choose between being subject to the judgment's preclusive effects, but retaining the favorable precedent, or the reverse.

However, the desirability of protecting appellants in this fashion is unclear. The right to appeal is provided to secure relief from judgments. Mere disagreement with nonbinding aspects of a court's decision provides no right to appeal. *See infra* text accompanying note 407. Since the *Munsingwear* doctrine protects appellants from the loss of their right to appeal, preclusion, not stare decisis, is the central interest involved. Nevertheless, while precedential concerns do not give rise to a right to appeal, they still are affected by an appeal's outcome. Therefore, although these concerns may lie outside the core of the right to appeal, their vindication, when other factors sanctioning appeal are present, is part of the right to appeal Congress afforded. *But cf. infra* text accompanying notes 407-09.

[134] *But cf.* Ringsby Truck Lines v. Western Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982) (failing to recognize the distinction in the text, treating settlement as an exception to *Munsingwear* because the appellant's own actions caused the dismissal).

should be allowed to treat the continued viability of the judgment as a negotiable issue.[135] Such an approach would encourage settlement,[136] and in all probability few litigants would appeal solely to make this a portion of the settlement agenda. Whatever the parties' choice as to the judgment's continued effect, neither would lose the full value of the judgment, or the right to attack it, by actions beyond its control.

Party control of res judicata may be appropriate, as it pertains only to parties or their privies.[137] The same is not true for collateral estoppel, however, given the demise of the mutuality doctrine. Thus, a question arises whether parties should be allowed to determine these collateral consequences of a court's judgment.[138] Negotiation over the

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[135] Of tangential interest are three interrelated suits brought by Sidney Sampson charging Ampex, Sony, and RCA with patent infringement. Sampson v. Ampex Corp., 478 F.2d 339 (2d Cir. 1973); Sampson v. RCA, 434 F.2d 315 (2d Cir. 1970); Sampson v. Sony Corp., 434 F.2d 312 (2d Cir. 1970). In his suit against RCA, Sampson lost at the trial level. After filing for appeal, the case was settled and the appeal dismissed. The other cases remained extant, however. Sampson then sought to have the trial court judgment vacated under Rule 60(b) of the Federal Rules of Civil Procedure for two reasons: (1) to avoid a stipulation in the Sony case to be bound by the RCA judgment, and (2) to foreclose the judgment's use as collateral estoppel in the Ampex litigation. The motion to vacate was denied and that ruling was upheld on review. The court appeared to feel that Sampson received the benefit of his bargain in his settlement of the RCA appeal, in that he should have considered both the Sony stipulation and the Ampex litigation when he settled. A Rule 60(b) motion could not be used to avoid the consequences of his decision to settle the RCA litigation and forego an appeal from an adverse ruling. *Sampson v. RCA*, 434 F.2d at 317. Interestingly, the court did not suggest that Sampson might have avoided the dilemma by making a *Munsingwear* request instead of accepting dismissal in the initial action.

[136] As a general matter, the law encourages the resolution of disputes by settlement. Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910); Insurance Concepts, Inc. v. Western Life Ins. Co., 639 F.2d 1108, 1111 (5th Cir. 1981); Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1013-14 (7th Cir. 1980); Auleva v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969). By allowing flexibility with respect to the continued effect of the initial judgment, a party favoring legal consequences attaching to a judgment will be more likely to settle the underlying dispute (while preserving the judgment's legal consequences or receiving compensation for their loss) than if loss of these consequences attached automatically upon settlement through operation of the *Munsingwear* doctrine. *See generally* 1B MOORE'S, *supra* note 12, ¶ 0.444[1], at 795; 18 WRIGHT, MILLER, & COOPER, *supra* note 12, § 4433, at 318.

[137] While primarily of personal concern to the parties, the doctrine of res judicata serves public goals as well. *See infra* note 336.

[138] From one perspective, the choices parties make in bringing and conducting litigation inevitably define the issues adjudicated, the nature and quality of the judgment rendered and other matters instrumental in determining whether the requirements are met for legal consequences to attach to a court's actions. But once a judgment has been rendered from which legal consequences would flow, should the parties be allowed to

applicability of the *Munsingwear* doctrine would allow the parties in one suit to bargain away the collateral estoppel claims of parties to subsequent litigation.[139] Further, to the extent choosing the *Munsingwear* approach rather than dismissal of the appeal alters the precedential effect of the unreviewed judgment, that determination seems particularly appropriate for the court to make, not the parties. To allow the parties to dictate the continued use of judgments mooted by settlement would allow them to affect the rights of other litigants and the power of the court.

Nevertheless, these concerns may be outweighed by the desire to facilitate settlement of the ongoing litigation. Encouraging settlement may go farther in reducing the burden on the court system, a principal concern of the preclusion doctrines, than would preserving a judgment's preclusive effects for use in future cases which may never arise.[140]

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alter those consequences? *Cf.* Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1190 & n.86, 1192 (5th Cir. 1982), *cert. denied sub nom.* Bintliff v. Chemetron Corp., 103 S. Ct. 1254 (1983); Angstrohm Precision v. Vishay Intertechnology, 567 F. Supp. 537, 540-41 (E.D.N.Y. 1982); Aetna Cas. & Sur. Co. v. Jeppesen & Co., 440 F. Supp. 394, 399-406 (D. Nev. 1977), *vacated on other grounds*, 642 F.2d 339 (9th Cir. 1981). These cases reflect a growing judicial reluctance to allow parties, through settlement, to curtail the offensive collateral estoppel effect to be accorded a decision in subsequent litigation brought by strangers to the initial action.

[139] Parties often enter into consent judgments in which they define the scope of the judgment's collateral effect, and settlement on appeal could be viewed as a form of consent judgment. Consent judgments at the trial level, however, do not have independent collateral estoppel effect, since no issues are actually litigated. *See* RESTATEMENT (SECOND) § 27 comment e (1982). *But see* Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1187-92 (5th Cir. 1982) (finding that when, after full trial a court prepares findings of fact and conclusions of law, but subsequently withdraws them solely to effectuate settlement by the parties, issues decided in the withdrawn findings are sufficiently firm to support their use as collateral estoppel in subsequent litigation brought by a nonparty to the initial action), *cert. denied*, 103 S. Ct. 1254 (1983); *accord* Angstrohm Precision v. Vishay Intertechnology, 567 F. Supp. 537, 540-41 (E.D.N.Y. 1982). Any collateral effect consent judgments have is best viewed as a matter of contractual agreement by the parties, extending rights that would not otherwise lie. *See* 1B MOORE'S, *supra* note 12, ¶ 0.444[3], at 814-16; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4443, at 383. In contrast, when parties through settlement invoke the *Munsingwear* doctrine, the rights of others to the collateral use of a judgment are now restricted. This difference may be significant. *Cf.* Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1187-92 (5th Cir. 1982).

[140] *See* 1B MOORE'S, *supra* note 12, ¶ 0.444[1], at 794-95. It has been argued that resolving disputes by settlement rather than judicial decision provides additional benefits beyond the saving of judicial resources and those of the parties, including: (1) providing a higher quality of justice; (2) promoting the litigants' interests in autonomy; and (3) facilitating the restoration of working relationships among the parties. *See*

Despite the theoretical arguments for treating these situations differently based on the cause of mootness, the Supreme Court apparently would apply the *Munsingwear* doctrine to all of them. While *Munsingwear* involved mootness by happenstance,[141] the Court cited cases involving mootness caused by the appellant,[142] the appellee,[143] and joint action of the parties[144] in support of the vacation/dismissal procedure.[145]

Subsequent case law and commentary supporting differing dispositions based upon the cause of mootness have focused primarily on mootness caused by the appellant.[146] The most significant case is *New Left Education Project v. Board of Regents*,[147] in which New Left challenged the constitutionality of campus solicitation rules promulgated by the Texas Board of Regents. Initially a three judge district court enjoined enforcement of the rules on first amendment grounds.[148] On appeal the Supreme Court found that the three judge court had been improperly convened, and that as a consequence appeal would lie not to the Supreme Court, but to the Court of Appeals for the Fifth Circuit. The Court vacated the judgment below and remanded the case to the district court for it to issue a fresh decree, so that appeal to the circuit court would be timely.[149] Prior to the entry of the fresh decree, the

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Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1202 n.5 (5th Cir. 1982) (Reavley, J., dissenting), *cert. denied*, 103 S. Ct. 1254 (1983). Judge Reavley cited, *inter alia*, Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1976) (reprint of the Federal Judicial Center, Proceedings — Seminar for Newly Appointed United States District Judges, Sept. 13-18, 1976), and Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 646, 656-57 (1976).

[141] *See supra* text accompanying notes 122-23.

[142] *See, e.g.*, Brownlow v. Schwartz, 261 U.S. 216 (1923).

[143] *See, e.g.*, Heitmuller v. Stokes, 256 U.S. 359 (1921); Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919).

[144] *See, e.g.*, SEC v. Philadelphia Co., 337 U.S. 901 (1949); SEC v. Engineers Pub. Serv. Co., 332 U.S. 788 (1947); Farmers Grain Co. v. Brotherhood of Locomotive Firemen & Enginemen, 332 U.S. 748 (1947); Hammond Clock Co. v. Schiff, 293 U.S. 529 (1934).

[145] *See* United States v. Munsingwear, Inc., 340 U.S. 36, 39 n.2 (1950).

[146] *See* Wisconsin v. Baker, 698 F.2d 1323, 1330-31 (7th Cir.), *cert. denied*, 103 S. Ct. 3537 (1983); Ringsby Truck Lines v. Western Conference of Teamsters, 686 F.2d 720 (9th Cir. 1982); New Left Educ. Project v. Board of Regents, 472 F.2d 218 (5th Cir.), *vacated as moot*, 414 U.S. 807 (1973); 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 543-44; *cf.* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 294.

[147] 414 U.S. 807 (1973).

[148] New Left Educ. Project v. Board of Regents, 326 F. Supp. 158 (W.D. Tex. 1970).

[149] New Left Educ. Project v. Board of Regents, 404 U.S. 541 (1972).

Regents repealed the contested rules.

On appeal, the circuit court found that the Regents' action mooted the case. That finding raised two issues. First, did mootness arise before entry of the district court's judgment? If it did, then the district court was without power to enter a judgment and its judgment would have to be vacated and the case dismissed. Second, if mootness arose on appeal, should the *Munsingwear* doctrine be followed? As to the first issue, technically mootness arose prior to judgment. But, since entry of the fresh decree constituted no more than a technicality to permit appeal to the proper court, "in every substantial sense the case had been 'on appeal' ever since that [initial] judgment was entered."[150] Thus, the court held, the case became moot on appeal.

With respect to the second issue, the Fifth Circuit noted the *Munsingwear* procedure, but sought to distinguish cases which become moot through the action of the appellant. In such circumstances the court felt the *Munsingwear* goal of protecting the appellant from the prejudicial effect of an unreviewed judgment disappeared. To hold otherwise would provide appellants "with an extra judicial means of depriving the appellee of the full benefit of a judgment to which he is otherwise entitled." Thus dismissal of the appeal, rather than vacation of the judgment and dismissal of the suit, would be warranted.[151]

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[150] New Left Educ. Project v. Board of Regents, 472 F.2d 218, 220 (5th Cir.), *vacated as moot*, 414 U.S. 807 (1973).

[151] *Id.* at 220-21. In support of its reasoning the court cited five decisions: Dakota County v. Glidden, 113 U.S. 222 (1885) (case mooted by settlement); Taylor v. United States, 410 F.2d 392 (5th Cir. 1969) (case mooted when appellant paid contempt fine being appealed); Grathwohl v. United States, 401 F.2d 166 (5th Cir. 1968) (case mooted when appellant complied with IRS summons being appealed); Bingham v. Yingling Chevrolet Co., 297 F.2d 341 (10th Cir. 1961) (case mooted when appellant paid adverse judgment being appealed); Cover v. Schwartz, 133 F.2d 541 (2d Cir. 1943) (case mooted by appellant dropping patent infringement claim on appeal), *cert. denied*, 319 U.S. 748 (1943).

Dakota County, the only Supreme Court decision cited, does not involve mootness by the unilateral act of the appellant, but rather mootness by settlement. Further, in 1885, the Supreme Court dismissed cases mooted on appeal regardless of the cause of mootness. *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 79. Therefore, it does not support the use of different appellate dispositions depending upon the cause of mootness.

The four circuit court cases relied upon are silent on whether the parties requested application of the *Munsingwear* doctrine. As discussed *infra* text accompanying notes 322-33, such a request may be necessary to invoke the doctrine, so that in its absence dismissal might be appropriate, again regardless of the mooting cause. Of all the cases cited, only *Cover* directly addresses the need to provide different dispositions depending upon the cause of mootness. Although not cited by the Court, dictum in Van Geldern v.

On appeal, the Supreme Court, without opinion or citation to authority, ordered the judgment vacated and the case remanded to the district court to be dismissed as moot.[152] Without the benefit of the Court's reasoning, it is unclear whether its action was predicated upon a view that the case was moot before the district court judgment was entered, or that the *Munsingwear* doctrine pertains even to mootness caused by the appellant's actions.[153] If, as seems likely, the Court relied upon the latter rationale,[154] there remains a need for an explanation of the result.[155]

Perhaps because the Court has addressed this issue in such an unilluminating fashion, case law[156] and scholarly commentary[157] persist in supporting the cause specific approach. A recent example is the Ninth Circuit's opinion in *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*.[158] Without discussing *New Left*, the Ninth Circuit concluded that mootness by settlement, which occurred in *Ringsby*,

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Chavez, 392 F.2d 578 (9th Cir. 1968), also supports the Fifth Circuit's position in *New Left*.

[152] New Left Educ. Project v. Board of Regents, 414 U.S. 807 (1973).

[153] The latter appears far more likely, however. Of the six questions presented on review to the Supreme Court, none dealt with the issue of mootness arising before the district court judgment was entered. The question concerning mootness on appeal was presented in the following terms: "[w]hether the United States Court of Appeals for the Fifth Circuit erred in dismissing the appeal as moot, without remanding for dismissal, but allowing the judgment of the District Court to stand without reviewing the merits of the points raised on appeal." Petition for Certiorari at 2, New Left Educ. Project v. Board of Regents, 414 U.S. 807 (1973).

[154] *See* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 294; Note, *Supreme Court Disposition*, *supra* note 34, at 949 n.21; *supra* note 153; *cf.* Finberg v. Sullivan, 658 F.2d 93, 96 n.4 (3d Cir. 1980).

[155] The Court may have felt that the benefits of a cause specific dispositional structure might be outweighed by the added complexity of involving the appellate courts in an inquiry as to the cause of mootness. In most instances, however, that burden would appear minimal.

[156] *See, e.g.*, Wisconsin v. Baker, 698 F.2d 1323, 1330-31 (7th Cir.), *cert. denied*, 103 S. Ct. 3537 (1983); Ringsby Truck Lines v. Western Conference of Teamsters, 686 F.2d 720 (9th Cir. 1982); *cf.* FTC v. Food Town Stores, 547 F.2d 247, 249 (4th Cir. 1977) (finding *Munsingwear* appropriate on its facts, in part because "the controversy has been mooted by circumstances not under the control of the appellant Commission"). *See generally* Commodity Futures Trading Comm'n v. Board of Trade, 701 F.2d 653, 657 (7th Cir. 1983) (implicitly criticizing use of the *Munsingwear* doctrine when the appellant causes mootness, but acknowledging such application as the Supreme Court's position).

[157] *See* 1B MOORE'S, *supra* note 12, ¶ 0.416[6] (supporting dismissal when appellant moots action, with no reference to *New Left*).

[158] 686 F.2d 720 (9th Cir. 1982).

presents an exception to the *Munsingwear* doctrine. The court's logic and language draw a distinction between "litigants who are and are not responsible for rendering their case moot,"[159] and would apply the *Munsingwear* doctrine only to the latter. The court appears to perceive the *Munsingwear* doctrine as providing only a limited exception to the effects afforded final judgments, an exception necessary to protect appellants from the inadvertent loss of the protection afforded by the right of appeal. If an appellant moots the appeal,[160] the protection is waived[161] and the policies of preclusion prevail.[162]

C. Contextual Considerations

In preceding sections of this Article the structural context of the litigation in which mootness on appeal arises was not considered. Yet such factors as the level of appeal, the nature of the tribunal rendering the initial judgment, and the source of the law involved in the initial litigation all may have profound effects on whether the *Munsingwear* doctrine should be followed. The Article now turns to these issues.

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[159] *Id.* at 721.

[160] For the court, the key is the litigant's responsibility for the loss of the right to appeal. Whether the appellant acts unilaterally or collectively, as in settlement, is irrelevant. *Id.* at 722.

[161] In such circumstances the appellant has voluntarily foregone a right to appeal, and should be treated no differently than a party who takes no appeal from an adverse judgment. *Id.* at 722.

[162] The court expressed concern that:

> If the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books. "It would be quite destructive to the principle of judicial finality to put such a litigant in a position to destroy the collateral conclusiveness of a judgment by destroying his own right of appeal." 1B Moore's Federal Practice ¶ 0.416[6] at p. 2327 (2d ed. 1982). That possibility would undermine the risks inherent in taking any controversy to trial and, in cases such as this one, provide the dissatisfied party with an opportunity to relitigate the same issues.

Id. at 721.

While refusing to follow the vacation/dismissal procedure, the court explicitly left open the questions of "[w]hether [the action] should be dismissed by the district court and whether the lower court judgment should continue to have collateral estoppel effect." The court acknowledged the possibility that "the court below or one in which collateral estoppel is asserted" could deny the judgment collateral estoppel effect if the "equities and hardships" of the cases "vary the balance between the competing values of right to relitigate and finality of judgment." *Id.* at 722.

1. Level of Appeal in the Federal System

On its facts, *Munsingwear* sets forth a procedure for disposing of cases which become moot on appeal from federal district courts to circuit courts. In numerous decisions both before[163] and after[164] *Munsingwear*, the Supreme Court also has relied on the vacation/dismissal procedure for cases coming before it from lower federal courts.[165] Thus, the *Munsingwear* doctrine appears applicable regardless of the level of appeal within the federal system.

Recently, a different approach has been advocated for judgments mooted while on appeal to the Supreme Court. The arguments advanced for change vary according to the rationale perceived to underlie denying mooted judgments legal consequences:[166] the need for appellate review for the correction of errors,[167] or the need to protect parties from judgments that are premature within a statutory scheme.[168]

One student author, focusing on the corrective function of appeal, argues that the differing roles played by circuit and Supreme Court review justify limiting the *Munsingwear* approach to the former.[169] While one level of appellate review may be necessary to increase the likelihood that a correct decision is made, a second is not.[170] Supreme

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[163] In *Munsingwear* the Court cited more than thirty Supreme Court cases in support of the vacation/dismissal procedure. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 39 n.2 (1950). Since the early 1900's vacation/dismissal has been the established procedure of the Supreme Court. *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 79.

[164] *E.g.*, Devine v. Sullivan, 456 U.S. 986 (1982); Lane v. Williams, 455 U.S. 624, 634 (1982); Murphy v. Hunt, 455 U.S. 478, 484 (1982); Alabama v. Davis, 446 U.S. 903 (1980); County of Los Angeles v. Davis, 440 U.S. 625, 634 (1979); Hopper v. Barnett, 439 U.S. 1041 (1978); Guest v. Fitzpatrick, 429 U.S. 1084 (1977); Van Lare v. Hurley, 421 U.S. 338, 348 (1975); South Dakota v. McCay, 420 U.S. 904 (1975); Regan v. Johnson, 419 U.S. 1015 (1974); *see* ROBERTSON & KIRKHAM, *supra* note 34, § 273; STERN & GRESSMAN, *supra* note 1, § 18.4.

[165] The Court's approach when mootness blocks review of a case from a state court is discussed *infra* at text accompanying notes 198-223.

[166] Without addressing the theoretical underpinnings of the *Munsingwear* doctrine, several authorities advance the proposition that the Supreme Court may, in its discretion, ignore the *Munsingwear* approach and use alternative dispositions for cases that become moot while on appeal. *See, e.g.*, Bennett v. Local 456, Teamsters Union, 459 F. Supp. 223, 231 n.17 (S.D.N.Y. 1978); ROBERTSON & KIRKHAM, *supra* note 34, § 273, at 500; Comment, *Disposition of Moot Cases*, *supra* note 16, at 78 n.3, 81; *see also infra* note 299.

[167] *See supra* text accompanying notes 35-37.

[168] *See supra* text accompanying notes 38-42.

[169] Note, *Supreme Court Disposition*, *supra* note 34, at 953-58.

[170] *Id.* at 954; *see* Ross v. Moffitt, 417 U.S. 600, 616-17 (1974).

Court review primarily serves institutional goals such as developing uniform national rules of law, rather than party specific goals such as the correction of individual errors.[171] Consistent with this role, the Court hears and reverses few cases.[172] The need for an assurance of correctness before a judgment will be given full legal consequences is met by circuit court review.[173] As subsequent mootness does not endanger the quality of the decision below, a judgment moot on appeal from a circuit court to the Supreme Court simply should be dismissed, preserving the preclusive and precedential effects of an outstanding judgment.[174]

Were the *Munsingwear* doctrine rooted in a correction of error theory, as is the Restatement (Second) position, the above argument would

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[171] Note, *Supreme Court Disposition*, *supra* note 34, at 955-56.

[172] *Cf. id.* at 952 n.38. In its 1981 Term, the United States Supreme Court disposed of 2417 paid (i.e., excluding in forma pauperis) appeals and petitions for review. *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 308 (1982). Review was granted in only 299, or 12.4% of those cases, not including 18 cases summarily reversed, affirmed, or vacated. Of the 230 grants of certiorari encompassed by these figures, approximately 82% were either reversed or vacated in whole or in part. *Id.* Assuming a similar reversal/vacation rate in the 69 cases disposed of on appeal and in the 18 cases disposed of summarily (reversal/vacation rates are not readily available for these classes of cases), this results in a reversal/vacation rate of no more than 10% of all appeals and petitions reaching the Court in its 1981 Term. For the Court's 1980 Term, the comparable figures are: review granted in 10.6% of all appeals and petitions for review, reversal or vacation in whole or in part in about 84% of the cases on certiorari, and an overall reversal/vacation rate for all cases of about 9%. *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 342 (1981). Inclusion of in forma pauperis filings would skew the results further downward. In the 1981 Term, in only 13, or 0.6% of 2033 such filings, was review granted.

[173] Under this analysis, in those limited instances in which appeal is provided directly from a district court to the Supreme Court, *see, e.g.*, 28 U.S.C. §§ 1252, 1253 (1976), application of the *Munsingwear* doctrine by the Supreme Court would be appropriate, since the protection of one level of appellate review would be lost. Note, *Supreme Court Disposition*, *supra* note 34, at 957 n.57. An exception to the general analysis set forth in the text also might arise in instances of obligatory Supreme Court review, at least when Congress intended such review as a significant protection of the rights of the litigants involved. *Id.*

[174] Note, *Supreme Court Disposition*, *supra* note 34, at 957-58. However, should certiorari be granted before mootness arises, one could argue that the Court's granting review of the lower court's decision might throw the judgment's correctness sufficiently in doubt to warrant use of the *Munsingwear* approach. In recent years, of those cases reviewed in which certiorari is granted, approximately 80-85% are vacated or reversed in whole or in part. *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 308 (1982); *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 342 (1981); *see also infra* note 396.

be persuasive.[175] But despite some recognition by the Supreme Court of a link between the corrective function of review and legal consequences attributed to unreviewable judgments,[176] the basic factor underlying the *Munsingwear* approach is the need to protect parties from the effects of a judgment when the legislatively granted opportunity to appeal has been lost.[177] Focusing on the differing roles played by circuit court and Supreme Court review does not address this concern.

Even under the traditional rationale underlying federal practice in this area, however, attempts have been made to limit the applicability of the *Munsingwear* doctrine at the Supreme Court level. At its core, the issue turns on whether the *Munsingwear* doctrine is meant to protect an individual from being bound by a judgment when one loses the right to seek review, or only when an established right to review is lost. Three views predominate. The broadest is that as long as there is a right to seek review, and that right is cut off, the *Munsingwear* doctrine applies.[178] A second approach would limit the doctrine in those instances when it could be determined that review, although available, would not be granted.[179] The third view would treat the doctrine as applicable only when review is available of right.[180]

Since most cases before the circuit courts involve appeals of right, the *Munsingwear* doctrine would apply to judgments moot at the circuit court level regardless of the view adopted. Supreme Court review of judgments from the federal system, however, is predominantly discre-

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[175] As discussed *supra* in the text accompanying notes 35-37, the Restatement (Second) in § 28(1) suggests that the collateral estoppel effect of mooted judgments should be limited because, absent review, they lack sufficient assurance of correctness to justify their collateral use. Given this theoretical justification, a question arises regarding the extent of the section's applicability in systems affording multiple levels of review. By its terms, the section denies collateral estoppel effect in those instances in which a party "could not, as a matter of law, have obtained review of the judgment in the *initial* action." RESTATEMENT (SECOND) § 28(1) (1982) (emphasis added). Whether this language was intended as a limitation is unclear. There is no discussion of the point in the comments and Reporter's note accompanying the section, or in the reports of the ALI proceedings at which the provision was reviewed. *See* 54 A.L.I. PROC. 158-59, 194-97 (1977); 53 A.L.I. PROC. 307, 333, 338-39, 346-47 (1976); 52 A.L.I. PROC. 321, 362, 367-68, 371-72 (1975); 50 A.L.I. PROC. 273, 337 (1973). Nevertheless, if one accepts the premise underlying the Restatement (Second), that appellate review is critical for the correction of errors, the force of this concern diminishes at each succeeding appellate level.

[176] *See supra* text accompanying notes 45-46.

[177] *See supra* text accompanying note 42.

[178] *See infra* text accompanying notes 181-88.

[179] *See infra* text accompanying notes 190-97.

[180] *See infra* text accompanying note 189.

tionary. Thus, use of the *Munsingwear* procedure by the Supreme Court could be limited severely.

Consistent with the view that the opportunity for review is key, the Supreme Court applies *Munsingwear* to mooted cases on discretionary review.[181] Further, in *Durham v. United States*,[182] in which a petition for certiorari on a criminal conviction became moot when the petitioner died, the Court expressly declined to limit the vacation/dismissal procedure to appeals of right. In the Court's words:

> It is, of course, true that appeals are a matter of right while decisions on certiorari petitions are wholly discretionary. Congress, however, has given a right to petition for certiorari and petitioner exercised that right. No decision has been made on that petition prior to his death. Since death will prevent any review on the merits, whether the situation is an appeal or certiorari, the distinction between the two would not seem to be important for present purposes.[183]

Subsequently, however, in *Dove v. United States*,[184] the Supreme Court, in a brief order, simply dismissed a petition for writ of certiorari when death of the petitioner mooted his challenge to a criminal conviction. The Court noted, "to the extent that *Durham* may be inconsistent with this ruling, *Durham* is overruled."[185]

Although the import of the Court's decision is not clear,[186] most interpret *Dove* as creating a distinction, at least in the criminal setting, between moot appeals of right and moot discretionary appeals, with the vacation/dismissal procedure applicable to the former and dismissal of the appeal to the latter.[187] As one court explained in justifying the distinction, an appeal of right is "an integral part of [our] system for finally adjudicating . . . guilt or innocence," but discretionary review is

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[181] *E.g.*, Devine v. Sullivan, 456 U.S. 986 (1982); Lane v. Williams, 455 U.S. 624, 634 (1982); Alabama v. Davis, 446 U.S. 903 (1980); County of Los Angeles v. Davis, 440 U.S. 625, 634 (1979); Hopper v. Barnett, 439 U.S. 1041 (1978); Regan v. Johnson, 419 U.S. 1015 (1974).

[182] 401 U.S. 481, 483 n.* (1971) (overruled in Dove v. United States, 423 U.S. 325 (1976)) (scope of overruling unclear).

[183] *Id.*

[184] 423 U.S. 325 (1976).

[185] *Id.* (citation omitted).

[186] *See* United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980) (describing the *Dove* opinion as "42 cryptic, enigmatic words"); United States v. Moehlenkamp, 557 F.2d 126, 127 (7th Cir. 1977) (noting that "it is difficult to divine the intentions of the Supreme Court when it says so little").

[187] *See, e.g.*, United States v. Pauline, 625 F.2d 684 (5th Cir. 1980); United States v. Littlefield, 594 F.2d 682 (8th Cir. 1979); United States v. Moehlenkamp, 557 F.2d 126 (7th Cir. 1977); United States v. Bechtel, 547 F.2d 1379 (9th Cir. 1977).

not.[188] Thus, only in the former is a judgment cut off from review by mootness truly premature. If this interpretation of *Dove* is correct, and extends by analogy to civil suits as well, then a major change in the treatment of moot discretionary appeals is justified. One theory advanced to explain the apparent anomaly between the appeal of right/discretionary appeal dichotomy and the Supreme Court's continued practice of applying the *Munsingwear* procedure to both, is that the Supreme Court is bound to vacate and dismiss mooted appeals of right but treats mooted discretionary appeals identically by choice.[189]

A third position was first advocated by the Government in *Velsicol Chemical Corp. v. United States*[190] and has been renewed in subsequent cases.[191] The Government argued that the *Munsingwear* doctrine should apply when mootness arises to block consideration of appeals of right,[192] or discretionary appeals when jurisdiction has or would have been accepted, had mootness not occurred.[193] In such instances review which would have taken place is lost. When jurisdiction would not be exercised, however, review is not lost through mootness.[194] In those cases, the Court should deny certiorari rather than grant it for the sole purpose of entering a *Munsingwear* order, as is the current practice.[195]

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[188] United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977).

[189] Finberg v. Sullivan, 658 F.2d 93, 96 n.4 (3d Cir. 1980).

[190] *See* Brief for the United States in Opposition at 4-8, Velsicol Chem. Corp. v. United States, 435 U.S. 942 (1978).

[191] *See* Brief for the FTC in Opposition to the Petition for a Writ of Certiorari at 11 n.11, Dairymen, Inc. v. FTC, 103 S. Ct. 2452 (1983); Reply Memorandum from Petitioner at 2-3, SEC v. Board of Trade, 103 S. Ct. 434 (1982); Memorandum for the Secretary of Commerce in Opposition at 10, Fullilove v. Klutznick, 448 U.S. 448 (1980), *aff'g* Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978); Memorandum for the United States in Opposition at 4 n.4, Local 102, Int'l Ladies' Garment Workers Union v. United States, 439 U.S. 1070 (1979).

[192] *See* Brief for United States in Opposition at 5 n.4, Velsicol Chem. Corp. v. United States, 435 U.S. 942 (1978).

[193] *Id.* at 6. Others advocate a simpler approach — that *Munsingwear* should apply when certiorari is granted before mootness arises, but should not apply when mootness occurs before a certiorari decision is reached. *See* Brief in Opposition to the Petitions For a Writ of Certiorari at 8 n.13, Chicago Bd. of Options Exch. v. Board of Trade, 103 S. Ct. 434 (1982). Only in the former situation is an acknowledged right to review lost. *Id.*

[194] Brief for United States in Opposition at 6, Velsicol Chem. Corp. v. United States, 435 U.S. 942 (1978).

[195] The Court often grants certiorari in order to employ the *Munsingwear* procedure. *See, e.g.*, Tulare Lake Canal Co. v. United States, 103 S. Ct. 712 (1983); Devine v. Sullivan, 456 U.S. 986 (1982); Alabama v. Davis, 446 U.S. 903 (1980); Hopper v. Barnett, 439 U.S. 1041 (1978); Regan v. Johnson, 419 U.S. 1015 (1974); Petitioner's

The Supreme Court's response to this approach is unclear to date.[196] Nevertheless, the increased work required to make a jurisdictional decision, not required under present practice, may outweigh the benefit of preserving the legal consequences of the judgments involved.[197]

2. Nature of the Tribunal Rendering the Initial Judgment

To this point, the problems posed by mootness on appeal have been considered in the context of appellate review of lower federal court determinations. Yet judicial review by federal courts is of broader scope. For example, the Supreme Court reviews not only lower federal court decisions but state court decisions as well. Within the federal system, review is not limited to the decisions of lower courts, but also extends to decisions of administrative agencies. When decisions from these tribunals become moot on appeal, qualities of the tribunal, or the nature of its relationship to the federal court system, may warrant departure from the *Munsingwear* approach.

a. Appeals of State Court Judgments

In contrast to mooted appeals within the federal court system, appeals from state courts to the United States Supreme Court are not

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Reply Memorandum at 1-4, Velsicol Chem. Corp. v. United States, 435 U.S. 942 (1978) (citing United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) and ROBERTSON & KIRKHAM, *supra* note 34, at 624-25). *But see* 6A MOORE'S, *supra* note 1, ¶ 57.13, at 57-127.

[196] The Supreme Court denied certiorari to Dairymen, Inc. v. FTC, 103 S. Ct. 2452 (1983), Local 102, Int'l Ladies' Garment Workers Union v. United States, 439 U.S. 1070 (1979), and Velsicol Chem. Corp. v. United States, 435 U.S. 942 (1978). It is unclear whether the Court did so pursuant to the Government's theory, or because the cases were found to be live, but unworthy of Supreme Court review. *See* Commodity Futures Trading Comm'n v. Board of Trade, 701 F.2d 653, 657 (7th Cir. 1983); Note, *Supreme Court Disposition*, *supra* note 34, at 951. *But cf.* Brief for the FTC in Opposition to the Petition For a Writ of Certiorari at 11 n.11, Dairymen, Inc. v. FTC, 103 S. Ct. 2452 (1983) (the Solicitor General suggesting that the Court has adopted the *Velsicol* approach); Brief in Opposition to the Petition For a Writ of Certiorari at 10, SEC v. Board of Trade, 103 S. Ct. 434 (1982) (arguing that the Court adopted the *Velsicol* position sub silentio). In SEC v. Board of Trade, 103 S. Ct. 434 (1982), the Court followed the *Munsingwear* approach. Again it is unclear whether they did so pursuant to the Government's theory, or because *Munsingwear* applies to all mooted civil appeals from federal courts. In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court found a live controversy and decided the case on the merits.

[197] *See* Note, *Supreme Court Disposition*, *supra* note 34, at 952-53, 958.

subject to the *Munsingwear* procedure.[198] Traditionally,[199] the Supreme Court vacated the decision and remanded for such proceedings as the state court deemed appropriate.[200] Recently, without discussion, the Court has taken yet another approach, simply dismissing mooted appeals from state courts.[201]

The appropriate treatment of state court judgments moot on appeal to the United States Supreme Court turns on a number of competing factors. Viewed solely from the perspective of the policy underlying *Munsingwear* — to deny continued effect to premature judgments[202] — mooted appeals from state courts and federal courts should be treated identically.[203] In both of these situations mootness cuts off the possibility

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[198] Prior to 1919, the Supreme Court simply dismissed most cases moot on appeal, regardless of whether they came from the federal system or the state courts. After 1919, the Court adopted different approaches directing vacation and dismissal for cases from the federal system and vacation and remand for further proceedings for cases from state courts. *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 79-82. The modern practice with respect to appeals from state courts can be traced to the Court's decision in Allen & Reed v. Presbrey, 280 U.S. 518 (1929). *See* DeFunis v. Odegaard, 84 Wash. 2d 617, 626, 529 P.2d 438, 443 (1974).

[199] *See supra* note 198. For a discussion of emerging trends, see *infra* text accompanying notes 201, 220-23.

[200] *E.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974); Brockington v. Rhodes, 396 U.S. 41 (1969); Hainsworth v. Martin, 382 U.S. 109 (1965); Garvin v. Cochran, 371 U.S. 27 (1962); Local 8-6, Oil Workers Int'l Union v. Missouri, 361 U.S. 363 (1960); *see* STERN & GRESSMAN, *supra* note 1, § 18.4; ROBERTSON & KIRKHAM, *supra* note 34, § 273, at 501; 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 295; Note, *Supreme Court Disposition*, *supra* note 34, at 946 n.4.

[201] Despite the apparent consensus among the treatise writers that vacation and remand for further consideration is the standard disposition for mooted appeals from state courts, *see* authorities cited *supra* note 200, simple dismissal of the appeal has been used almost exclusively by the Supreme Court since 1966. *See, e.g.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982); District Attorney v. Sacramento County Civil Serv. Comm'n, 449 U.S. 811 (1980); Logan v. Strickland, 440 U.S. 902 (1979); Northern v. Department of Human Resources, 436 U.S. 923 (1978); Times-Picayune Publishing Corp. v. Schulingkamp, 420 U.S. 985 (1975); Daniels v. Hirshberg, 406 U.S. 902 (1972); Aikens v. California, 406 U.S. 813 (1972); Bernier v. Maine, 401 U.S. 968 (1971); Hayes v. Lieutenant Governor, 401 U.S. 968 (1971); *In re* T.W.P., 388 U.S. 912 (1967); Jacobs v. New York, 388 U.S. 431 (1967); Cavanaugh v. California, 384 U.S. 882 (1966).

[202] *See supra* text accompanying notes 38-42.

[203] The discussion in the text is premised upon the view that, as a general matter, the Supreme Court applies the *Munsingwear* doctrine to cases moot on appeal. *See supra* notes 163-65. Suggested limitations to the application of the *Munsingwear* procedure, in the context of Supreme Court review, are discussed *supra* in the text accompanying notes 166-97.

of Supreme Court review.[204]

Special concerns of federal supremacy also support application of the *Munsingwear* doctrine in this context. Federal review of state court determinations involving federal questions is based on a concern that state courts may be less faithful to federal law, less perceptive about its content, and less uniform in its application than federal courts.[205] Given the heightened concern over the quality of state court judgments on federal issues, purging such judgments of continued effect when mootness bars Supreme Court review is even more appropriate than with respect to mooted appeals within the federal system.[206]

Other factors, however, argue against application of *Munsingwear*. Unlike federal courts, state courts are not bound by article III of the Constitution and the justiciability standards it mandates,[207] such as the

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[204] *But see infra* note 211.

[205] State judges, particularly in states where they are elected and lack life tenure, are considered more susceptible to political pressure and more likely to weigh state interests above federal concerns than their federal counterparts. *See* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158 (1953); Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959-60 (1976). To assure adequate protection for federal interests, Congress, in 28 U.S.C. § 1257 (1976), provided appeal as of right in cases in which state courts invalidate federal statutes or treaties, or uphold state statutes over objections that they contravene federal law. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 189-91, 277 (1928); Mishkin, *supra*, at 158 n.10.

[206] *Cf.* SUPREME COURT AND SUPREME LAW 35 (E. Cahn ed. 1954) (statement of P. Freund) [hereafter Freund]; Varat, *Variable Justiciability and the* Duke Power *Case*, 58 TEX. L. REV. 273, 310-13 (1980).

[207] *See* National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 628-29 (1949) (Vinson, J., dissenting); STERN & GRESSMAN, *supra* note 1, § 3.35, at 247-48; 47 IOWA L. REV. 774, 779 n.26 (1962).

The seminal case in this regard is Doremus v. Board of Educ., 342 U.S. 429 (1952). There, appellant sought review of a state court determination upholding a New Jersey statute providing for Bible reading in public schools against first amendment attack. The Supreme Court dismissed the appeal, finding that the case did not present a case or controversy within the meaning of article III. With respect to the legitimacy of a state court deciding a federal question in this context, the Court remarked:

> 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, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

Id. at 434; *accord* Orr v. Orr, 440 U.S. 268, 299 (1979) (Rehnquist, J., dissenting); Bateman v. Arizona, 429 U.S. 1302, 1305 (1976) (Rehnquist, Circuit Justice); Opinion of the Justices, Supreme Court of Delaware, 413 A.2d 1245, 1250 (1980).

mootness doctrine,[208] even when deciding federal questions.[209] Thus, state courts may decide federal questions when federal courts cannot, and such decisions are not reviewable by the Supreme Court on the merits.[210] If state courts have the authority to make such decisions, then their decisions need not be vacated when mootness intercedes to bar Supreme Court review.[211] Dismissal of the appeal best accomplishes

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[208] *See* Goldwater v. Carter, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., concurring); Socialist Labor Party v. Gilligan, 406 U.S. 583, 592 n.3 (1972) (Douglas, J., dissenting).

[209] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 81-82 (1978); 1B MOORE'S, *supra* note 12, ¶ 0.402[6], at 105 n.2; cases cited *supra* notes 207-08. *But see* 47 IOWA L. REV. 774, 780 (1962). In support of this position some have argued that justiciability concerns serve primarily as institutional housekeeping devices, protecting federal courts from excessive caseloads and the burden of adjudicating inadequately presented issues. *Cf.* L. TRIBE, *supra*, § 3-18, at 81. Viewed solely from this perspective, there is no reason to impose justiciability concerns on state courts.

Others suggest that states should be bound by federal justiciability standards when deciding federal questions in order to preserve the Supreme Court's ability, on review, to assure the supremacy and uniformity of federal law. *See* Flast v. Cohen, 392 U.S. 83, 132 n.22 (1968) (Harlan, J., dissenting); Freund, *supra* note 206, at 34; Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis*, 25 ST. LOUIS U.L.J. 473, 490-91, 498 (1981); Varat, *supra* note 206, at 311-13.

A third view is that a state court decision on a federal question creates a case or controversy, regardless of the abstract or hypothetical nature of the underlying federal question at issue. Murphy, *supra*, at 478-80, 491-94. Thus, Supreme Court review on the merits would lie, absent a non-article III barrier to review. Such a view, however, ignores article III's mandate that federal court jurisdiction be limited to concrete, adversarial controversies. Presumably, adherents of this third view find the interests of federal supremacy more important than article III's more ministerial concerns.

[210] *See, e.g.*, Orr v. Orr, 440 U.S. 268, 299 (1979) (Rehnquist, J., dissenting); Bateman v. Arizona, 429 U.S. 1302, 1305 (1976) (Rehnquist, Circuit Justice); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Local 8-6, Oil Workers Int'l Union v. Missouri, 361 U.S. 363, 367 (1960); Doremus v. Board of Educ., 342 U.S. 429, 434 (1952); Amalgamated Ass'n of Street & Motor Coach Employees Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 416, 418 (1951). However, the Court might wish to differentiate situations in which a finding of mootness is premised on article III from those that turn on prudential concerns. Although the Court is constitutionally barred from considering a case in the former situation, it could choose to reduce its prudential barriers in the latter. *Cf.* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 226 (Cum. Supp. 1980) (advocating that the Court treat mootness more as a prudential concern, allowing review of state decisions which, under current federal practice, would be treated as moot).

[211] *Cf. supra* note 210. Congress could prevent state courts from deciding federal questions without regard to federal justiciability standards "by making federal jurisdiction exclusive over the subjects in question or by conditioning state jurisdiction on an undertaking by state courts to apply federal rules . . . ." L. TRIBE, *supra* note 209, §

this.

The effect of such a disposition on the future effect of the judgment is unclear. If such a dismissal carries the same effect as dismissal of mooted appeals within the federal system, then the judgment would retain its legal consequences.[212] However, some have argued that while state courts may render unreviewable judgments on federal questions, the collateral effects of those judgments are severely limited.[213] Alternatively, if the effects of the disposition are measured by the standards of the state of the judgment's rendition, then dismissals of appeals as moot may substantially reduce the judgment's collateral consequences.[214]

Traditionally, the Supreme Court took a compromise position between these alternatives, vacating the state court judgment, but remand-

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3-18, at 81 n.11. Failure to do so may suggest that the congressional will is not thwarted when review of state court judgments is cut off by mootness. *See supra* note 204.

[212] *See infra* text accompanying note 323. Inherent in the position of those who argue for a restriction on the ability of state courts to render judgments on federal questions, when federal courts cannot, is a belief that such state court judgments, absent their vacation, have collateral consequences. *See* Freund, *supra* note 206, at 35; Murphy, *supra* note 209, at 484 (discussing precedent and law of the case); Varat, *supra* note 206, at 310-11.

[213] In Doremus v. Board of Educ., 342 U.S. 429 (1952), the Court acknowledged the authority of state courts to render judgment on federal questions, unbounded by article III concerns, but cast doubt on the reach of such judgments, indicating: "we cannot accept . . . as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute [a case or controversy]." *Id.* One state court has concluded from this language that in such situations "the action of the state court results in no meaningful determination to the parties or the public." Bonnet v. New Jersey, 141 N.J. Super. 177, 198, 357 A.2d 772, 783 (Law Div. 1976), *aff'd on other grounds*, 155 N.J. Super. 520, 382 A.2d 1175 (App. Div. 1978). Scholars have questioned such judgments' precedential value and their effect as res judicata in future federal proceedings. *See* HART & WECHSLER, *supra* note 34, at 113, 128, 160, 180 (citing Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123, 130-31 (1927), for the proposition that absent the availability of Supreme Court review of state determination of federal questions, such decisions would not give rise to res judicata); L. TRIBE, *supra* note 209, § 3-18, at 81 n.11 (stating that "such determinations would constitute only the weakest sort of authority"); *cf.* 1B MOORE'S, *supra* note 12, ¶ 0.402[6] (advisory opinions are not precedents).

[214] At least in the states where the Restatement is followed, dismissal of an appeal on mootness grounds would purge the decision of its issue preclusive consequences. *See* RESTATEMENT (SECOND) § 28 (1) comment a & reporter's note at 284-85 (1982). *But cf. supra* note 175 (discussing the possibility that, under the Restatement approach, a judgment might retain its legal consequences when mootness arises beyond the initial level of review). The possible variations among state courts in response to the problem posed by mootness on appeal are beyond the scope of this Article. *See infra* note 266.

ing for further consideration.[215] This approach speaks to the *Munsingwear* concerns by at least temporarily purging the judgment of its collateral consequences. Nevertheless, the state court retains the full range of judicial powers on reconsideration,[216] preserving state authority to act on mooted federal questions.[217] When cases become moot subsequent to the state court's initial determination, the vacation/reconsideration procedure is especially appropriate. It allows the state court to determine whether to exercise its discretion to render an outstanding judgment in a moot case.

Yet, the procedure also has been used in cases in which state courts

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[215] *See supra* note 200.

[216] State courts on remand may exercise their authority to affirm their previous judgments, reverse them, or vacate them as moot. *E.g.*, Natural Milk Prods. Ass'n v. San Francisco, 20 Cal. 2d 101, 124 P.2d 25 (1942) (affirming judgment of trial court), *vacated and remanded as moot*, 317 U.S. 423 (1943), *prior judgment aff'd*, 24 Cal. 2d 122, 148 P.2d 377 (1944); Garvin v. Cochran, 135 So. 2d 746 (Fla. 1961) (denying writ of habeas corpus without opinion), *vacated and remanded as moot*, 371 U.S. 27 (1962), *habeas corpus denied mem.*, 138 So. 2d 337 (Fla. 1962); DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973) (reversing judgment of trial court), *vacated and remanded as moot*, 416 U.S. 312 (1974), *prior judgment reinstated*, 84 Wash. 2d 617, 529 P.2d 438 (1974); Washington *ex rel.* Columbia Broadcasting Co. v. Superior Court, 1 Wash. 2d 379, 96 P.2d 248 (1939) (denying writ of prohibition), *vacated and remanded as moot*, 310 U.S. 613 (1940), *judgment vacated and motion to withdraw opinion denied*, 5 Wash. 2d 711, 105 P.2d 70 (1940); Dyer v. City Council, 250 Wis. 613, 27 N.W.2d 733 (1947) (affirming judgment of trial court), *vacated and remanded as moot*, 333 U.S. 825 (1948), *judgment appealed from rev'd and cause remanded with directions to dismiss the complaint*, 252 Wis. 249, 32 N.W.2d 333 (1948); *see* Comment, *Disposition of Moot Cases*, *supra* note 16, at 87 n.53.

[217] In his partial dissent in DeFunis v. Odegaard, 84 Wash. 2d 617, 630-34, 529 P.2d 438, 446-47 (1974) (Finley, J., dissenting), on remand from the Supreme Court after a finding of mootness, Judge Finley discussed the options available to the state court. While agreeing with the plurality that the state court had the power to affirm its previous judgment, he argued that to do so would be inappropriate in most instances:

> At the core of the existing theory of federalism is the proposition that state court decisions passing on federal constitutional issues are susceptible to judicial review by the Supreme Court. . . . Therefore, one of our obligations in a federal system is to refrain from actions not commensurate or consistent with the doctrine of judicial review by the Supreme Court. Since reinstatement would impinge upon the viability and efficacy of that review, I do not believe that we would fulfill our obligations to the federal aspects of our dual court system by reinstating our *DeFunis* decision.

Id. at 631-32, 529 P.2d at 446. Judge Finley explained that the Supreme Court remands for further proceedings in instances of mootness not to provide the state court unfettered choices, but rather to afford it, in "aberrational cases," "some flexibility in determining whether justice as between the parties would be best served by giving or denying res judicata effect to a prior state judgment." *Id.* at 632-33, 529 P.2d at 447.

have decided moot issues in the first instance.[218] The propriety of vacation and reconsideration in that context is problematic. Perhaps the Court uses the vacation/reconsideration procedure even here because it considers the mootness doctrine more important to the decision of federal issues than other justiciability concerns. If these are lacking, the Supreme Court would simply dismiss the appeal.[219] Remand at least allows the state court to reconsider its decision to decide the mooted issue.

Despite the attractiveness of the vacation/reconsideration procedure, when mootness arises after a state court determination on the merits, the current trend is to dismiss the appeal.[220] Although the Court has not explained this procedural change, it may reflect the increased deference the Court has shown in recent years to determinations in state proceedings.[221] Reluctance to interfere with state court actions involving nonjusticiable controversies may derive from a sense of comity,[222] and an appreciation for the constitutional balance of interests at stake.[223]

b. Appeals of Administrative Agency Decisions

The substantial differences that exist between courts and agencies may influence the treatment of agency determinations mooted on appeal to the federal courts. First, there is a difference in the institutional relationships between a higher and lower court and between a court and an administrative agency. In the former only the prerogatives of the judici-

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[218] *See* DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Local 8-6, Oil Workers Int'l Union v. Missouri, 361 U.S. 363 (1960); Harris v. Battle, 348 U.S. 803 (1954); Riley v. Teamsters Local 633, 336 U.S. 930 (1949); *cf.* Amalgamated Ass'n of State Employees v. Wisconsin Employment Relations Bd., 340 U.S. 416 (1951).

[219] For example, the Court has dismissed appeals of state cases in which the plaintiff met state but not federal standards for standing. *See, e.g.*, Doremus v. Board of Educ., 342 U.S. 429 (1952).

[220] *See supra* note 201.

[221] *See* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1018 (1977) (noting an increased deference to the states by the Burger court); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1192-94 (1977) (increased deference to state administration and adjudication by the Supreme Court). *But cf.* Collins, *O'Connor Court's Attempts to Stifle State Justices' Brand of Innovation*, Nat'l L.J., March 28, 1983, at 16, col. 1 (stating that the Supreme Court has shown an increased "willingness to review state court decisions that are more than arguably based on state law" when those decisions uphold individual rights claims).

[222] *See supra* note 221.

[223] It has been suggested that vacation of state court judgments, in this context, raises significant tenth amendment concerns. 47 IOWA L. REV. 774, 779-80 (1962); *cf.* Note, *The Mootness Doctrine*, *supra* note 1, at 393 n.104.

ary are at issue, whereas in the latter the rights of coordinate branches of government are involved.[224] Second, agency determinations may flow from different decisionmaking processes. At times, administrative agencies act like courts, resolving live disputes among contesting parties in adjudicatory proceedings. In other instances, they engage in a legislative process, formulating general rules of conduct, or in an executive capacity, administering government programs.[225] Third, administrative agencies are not bound by the case and controversy requirement of article III of the Constitution and may decide hypothetical, abstract or moot questions.[226] To what extent, if any, should these differences affect the applicability of the *Munsingwear* doctrine to administrative determinations moot on appeal?

Munsingwear cited with approval several cases involving challenges to administrative orders moot on appeal.[227] In each the Court had ordered vacation and dismissal of the lower court proceeding, leaving the underlying administrative orders intact.

The Court continued to use this approach[228] until *A.L. Mechling Barge Lines v. United States*,[229] in which it firmly established that the

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[224] As a general rule, agencies are said to function either as part of the executive branch (executive departments) or the legislative branch (independent agencies) of government. *See, e.g.*, 1 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 4.01, at 4-5 (1983) (stating that "agencies located in Executive Departments are clearly within the executive branch") [hereafter 1 MEZINES, STEIN & GRUFF]; 5 STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 2D SESS., STUDY OF FEDERAL REGULATION-REGULATORY ORGANIZATION 28-31 (Comm. Print 1977) (independent agencies treated as an extension of the legislative branch); *cf.* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.8, at 88 (2d ed. 1978) [hereafter 1 DAVIS TREATISE (2d ed.)]. *But cf.* 1 MEZINES, STEIN & GRUFF, *supra*, § 4.01, at 4-6 to 4-7 (some independent agencies are established within the executive branch; some may not be assigned to any branch at all); 5 STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, *supra*, at 31-32 (setting forth the view that independent agencies form a "fourth branch" of government).

[225] *See, e.g.*, 1 DAVIS TREATISE (2d ed.), *supra* note 224, § 2.2, at 63-64; 1 MEZINES, STEIN & GRUFF, *supra* note 224, § 3.03[1], at 3-71; L. MODJESKA, ADMINISTRATIVE LAW PRACTICE & PROCEDURE 2 (1982).

[226] *See infra* text accompanying note 252.

[227] United States v. Munsingwear, Inc., 340 U.S. 36, 39 n.2 (1950) (citing, *inter alia*, SEC v. Philadelphia Co., 337 U.S. 901 (1949); SEC v. Engineers Pub. Serv. Co., 332 U.S. 788 (1947); Woodring v. Clarksburg-Columbus Short Route Bridge Co., 302 U.S. 658 (1937); Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930); United States v. Anchor Coal Co., 279 U.S. 812 (1929)).

[228] *See, e.g.*, Luckenbach S.S. Co. v. United States, 364 U.S. 280 (1960) (per curiam); Atchison, T. & S.F. Ry. v. Dixie Carriers, 355 U.S. 179 (1957) (per curiam); United States v. Amarillo-Borger Express, 352 U.S. 1028 (1957) (per curiam).

[229] 368 U.S. 324 (1961).

Munsingwear doctrine applies to reach the judgments of administrative tribunals. *A.L. Mechling* involved appellate review of an ICC railroad rate order, allegedly adopted in a procedurally improper manner.[230] While the case was pending before the district court, the railroads withdrew the tariff at issue, mooting the appeal. The district court granted a motion to dismiss the court proceeding.[231] On review the Supreme Court overruled the district court's dismissal stating:

> In *United States v. Munsingwear, Inc.*, this Court expressed the view that a party should not be concluded in subsequent litigation by a District Court's resolution of issues, when appellate review of the judgment incorporating that resolution, otherwise available as of right, fails because of intervening mootness. We there held that that principle should be implemented by the reviewing court's vacating the unreviewed judgment below. We think the principle enunciated in *Munsingwear* at least equally applicable to unreviewed administrative orders, and we adopt its procedure here. The District Court should have vacated the order which it declined to review.[232]

On its face the opinion simply recognizes that administrative decisions are initially made at the agency level, whereas in cases entirely within the judicial system, the initial proceeding occurs in the trial court. Just as the trial court's judgment is to be vacated in mooted cases

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[230] In this litigation several railroads published tariffs providing long haul rates substantially lower than existing short haul rates for the transportation of certain commodities between the same locations. Under ICC procedure a carrier could file such rates (which were technically illegal) and then request administrative relief to allow them. The railroads did so and several barge carriers, competitors for this service, filed a protest. Without hearing, investigation, or a statement of grounds, the ICC allowed the rates to become effective pending a subsequent determination of their validity. The barge carriers then sought review of the Commission's order, basing their attack on the propriety of the prehearing rate approval.

[231] Cargill, Inc. v. United States, 188 F. Supp. 386, 389 (E.D. Mo. 1960).

[232] A.L. Mechling Barge Lines v. United States, 368 U.S. 324, 329 (1961) (citation omitted). The Court failed to mention any of its previous decisions involving administrative orders moot on appeal except Atchison, T. & S.F. Ry. v. Dixie Carriers, 355 U.S. 179 (1957). It disclaimed that case as precedent, apparently on the ground that there the parties retained no interest in the underlying order once the case became moot. 368 U.S. at 329 n.11. Here, in contrast, the appellants retained an active interest in the underlying orders, as evidenced by their active advocacy against a finding of mootness.

The Court also rejected appellee's argument that while appellate courts might apply the *Munsingwear* doctrine, district courts should dismiss complaints which have become moot. Brief for Appellee at 18, Atchison, T. & S.F. Ry. v. Dixie Carriers, 355 U.S. 179 (1957). The argument fails to recognize that, in the context of judicial review, the district court is performing an appellate function with respect to the agency's determination. This makes the use of an appellate tool appropriate.

arising entirely within the courts, by analogy an administrative agency's order must be vacated in proceedings that begin there.

Since *A.L. Mechling*, the *Munsingwear* approach often has been applied in cases involving moot administrative orders.[233] Application of the rule appears particularly appropriate in the administrative context, because judicial review of administrative decisionmaking is intended to serve a central role as a check on agency action.[234]

Nevertheless, the logic underlying the Court's opinion in *A.L. Mechling* and the intended scope of its application are not entirely clear. To the extent the agency action is judicial in nature, the analogy is sound. When warranted, an administrative order will be afforded res judicata, collateral estoppel[235] and precedential[236] treatment. As with

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[233] *See, e.g.*, Board of Governors of the Fed. Reserve Sys. v. Security Bancorp, 454 U.S. 1118 (1981); D.H.L. Corp. v. CAB, 659 F.2d 941, 951 (9th Cir. 1981); North Carolina Utils. Comm'n v. FERC, 653 F.2d 655, 660 (D.C. Cir. 1981) (dictum); Tennessee Gas Pipeline Co. v. Federal Power Comm'n, 606 F.2d 1373, 1380-83 (D.C. Cir. 1979); National Ass'n of Indep. T.V. Producers & Distributors v. FCC, 516 F.2d 760, 765 (D.C. Cir. 1975); Boston Community Media Comm. Minority Caucus v. FCC, 509 F.2d 516 (D.C. Cir. 1975); Swingline, Inc. v. I.B. Kleinert Rubber Co., 399 F.2d 283, 284-85 (C.C.P.A. 1968); Quincy Oil v. FEA, 472 F. Supp. 1233, 1235 (D. Mass. 1979), *aff'd*, 620 F.2d 890 (Temp. Emer. Ct. App. 1980). *But see* Diamond v. Chakrabarty, 444 U.S. 1028 (1980); Nueces County Navigation Dist. No. 1 v. ICC, 674 F.2d 1055, 1059 n.4 (5th Cir.) (*Munsingwear* does not apply when agency adjudication will not have res judicata or precedential consequences), *cert. denied*, 103 S. Ct. 446 (1982). In *Diamond* an appeal of a decision of the United States Court of Customs and Patent Appeals, which overturned a Patent Office Board of Appeals decision denying a patent application, became moot when the patent application was withdrawn. At the request of the Respondent, with the concurrence of the Petitioner, the Supreme Court vacated the case and remanded it to the lower court with directions to dismiss the appeal as moot. *See* Respondent's Motion to Dismiss & Vacate at 1-2, Diamond v. Chakrabarty, 444 U.S. 1028 (1980); Letter from Wade McCree, Jr., Solicitor General, to Michael Rodak, Jr., Clerk, Supreme Court of the United States (Jan.. 8, 1980) (acquiescing to Respondent's *Munsingwear* request). No direction was given, however, with respect to the underlying administrative order. It is unclear whether this reflects the exercise of discretionary power by the Court to ignore the *Munsingwear* procedure, *see supra* text accompanying note 189 and *infra* text accompanying note 299, a requirement that a party must affirmatively act to invoke the full *Munsingwear* procedure, *see infra* text accompanying notes 322-33, the nature of the agency proceeding, *see infra* text accompanying notes 237-51, or some other factor. *Accord* Brenner v. Hofstetter, 389 U.S. 5 (1967); *cf.* cases cited *infra* note 243.

[234] *See, e.g.*, B. SCHWARTZ, ADMINISTRATIVE LAW § 8.1, at 429 (2d ed. 1984).

[235] In the early years of administrative law, the rules of res judicata and collateral estoppel generally were held inapplicable to administrative decisions. *See* RESTATEMENT (SECOND) § 83 comment b & reporter's note a (1982). In the 1930's and 1940's, however, the courts began to recognize that preclusive effects should attach to administrative decisions in appropriate situations. *See, e.g.*, Sunshine Anthracite Coal Co. v.

court proceedings, use of the *Munsingwear* procedure would strip an administrative order of these legal consequences.

But not all administrative decisions mooted on appeal are judicial in nature, since agencies perform quasi-legislative and quasi-executive functions as well.[237] Typically, these actions have no res judicata or collateral estoppel effect.[238] Although they may serve as precedent in a nontechnical sense, and courts on review may seek to enforce the precedent by requiring a reasoned explanation for departure from it,[239] doctrines other than those of judicial precedent are at work. Indeed, even if a legislative action of an agency were vacated on mootness grounds,[240] it

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Adkins, 310 U.S. 381 (1940); Tait v. Western Md. R.R., 289 U.S. 620 (1933). For a discussion of the modern rules governing this area, see, *e.g.*, K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 18.01-18.06 (1976); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 18.01-18.12 (1958 & 1982 Supp.) [hereafter 2 DAVIS TREATISE]; 5 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 40.01 (1983); RESTATEMENT (SECOND) § 83 (1982); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4475; Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422 (1983); Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65 (1977).

[236] *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 17.07 (1976); 2 DAVIS TREATISE, *supra* note 235, § 17.07; 5 B. MEZINES, J. STEIN & J. GRUFF, *supra* note 235, § 40.02; 1B MOORE'S, *supra* note 12, ¶ 0.403.

[237] *See supra* note 225.

[238] As a general rule an administrative action will be accorded preclusive effect if the agency proceeding follows judicial procedure to a sufficient extent to afford parties a full and fair opportunity to litigate and if claims are concluded (for claim preclusion) or issues of adjudicatory fact, meeting the other criteria for estoppel, are determined (for issue preclusion). *See, e.g.*, ITT v. American Tel. & Tel. Co., 444 F. Supp. 1148, 1155-59 (S.D.N.Y. 1978); RESTATEMENT (SECOND) § 83(2) & comment b (1982); *see also* sources cited *supra* note 235. When acting in an executive or legislative capacity, the agency often will not use adjudicatory procedures in its decisionmaking. *Cf.* 1 DAVIS TREATISE (2d ed.), *supra* note 224, § 6.8. Furthermore, such decisions may rest, to a large extent, on agency expertise and rough predictive judgments, rather than on an evidentiary record used to make conclusive factual findings on which a judgment will be based. Thus they would be inappropriate vehicles to carry preclusive effect. *See* ITT v. American Tel. & Tel. Co., 444 F. Supp. at 1158-59; 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958) [hereafter 1 DAVIS TREATISE]; *see also* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 12.3-12.4 (2d ed. 1979).

[239] *See, e.g.*, Motor Vehicle Mfr's. Ass'n v. State Farm Mutual Auto. Ins., 103 S. Ct. 2856, 2866 (1983) (agency must explain adequately revocation of extant regulation); Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 806-08 (1973) (agency must explain change in policy concerning acceptable charges to be incorporated in rates); Action on Smoking & Health v. CAB, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (agency must explain rescission of extant regulation).

[240] If the act of a legislature becomes moot while under judicial challenge, the appel-

is likely that a court reviewing subsequent agency action would still insist on an explanation of the agency's change in focus.[241]

Since nonadjudicatory administrative actions generally do not give rise to legal consequences of the sort the *Munsingwear* doctrine was intended to address,[242] requiring vacation is inappropriate. Consonant with this view, the Court often vacates lower court orders but leaves the nonadjudicatory agency action intact.[243]

Although appealing, this adjudicatory/nonadjudicatory dichotomy oversimplifies the analysis, for under this approach *A.L. Mechling* may be wrongly decided. In *A.L. Mechling* the agency action under review could be classified as ratemaking,[244] a legislative rather than judicial process.[245] Furthermore, it was undertaken without trial-type proce-

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late court does not order the legislature to vacate the now mooted statutory provision. By analogy, it would seem inappropriate for a court to order vacation of a challenged agency rule should it subsequently become moot. *Cf.* City of Houston v. FAA, 679 F.2d 1184, 1199 (5th Cir. 1982) (mooted action to review interim rule dismissed); Relf v. Weinberger, 565 F.2d 722, 727 (D.C. Cir. 1977) (challenge to an HEW rule mooted when the rule was withdrawn; court orders vacation and dismissal at the district court level only); Save Our Cumberland Mountains, Inc. v. Watt, 550 F. Supp. 979 (D.D.C. 1982) (mooted action to review rule dismissed).

[241] On review of agency action courts attempt to assure that the agency has engaged in reasoned decisionmaking. Departure from previous policy or practice raises questions as to the propriety of current action; the reason for the change must be explained. *See, e.g.*, Public Service Comm'n v. FERC, 589 F.2d 542, 551-52 (D.C. Cir. 1978); Public Service Comm'n v. Federal Power Comm'n, 511 F.2d 338, 353 (D.C. Cir. 1975); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *supra* cases cited in note 239. Even if the earlier agency action were vacated on nonsubstantive grounds, the change in direction from the one there espoused might still require explanation.

[242] To the extent the Court in *Munsingwear* or *A.L. Mechling* meant to address a broader group of legal consequences than those which flow from judicial action, the analysis in the text is inapplicable. *See infra* note 353 (discussing the use of administrative reports as evidence in court proceedings).

[243] *See, e.g.*, EPA v. St. Joseph's Mineral Corp., 425 U.S. 987 (1976) (review of EPA proceeding approving state clean air implementation plan); SEC v. Medical Comm. for Human Rights, 404 U.S. 403 (1972) (review of Commission approval of no-action ruling); *infra* note 246 (cases cited therein); *cf.* CIA v. Holy Spirit Ass'n, 455 U.S. 997 (1982) (de novo review of CIA denial of F.O.I.A. request).

[244] Although the distinction between making future rates (a rulemaking function) and assessing the reasonableness of past rates (an adjudicatory function) is often unclear, *A. L. Mechling* may involve the former. *See* UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 53 (1947) (discussing the distinction).

[245] *See, e.g.*, Arizona Grocery v. Atchison, T. & S.F. Ry., 284 U.S. 370, 389 (1932); 2 DAVIS TREATISE, *supra* note 235, § 18.08, at 598-99; Note, *supra* note 235, at 90.

Traditionally, res judicata and collateral estoppel were not thought to attach to

dures, a necessary prerequisite for preclusion to attach to administrative determinations.[246]

Perhaps a better solution is to adopt an approach similar to that advocated for interlocutory orders moot on appeal.[247] There it was suggested that the *Munsingwear* doctrine should be applied to all such orders, even though only some could support legal consequences. This would insure the protection the doctrine affords while conserving judicial resources which would otherwise be expended in analyzing individual interlocutory review cases.

Similarly, in the administrative context, there are proceedings which, while not strictly adjudicatory, in limited instances may give rise to determinations with preclusive consequences. Ratemaking is a prime example.[248] Rather than expending judicial effort to identify which deter-

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ratemaking proceedings. *See, e.g.*, Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444-45 (1930); FTC v. Texaco, Inc., 555 F.2d 862, 893-94 (D.C. Cir.) (Leventhal, J., concurring), *cert. denied*, 431 U.S. 974 (1977); ITT v. American Tel. & Tel. Co., 444 F. Supp. 1148, 1155-59 (S.D.N.Y. 1978); 2 DAVIS TREATISE, *supra* note 235, § 18.08, at 598; RESTATEMENT (SECOND) § 83 reporter's note at 282 (1982). However, there are exceptions to the general rule. *See infra* note 248 and accompanying text.

[246] Even if res judicata or collateral estoppel might theoretically attach to a rate proceeding in the proper circumstances, *see supra* note 245 and *infra* note 248, the doctrines would not be applicable in the *A.L. Mechling* litigation. The ICC action, allowing certain rates to go into effect temporarily, although technically in violation of a statute, was taken without hearing, investigation, or a statement of findings by the ICC. *See supra* note 230. It did not provide the full and fair opportunity to litigate necessary for preclusive effects to flow from an administrative decision. *See supra* note 238.

In numerous appeals of ICC rate and reorganization orders, based on fuller proceedings before the agency than in *A.L. Mechling*, the Supreme Court has vacated the orders and remanded to the lower courts, not the ICC, when mootness has interceded to block substantive consideration of the issues presented. *See, e.g.*, Congress of Ry. Unions v. United States, 419 U.S. 811 (1974); Florida E. Coast Ry. v. United States, 386 U.S. 544 (1967); Baltimore & O.R.R. v. Atchison, T. & S.F. Ry., 383 U.S. 832 (1966); New York Cent. R.R. v. United States, 371 U.S. 805 (1962).

[247] *See supra* text accompanying notes 78-121.

[248] *See, e.g.*, Safir v. Gibson, 432 F.2d 137, 142-43 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970); Aloha Airlines v. Hawaiian Airlines, No. 72-3594 (D. Hawaii 1973) (unpublished opinion); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4475, at 765-66:

> Issue preclusion may be warranted to the extent that a particular ratemaking proceeding entails clear adversary presentation under procedures that parallel judicial procedure, and resolution of a question of historic fact or law application that is both clear and necessary to the decision.

Note, *supra* note 235, at 90-91 (stating that "[r]ate proceedings in which a regulated entity's rate practices are challenged by others before the agency as not complying with

minations warrant special treatment, the *Munsingwear* doctrine should be applied across the board when mootness arises on appeal.[249]

Unlike interlocutory orders, there are some types of administrative decisions, such as rules adopted through informal notice and comment rulemaking, from which judicial consequences simply will not flow.[250] As to these, the argument for employing the *Munsingwear* approach vanishes. A court order to vacate an administrative determination in this context would appear an unwarranted intrusion by the judiciary into the activities of other branches of government.[251]

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legislative standards or agency rules should not automatically be denied an estoppel effect"); *cf.* Burrough of Lansdale v. Federal Power Comm'n, 494 F.2d 1104, 1114 & n.45 (D.C. Cir. 1974) (the court indicating it "need not decide whether the essentially judicial concepts of *res judicata* should be applied to FPC 'rejections' of rate filings"); ITT v. American Tel. & Tel. Co., 444 F. Supp. 1148, 1159 (S.D.N.Y. 1978). In *ITT*, the court rejected a request that collateral estoppel effect be given to a ratemaking in that litigation. The court went on to state, however, that it did "not hold that no findings of any rate-making proceedings should ever be accorded collateral estoppel treatment by the judiciary."

[249] This approach would explain the result in *A.L. Mechling*, but it does not appear that the Supreme Court has gone this far. *See supra* notes 243, 246 (citing instances of appeal from administrative proceedings when vacation of the administrative decision has not been ordered).

[250] Notice and comment rulemaking does not utilize adjudicatory procedures. Thus, preclusive consequences do not flow from such proceedings. *See supra* notes 238, 246.

[251] *See, e.g.*, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 141-46 (1940). There, the Supreme Court recognized that because of the different institutional relationships involved, greater restraint is required in the judicial review of administrative decisions than in the review of determinations of a lower federal court. In the Court's words:

> A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal court *inter se* — a relationship defined largely by the courts themselves — but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under

Even with respect to administrative decisions which could foster judicial consequences, limitations on the the *Munsingwear* doctrine may be warranted. Agencies, unlike federal courts, derive their authority to adjudicate from article I of the Constitution, not article III. Hence they are not bound by article III concerns.[252] With legislative authorization[253] an administrative agency can decide issues which federal courts would be barred from deciding. The power of the federal court to review such an agency determination on the merits, on the other hand, is circumscribed by article III limitations.[254]

When agencies, pursuant to delegated authority, decide moot controversies, courts should deny review and allow the administrative decisions to stand,[255] reflecting congressional intent that the agency make

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the Constitution.

Id. at 141. *See also* Heckler v. Lopez, 104 S. Ct. 10 (1983) (Rehnquist, Circuit Justice); South Prairie Constr. v. Operating Eng'rs, 425 U.S. 800, 806 (1976).

[252] Tennessee Gas Pipeline Co. v. Federal Power Comm'n, 606 F.2d 1373, 1380 (D.C. Cir. 1979); *see* Cromwell v. Benson, 285 U.S. 22, 48-51 (1932); 1 DAVIS TREATISE (2d ed.), *supra* note 224, § 3.10; 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3528, at 141-43.

[253] Administrative agencies derive their power from congressional delegations. These grants serve as both the basis for and limit of agency action. *See, e.g.*, CAB v. Delta Air Lines, 367 U.S. 316, 322 (1961); Atchison, T. & S.F. Ry. v. ICC, 607 F.2d 1199, 1203 (7th Cir. 1979); Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974); B. SCHWARTZ, *supra* note 234, § 1.6, at 10-11; *see also* Peters v. Hobby, 349 U.S. 331, 345 (1955).

[254] Purely advisory or hypothetical rulings by agencies, which create no case or controversy, are not subject to judicial review regardless of the manner of their adoption. *See* 1 DAVIS TREATISE, *supra* note 238, §§ 4.09, at 265, 4.10, at 278; E. GELLHORN & B. BOYER, ADMINISTRATIVE LAW & PROCESS 132 (2d ed. 1981); Dickson, *Advisory Rulings by Administrative Agencies: Their Benefits and Dangers*, 2 CAMPBELL L. REV. 1, 29-38 (1980).

[255] *See* Pacific Towboat & Salvage Co. v. ICC, 620 F.2d 727, 730-31 (9th Cir. 1980) (denying *Munsingwear* request and dismissing petition for review when agency decided moot question); *cf.* National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 698-99 (D.C. Cir. 1971) (acknowledging judicial intervention as inappropriate when the agency decides a moot question). *But see* Tennessee Gas Pipeline Co. v. Federal Power Comm'n, 606 F.2d 1373, 1382-83 (D.C. Cir. 1979) (granting *Munsingwear* request and vacating agency decision on moot issue.) In both *Tennessee Gas* and *Pacific Towboat* the courts were asked to review agency orders from proceedings which ceased to present live controversies at the administrative level. In the former the court applied the *Munsingwear* doctrine; in the latter it did not, finding it had no power to do so. Several possible explanations for this discrepancy exist:

(1) In *Pacific Towboat* the court seemed to find both statutory and article III impediments to review, whereas in *Tennessee Gas* the court found only article III concerns. While both article III and statutory limitations deprive the court of the authority to review, their effect may differ with respect to the dispositional alternatives available to

such decisions. When mootness arises after the agency determination, the Court's decision in *A.L. Mechling* indicates that the *Munsingwear* procedure should be applied. That decision, however, did not address what effect the authority of agencies to make nonjusticiable decisions should have. In the analogous situation of Supreme Court review of state court determinations, the Court has eschewed the *Munsingwear* approach.[256] How can this disparity be explained?

In many ways review of mooted administrative agency and state court decisions is similar. In neither case is the initial decisionmaking body bound by article III concerns.[257] In both cases the possibility of judicial review plays a crucial role, checking the exercise of power by agencies[258] and assuring uniformity of federal law and federal supremacy with respect to state court decisions.[259] Congress also has the power, in both situations, to limit consideration of federal issues to actions posing live cases or controversies.[260] Its failure to do so may be tacit approval for agencies and state courts to act. If so, the federal

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the appellate court. As *Munsingwear* and the cases invoking it illustrate, the loss of article III power to treat a case substantively does not deprive the court of the ministerial power to vacate the decree and remand for dismissal. When the jurisdictional statute in question cuts off entry into the court itself, however, no more than dismissal may be available. Article III thus sets the outer limit of the court's power, but the jurisdictional standard may provide further limits within article III's broader grant.

(2) In *Pacific Towboat* the Commission's declaration that the carrier's past conduct was illegal carried with it no sanction. On appeal the ICC argued that the decision had no more future effect than a press release. Brief for Commission at 8, Pacific Towboat & Salvage Co. v. ICC, 620 F.2d 727 (9th Cir. 1980).

In *Tennessee Gas* the Federal Power Commission's order similarly carried no present sanction, but the Federal Power Commission contended that, based upon its decision, future violations would be subject to sanction. Brief for Commission at 24, *Tennessee Gas*, 606 F.2d at 1373. If the possible future effect of the orders varies, then from a practical standpoint, the differences in approach may be warranted. Only in *Tennessee Gas* were there possible legal consequences, so only there was it necessary to invoke the *Munsingwear* doctrine.

(3) The cases simply may be in conflict with respect to the power to employ the *Munsingwear* doctrine when cases become moot on the administrative level.

(4) Finally, it should be noted that the court's approach in *Tennessee Gas* may have been affected by the peculiar procedural posture of the case. As the court remarked, "[o]ur disposition of the instant petition depends simply on the peculiar, uncertain limbo from which we feel obliged to remove the subject orders." *Tennessee Gas*, 606 F.2d at 1380.

[256] *See supra* text accompanying notes 198-223.

[257] *See supra* text accompanying notes 207-10, 252.

[258] *See supra* text accompanying note 234.

[259] *See supra* text accompanying notes 205-06.

[260] *See supra* note 211 and text accompanying note 253.

courts should not interfere.

Given these similarities, the different treatment given mooted appeals from agencies and from state courts is surprising. One possible explanation stems from the different institutional relationship of each with the federal reviewing court. Notions of comity and federalism argue for a temperate federal judicial response with respect to appeals from state court proceedings.[261] As to agency decisions, although there is some reluctance to interfere with other branches of government,[262] there is the competing notion that judicial review reflects a robust partnership between the court and the agency.[263] Perhaps as a consequence, the Court takes a less intrusive approach to appeals of mooted state court judgments, dismissing the appeal, than to appeals of mooted administrative orders, to which the Court applies the vacation/dismissal procedure.

3. State Law Questions Raised in Federal Courts

On its facts, the *Munsingwear* decision concerns mootness on appeal in federal question litigation.[264] The opinion sheds little light on whether the *Munsingwear* doctrine or state law should be applied to state law issues moot on appeal in federal courts.[265] Differences be-

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[261] *See supra* text accompanying notes 221-23.

[262] *See supra* text accompanying note 251.

[263] *See, e.g.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 378 (1973).

[264] United States v. Munsingwear, Inc., 340 U.S. 36 (1950).

[265] Nowhere in its opinion does the Court differentiate between state law questions and federal questions which become moot on appeal within the federal system. Several of those cases cited by the Court in support of the vacation/dismissal practice involved diversity of citizenship. *See id.* at 39 n.2 (citing O'Ryan v. Mills Novelty Co., 292 U.S. 609 (1934); First Union Trust & Savings Bank v. Consumer's Co., 290 U.S. 585 (1933); Berry v. Davis, 242 U.S. 468 (1917)). Yet all predate the Court's opinion in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Nor does it appear that the Supreme Court has directly addressed the issue in its numerous post-*Munsingwear* decisions.

There are numerous instances of mootness on appeal in diversity litigation before the lower courts. *See, e.g.*, H. K. Porter Co. v. Metropolitan Dade County, 650 F.2d 778 (5th Cir. 1981); Shepard v. Kline, 468 F.2d 917 (2d Cir. 1972); Sterling v. Blackwelder, 405 F.2d 884 (4th Cir. 1969); Lesmark, Inc. v. Pryce, 334 F.2d 942 (D.C. Cir. 1964); Four Star Publications v. Erbe, 304 F.2d 872 (8th Cir. 1962); Maddox v. Black, Raber-Kief & Assocs., 301 F.2d 904 (9th Cir. 1962); Newport v. Revyuk, 283 F.2d 145 (8th Cir. 1960). Yet, in none of those cases was the choice of law question discussed. In many cases the court simply dismissed the appeal, rather than follow the *Munsingwear* procedure.

While it is beyond the scope of this Article, the more general question of what effect, if any, the state law of res judicata and collateral estoppel should be given in federal

tween federal and state law may arise concerning both the effect mootness should have on the judgment's continued life and the procedural device employed to achieve the desired effect.[266] Resolution of these

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litigation has been addressed by several other authors. *See, e.g.*, RESTATEMENT (SECOND) § 87 (1982); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4472; Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976); Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968); Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96 (1965).

[266] Federal courts and the Restatement (Second) may differ in their view of both these matters, although each would strip mooted judgments of at least some future effect. Yet cogent arguments can be made that mooted judgments should retain full effect. *See supra* text accompanying note 65.

While an extensive review of the law of the states in this area is beyond the scope of this Article, it should be noted that few states have adopted explicitly either the *Munsingwear* approach or the Restatement approach. Although a number of reported cases cite the relevant sections of the first or second Restatement, only a few do so to support the proposition that judgments moot on appeal should lose their collateral estoppel effects. *See, e.g.*, Munroe v. City Council, 547 P.2d 839, 840 (Alaska 1976); Minor v. Lapp, 220 Cal. App. 2d 582, 33 Cal. Rptr. 864 (1963); Commissioners of Vienna v. Phillips Co., 207 Md. 12, 20, 113 A.2d 89, 92 (1955); Lange v. City of Byron, 255 N.W.2d 226, 229 (Minn. 1977); *cf. In re* Mehrer, 273 N.W.2d 194, 198 (S.D. 1979) (concurring opinion on the lack of collateral estoppel effect when review is unavailable as a matter of law). In Massachusetts, although the courts follow the *Munsingwear* procedure, the Restatement has been cited for the proposition that even if an appeal were dismissed, the judgment would have no collateral estoppel effect. Reilly v. School Comm., 362 Mass. 389, 396, 290 N.E.2d 516, 520 (1972).

Adherence to the *Munsingwear* doctrine in the states also is limited, *see* RESTATEMENT (SECOND) § 28 reporter's note at 285 (1982), although courts in at least eight states have cited *Munsingwear* directly to support use of a vacation/dismissal procedure for cases which became moot on appeal. *See, e.g.*, Paul v. Milk Depots, Inc., 62 Cal. 2d 129, 135, 396 P.2d 924, 927, 41 Cal. Rptr. 468, 471 (1964); Smith v. Town Center Management Corp., 329 A.2d 779, 780 (D.C. 1974); Fritz v. City of Hialeah, 411 So. 2d 974 (Fla. Dist. Ct. App. 1982); Moon v. Investment Bd., 102 Idaho 131, 627 P.2d 310 (1981); La Salle Nat'l Bank v. City of Chicago, 3 Ill. 2d 375, 382, 121 N.E.2d 486, 489-90 (1954); Reilly v. School Comm., 362 Mass. 689, 696 n.6, 290 N.E.2d 516, 520 n.6 (1972); Hearst Corp. v. Clyne, 50 N.Y.2d 707, 718, 409 N.E.2d 876, 880, 431 N.Y.S.2d 400, 405 (1980); Local Division 757, Amalgamated Transit Union v. Lane County Mass Transit Dist., 295 Or. 117, 121, 663 P.2d 1244, 1247 (1983). Courts in ten states have employed the vacation/dismissal approach at times, without citation to *Munsingwear*. *See, e.g.*, Arizona Osteopathic Medical Ass'n v. Fridena, 105 Ariz. 291, 293, 463 P.2d 825, 827, *cert. denied*, 399 U.S. 910 (1970); Board of Educ. v. Muncy, 239 S.W.2d 471, 473-74 (Ky. 1951); Area Dev. Corp. v. Free State Plaza, 254 Md. 269, 271-72, 254 A.2d 355, 356-57 (1969); Central Moloney Inc. v. City of St. Louis, 527 S.W.2d 39, 41 (Mo. Ct. App. 1975); DeRose v. Byrne, 139 N.J. Supp. 132, 134, 353 A.2d 100, 100-01 (N.J. Super. Ct. App. Div. 1976); State *ex rel.* Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 288-90, 221 S.E.2d 322, 324-25 (1976); Johnson v. Richland County, 160 N.W.2d 406 (N.D. 1968); Red Ball Motor Freight

choice of law questions turns on the application of the Rules of Decision Act,[267] as interpreted by the Supreme Court in *Erie Railroad v. Tompkins*[268] and its progeny.[269]

The Rules of Decision Act provides that, "in cases where they apply," state laws will constitute the rules of decision in federal courts "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide."[270] Two arguments support the proposition that these limiting provisos of the Rules of Decision Act require application of federal law to judgments mooted on appeal. First, the authority to decide the force and effect of a federal adjudication is arguably "a defining element of Article III judicial power"[271] and thus is either provided for directly by the Constitution, or at least is an area in which state laws do not apply.[272] The *Munsingwear* doctrine, by limiting a judgment's legal consequences, falls within this rationale. Second, the *Munsingwear* doctrine itself is based upon statutory authority.[273] Given the constitutional and statutory underpinnings of the federal treatment of judgments mooted on appeal, an argument can be made that the Rules of Decision Act mandates that federal law govern the collateral effect and procedural treatment of state law questions moot on appeal in federal courts.

Taken to an extreme, however, these arguments prove too much. By definition, all permissible actions taken by federal courts are authorized by article III. To say each then falls within the exception language of the Rules of Decision Act would leave no areas for which state law would serve as the rule of decision. Rather, it is the power of a federal

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v. Southern Conference of Teamsters, 358 S.W.2d 955, 956 (Tex. Civ. App. 1962); Nowlin v. Chapman, 19 S.E. 775, 776 (Va. 1894); City of Yakima v. Huza, 67 Wash. 2d 351, 360, 407 P.2d 815, 821 (1965). In all these jurisdictions a simple dismissal approach also has been used.

That few state courts cite the primary sources of authority in the area, the Restatement or the *Munsingwear* decision, suggests the possibility that these courts may be employing divergent approaches. *Cf.* 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 549 (suggesting that many state courts dismiss moot appeals, but the mooted judgment may still have collateral estoppel effect).

[267] 28 U.S.C. § 1652 (1976).

[268] 304 U.S. 64 (1938).

[269] Of particular importance here are the Supreme Court's decisions in Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958), and Hanna v. Plumer, 380 U.S. 460 (1965).

[270] 28 U.S.C. § 1652 (1976).

[271] *See* Degnan, *supra* note 265, at 770 n.138.

[272] *See id.*; *cf.* RESTATEMENT (SECOND) § 87 comment a at 315 (1982).

[273] 28 U.S.C. § 2106 (1976); *see supra* note 11.

court to determine the scope of its own judgments, the heart of article III's provision for a federal judiciary, which differentiates this situation.[274]

With respect to the second argument, the applicable statutory provision merely provides federal appellate courts the power to apply the *Munsingwear* procedure. That general grant of authority need not be read as requiring the application of federal law should state law differ.[275]

If the propriety of applying the *Munsingwear* doctrine to moot state law questions in federal court cannot be determined by reference to the express limits of the Rules of Decision Act, a more detailed exploration of competing federal and state interests is required. Although courts differ in the precise analysis they employ,[276] they tend to look at some combination of the following factors: (1) the relationship between the state rule and state substantive policies; (2) the difference in effect of the application of state or federal law on the character or result of the litigation;[277] (3) the likelihood that such differences will lead to forum

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[274] *See* Degnan, *supra* note 265, at 769-70 & n.138. Even if this argument is insufficient to resolve the question on the basis of the express statutory exception, it is still important in the balancing of federal and state interests which may be required. *See infra* text accompanying notes 289-91.

[275] *Cf.* Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 358 (1977) (apparently limiting the federal statutory exception to instances when a "specifically applicable federal statute is involved"); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1089-94 (1964). As analyzed by the student author:

> [T]he presence of a federal statute does not necessarily imply that there is a congressional interest that any particular issue be resolved by reference to federal law. If inquiry indicates that Congress was wholly unconcerned with the resolution of a given issue, it cannot properly be said that federal statutes "require or provide" that state policies be supplanted by federal court-made rules.

Id. at 1090.

[276] Redish & Phillips, *supra* note 275, at 360.

[277] In Hanna v. Plumer, 380 U.S. 460, 467, 468 n.9 (1965), the Court defined the relevant inquiry for choosing whether to apply state or federal law in part by whether the choice would lead to substantial variations in the "character or result" of the litigation. However, the Court did not define these terms. As one scholar has interpreted the Court's opinion:

> The Court therefore suggested . . . that a federal court may adhere to its own rules . . . insofar . . . as they are neither materially more or less difficult for the burdened party to comply with than their state counterparts ["character"], nor likely to generate an outcome different from that which would result were the case litigated in the state court system and the state rules followed ["result"].

shopping by the parties; and (4) the relative balance between federal and state interests in the application of their own law.[278]

The greater the implication of the first three factors, the more likely it is that state law will be applied. These comprise the state interests to be weighed against competing federal interests. Under this analysis, differences in the procedure employed to dispose of a mooted judgment are unlikely to require an adoption of state procedures.[279] Whether differences in the effect to be given a mooted judgment necessitate the use of state standards poses a more difficult question.

With respect to the first factor, procedurally oriented concerns such as fairness and efficiency often underlie the choice to grant or withhold legal consequences from mooted judgments.[280] The decision to attribute

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Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 714 (1974).

[278] Development of an ideal Rules of Decision Act analysis is a separate article in itself. This is reflected by the significant scholarly inquiry devoted to the subject in recent years. *See, e.g.*, Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *supra* note 277; Mishkin, *Some Further Last Words on Erie — The Thread*, 87 HARV. L. REV. 1682 (1974); Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980); Redish & Phillips, *supra* note 275; Westen, *After "Life for Erie" — A Reply*, 78 MICH. L. REV. 971 (1980); Westen & Lehman, *Is There Life For Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678 (1976). As Redish and Phillips amply demonstrate, the lower courts vary widely in their approach to Rules of Decision Act problems, but most employ some combination of the four factors set forth in the text. *See* Redish & Phillips, *supra* note 275, at 369 n.76, 372. Factors 1 and 4 can be traced to the Supreme Court's opinion in Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958), and factors 2 and 3 to its opinion in Hanna v. Plumer, 380 U.S. 460 (1965).

[279] Assuming the same outcome is desired concerning the collateral consequences to be accorded a mooted judgment, the procedure employed to reach that end should be the federal court's choice. By definition the differences in procedure have no discernible effect on the outcome of the litigation. The chance that a state's choice of dismissal of an appeal, rather than the *Munsingwear* approach, is tied to state substantive policy is small. In states where the fact of mootness determines the effects of mooted judgments, an additional federal requirement of a motion to receive the appropriate determination might be seen as a difference in the character of the proceeding. This would be particularly true if the concern that parties inadvertently sleep on their rights and fail to make such a motion is correct. *See generally infra* text accompanying note 346. However, the distinction probably is not substantial enough to warrant the application of state law.

[280] In a substance-procedure dichotomy, fairness and efficiency concerns may be considered procedural in nature. Ely, *supra* note 277, at 724; *cf.* RESTATEMENT (SECOND) § 87 comment b at 317 (1982).

Attempts to distinguish substance from procedure, and critiques of such an enterprise, are long standing. *See, e.g.*, Cook, *"Substance" and "Procedure" in the Conflicts of Laws*, 42 YALE L.J. 333 (1933); Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813, 818-25

broad collateral consequences to a mooted judgment may reflect a desire to avoid the cost of relitigating issues once resolved, or the potential embarrassment of inconsistent decisions.[281] The choice to purge a judgment of collateral consequences may reflect concern over the accuracy of unreviewed judgments,[282] or over the fairness of treating a judgment as conclusive when a statutorily granted opportunity for review has been lost.[283] These are all nonsubstantive concerns.

Allowing mooted judgments legal consequences, however, may reflect substantive considerations as well.[284] Foremost among them are a desire to foster repose and to create a stable climate for future action. Both arise from the certainty that an issue has been conclusively resolved.[285]

(1962); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after* Erie Railroad v. Tompkins, 34 ILL. L. REV. 271, 274-78 (1939). For purposes of this Article, Professor Ely's attempt to define these terms, in the context of his interpretation of the Rules Enabling Act, 28 U.S.C. § 2072 (1976), will serve as well as any other.

> We have, I think, some moderately clear notion of what a procedural rule is — one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes. Thus, one way of doing things may be chosen over another because it is thought to be more likely to get at the truth, or better calculated to give the parties a fair opportunity to present their sides of the story, or because, and this may point quite the other way, it is a means of promoting the efficiency of the process. Or the protection of the process may proceed at wholesale, as by keeping the size of the docket at a level consistent with giving those cases that are heard the attention they deserve. The most helpful way, it seems to me, of defining a substantive rule . . . is as a right granted for one or more nonprocedural reasons, or some purpose or purposes not having to do with the fairness or efficiency of the litigation process.

Ely, *supra* note 277, at 724-25 (footnotes omitted). It should be noted that Professor Ely finds this definition inappropriate for analysis under the Rules of Decision Act. *Id.* at 724 n.168. But that position appears to be driven by his view that factors 2 and 3 alone are appropriate to resolve Rules of Decision Act concerns, a view the case law appears to reject. *See* Redish & Phillips, *supra* note 275, at 369.

[281] Indeed, these are among the core values which the preclusion doctrines protect. *See supra* note 50.

[282] *See supra* text accompanying notes 35-37.

[283] *See supra* text accompanying notes 38-42.

[284] Preclusion rules may reflect both substantive and procedural policies. *See* RESTATEMENT (SECOND) § 87 comment b at 317 (1982).

[285] In this context, the treatment of statute of limitation questions, under the Rules of Decision Act, presents a useful source for comparison. Like the policies underlying the decision to grant or deny a mooted judgment continued life, the statute of limitations may be seen to serve both procedural and substantive ends. It may serve dual purposes of protecting the docket from overcrowding and protecting the system from the resolution of stale claims (procedural policies) while providing individual peace of mind and

To the extent such substantive policies underlie the state approach, application of state law would be favored.

As to the second factor, differences in the collateral consequences attributed to a mooted judgment would have little effect on the character of the initial proceeding,[286] but could significantly influence its result. For example, in a state system a mooted judgment could carry full legal consequences, whereas in the federal system it would not. If the concern that different results may be obtained by choosing a federal rather than a state forum involves not only differences in the initial litigation outcome, but also difference in the outcome's effect on subsequent litigation, then differences in the consequences attaching to a judgment often will be significant for choice of law purposes.[287]

It is unlikely that differences of this kind would implicate the third factor, forum shopping. If mootness problems were unforeseeable at the outset of litigation, the prospect of different collateral consequences attaching to a judgment moot on appeal would be of little influence. Even if mootness were foreseeable, the plaintiff, when choosing a forum, often will not know whether the preservation of a judgment's collateral consequences will be beneficial or detrimental. Only rarely, if mootness on appeal is likely, and plaintiff's chance of victory small, would the potential purging of a judgment's collateral consequences make a federal forum desirable.[288]

Finally, even if some considerations point to the application of state law, they may be outweighed by countervailing federal interests. As the Supreme Court recognized in *Byrd v. Blue Ridge Rural Electric Cooperative*, the preservation of essential elements of the federal system as "an independent system for administering justice" is a legitimate fed-

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flexibility of planning through certainty that claims are resolved (substantive policies), here occasioned by the passage of time. *See* Ely, *supra* note 277, at 726. Professor Ely argues that given such substantive concerns underlying the statute of limitations, the Rules of Decision Act requires the application of state law to statute of limitations questions. *Id.* at 716 n.126; *see* Walker v. Armco Steel Corp., 446 U.S. 740, 751-53 (1980). By analogy, the application of state law concerning the continuing effect of a mooted judgment may be required.

[286] Of course, the collateral effect attributed to the first judgment may have substantial effect on the character of subsequent litigation, but that does not appear to be a relevant inquiry.

[287] Given the range of authority a mooted judgment could retain, from full effect to no effect to a position in between, the degree of difference between federal law and state law could vary widely. The smaller the difference, the less persuasive the argument that state law should be applied.

[288] The same basic analysis would appear to hold when defendants choose the forum, through removal, or choose to use the forum, as in a permissive counterclaim.

eral concern to be weighed in the balance.[289] Although the precise contours of this interest remain elusive,[290] the right of a federal court to determine the effect of its own judgments is at the core of this concern. Professor Degnan, in his influential article on federalized res judicata, put the point in these terms:

> [I]t is in the nature of the judicial power to determine its own boundaries. This principle was recognized by Judge Medina in *Kern v. Hettinger* in the very context we are considering here: 'One of the strongest policies a court can have is that of determining the scope of its own judgments.' Without that power it is less than a court. A clear thrust of the Constitution is that courts created by the Congress are courts in the fullest historical sense of the word.[291]

Certain aspects of the law of res judicata, such as the parties who may benefit or be bound by a judgment, may be so intertwined with state substantive interests as to warrant application of state law.[292] The evolving trend,[293] however, is that federal law governs core matters such as the effect of a judgment by federal law.[294]

A second federal interest to be considered is the policy underlying the *Munsingwear* doctrine. When a judgment becomes moot on appeal, the availability of statutorily provided review is lost. In fairness to the litigants and in fidelity to congressional intent, such judgments are stripped of their collateral consequences. To honor a conflicting state policy here would undermine the Rules of Decision Act, which mandates application of state law only in the absence of an articulated con-

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[289] 356 U.S. 525, 527 (1958).

[290] *See* Redish & Phillips, *supra* note 275, at 369-72.

[291] Degnan, *supra* note 265, at 769 (citation omitted); *see also* 57 A.L.I. PROC. 356-57 (1980) (statement by G. Hazard) (presenting a similar argument in support of RESTATEMENT (SECOND) § 87); *see also supra* note 274.

[292] *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4472, at 733-34; RESTATEMENT (SECOND) § 87 comment b at 317 (1982).

[293] Historically, state law governed the preclusive effect of federal adjudication of state rights. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, §§ 4468, at 655, 4472, at 732; 57 A.L.I. PROC. 357 (1980) (statement by G. Hazard). Cases so holding appear to persist. RESTATEMENT (SECOND) § 87 reporter's note on comment b (1982). However, the evolving trend is that federal law should govern the preclusive effect of federal judgments, although at times that will indicate choice of state law. RESTATEMENT (SECOND) § 87 & comment b (1982); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4472, at 733-34.

[294] Thus, the Restatement (Second) provides that "the basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function. See §§ 17-28. These should be determined by a federal rule." RESTATEMENT (SECOND) § 87 comment b (1982). Incorporated therein is § 28(1), which addresses the question of mootness on appeal.

stitutional or congressional interest. Although the issue may be close, the application of federal law to the question of a mooted judgement's continued life appears to be the better approach.[295]

D. Special Circumstances

Preceding sections of the Article focus on classes of cases which might fall outside the scope of the *Munsingwear* doctrine. Here the focus shifts to the possibility that, on a case-by-case basis, appellate courts might appropriately exercise discretion and avoid their "duty" to follow the *Munsingwear* approach.[296]

A starting point for analysis is the Supreme Court's pre-*Munsingwear* decision, *Walling v. Reuter Co.*[297] There the Court discussed its supervisory appellate authority to dispose of cases in which it could not proceed to the merits. The Court stated, in dictum, "[i]f a judgment has become moot, this Court may not consider the merits, but may make such dispositions of the whole case *as justice may require.*"[298] Some have interpreted that language as affording courts discretion to avoid the *Munsingwear* approach.[299]

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[295] Others have employed *Byrd's* concern for maintaining an independent system for the administration of justice in different ways, to justify federal courts determining the scope of their judgments on state law questions. *See* Vestal, *supra* note 265, at 1741-44; Comment, *supra* note 265, at 100-02. For example, Professor Vestal suggests that, by definition, the administration of justice includes determining the effect of judgments. Vestal, *supra* note 265, at 1742-43. Further, he argues that a desire to provide a speedy adjudication in the best possible manner and to use federal judges most efficiently is part of a concern for a federal system for the administration of justice which would be furthered by the adoption of federal preclusion rules. *Id.* at 1741-42.

Of particular interest is the notion that a federal concern in efficiently controlling the federal docket and resources is an important countervailing value. *Cf.* Redish & Phillips, *supra* note 275, at 392 (stating that "avoiding the cost or inconvenience to the federal courts that would accompany the application of a state procedural rule" is the "only . . . federal concern that should ever be allowed to outbalance a truly significant competing state interest"). Ironically, in this context, given the limited continued value placed on mooted judgments in the federal system, application of state law might ultimately be more efficient, as the broader the effect given the initial judgment, the more limited subsequent litigation can be.

[296] *See supra* text accompanying notes 66-67 (discussing application of the *Munsingwear* doctrine as the duty of the appellate court).

[297] 321 U.S. 671 (1944).

[298] *Id.* at 677 (emphasis added).

[299] *See* Finberg v. Sullivan, 658 F.2d 93, 95-96 (3d Cir. 1980); ROBERTSON & KIRKHAM, *supra* note 34, § 273, at 500; Comment, *Disposition of Moot Cases*, *supra* note 16, at 78 n.3, 81 n.18.

Some have argued that the *Walling* standard provides the Supreme Court discretion

Whether this dictum supports a discretionary view of the appellate court's duty is open to question. In each of the cases concerning mootness on appeal relied upon in *Walling*, the Court employed the *Munsingwear* procedure.[300] In the forty years since *Walling*, the Supreme Court has never invoked its dictum to support a discretionary approach. In fact, the Court cited *Walling* in *Munsingwear*[301] as support for the proposition that the vacation/dismissal procedure is part of the Court's general supervisory powers.[302] Thus, the case may mean no more than that the *Munsingwear* approach is the disposition justice requires. Nevertheless, given its broad language, the *Walling* standard could provide sufficient leeway for alternative dispositions in special circumstances.

Some case law in the lower courts supports the discretionary application of the *Munsingwear* doctrine. For example, in *Armendariz v. Hershey*,[303] the Fifth Circuit carved out an "exceptional circumstances" justification for its deviation from *Munsingwear*. The plaintiff had successfully argued, in the district court, that the Selective Service System's failure to grant him a student deferment for the academic year was improper. On appeal the Government argued that the district court lacked jurisdiction to conduct a pre-induction review of the plaintiff's classification. While appeal was pending, the school year ended, mooting the action. The appellate court, on its own motion, dismissed the case as moot. On petition for rehearing, the Government argued that if the case were moot, the *Munsingwear* procedure should be followed. The court rejected this contention in a brief footnote:

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to circumvent the *Munsingwear* procedure, but does not extend such discretion to the circuit courts as well. *See, e.g.*, Finberg v. Sullivan, 658 F.2d 93, 95-96 (3d Cir. 1980); Comment, *Disposition of Moot Cases*, *supra* note 16, at 78 n.3. However, that conclusion is open to serious question. The power of the Supreme Court to make dispositions "as justice may require" derives from 28 U.S.C. § 2106 (1976). *See* United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950). That provision applies to the Supreme Court and circuit courts alike. Albeit in a different context, the Supreme Court, in construing the statute, indicated that the power of the Supreme Court and courts of appeals to direct " 'such appropriate judgments . . . as may be just under the circumstances' " is "coextensive." Bryan v. United States, 338 U.S. 552, 558 (1949), *overruled on other grounds*, Burks v. United States, 437 U.S. 1 (1978). If their power is coextensive in the mootness context as well, then either both have discretion or neither does, unless other factors are at work to meaningfully distinguish the appellate levels. *See supra* text accompanying notes 163-97.

[300] Walling v. Reuter Co., 321 U.S. 671, 677 (1944) (citing Brownlow v. Schwartz, 261 U.S. 216, 218 (1923); Heitmuller v. Stokes, 256 U.S. 359, 362-63 (1921); United States v. Hamberg-American Co., 239 U.S. 466, 477-78 (1916)).

[301] United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950).

[302] *See supra* note 11.

[303] 413 F.2d 1006 (5th Cir. 1969).

> We are not warranted under the circumstances of this case to reverse or vacate the judgment below and remand with a direction to dismiss. [*Munsingwear*] recognizes that a case may warrant an exception to the general rule of reversing or vacating the judgment below . . . . [T]he matter is one for exercise of discretion on the part of the court where exceptional situations indicate that the court should not follow the general procedure.[304]

The *Armendariz* opinion fails to elaborate upon what special circumstances were present to warrant an exception to the vacation/dismissal procedure,[305] and it has not proved seminal in establishing an exceptional circumstances exception.

In *Wirtz v. Local 410, International Union of Operating Engineers*,[306] the Second Circuit took an even broader view of the circumstances allowing an appellate court to deviate from the *Munsingwear* approach. In *Wirtz*, the Secretary of Labor sued several union locals to have elections set aside on the ground that union rules deprived members of a reasonable opportunity to be candidates for union office, in violation of federal law. Having lost in the trial court, the Secretary appealed. Subsequent elections were held while the appeal was pending, thereby mooting the controversies. Rather than automatically applying the *Munsingwear* doctrine, the court indicated that it had discretion to choose between simple dismissal and the vacation/dismissal procedure with different legal consequences turning on the choice.[307] To determine how to exercise its discretion, the court considered the merits. Finding that the lower courts had erred, the court decided that "[i]n order not to leave in effect the lower courts' contrary conclusions, we vacate the judgments of the district courts with instructions that the complaints be dismissed."[308]

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[304] *Id.* at 1008 n.*. In support of this position the court cited *inter alia* United States v. Munsingwear, Inc., 340 U.S. 36, 38 & n.2 (1950); Comment, *Disposition of Moot Cases*, *supra* note 16, at 96; Note, *Cases Moot on Appeal*, *supra* note 34, at 794. Of these, only the Note directly supports the proposition that there should be an exceptional circumstances exception to the *Munsingwear* doctrine. Even this source may have meant only that cause of mootness should be taken into account when disposing of mooted appeals.

[305] Perhaps the court viewed this case like *Munsingwear*, in which dismissal was warranted because the Government failed to make a timely *Munsingwear* request, but that seems unlikely. Given that mootness was raised by the court rather than by the parties, making a *Munsingwear* request through a petition for rehearing, as was done here, seems sufficient.

[306] 366 F.2d 438 (2d Cir. 1966).

[307] *Id.* at 442.

[308] *Id.* at 443. It should be noted that although the court felt it could choose among dispositional alternatives, its ultimate choice conformed to established practice.

On its face, the opinion provides the appellate court broad discretion to choose between dispositional alternatives. However, exceptional circumstances may have motivated the court. As construed at that time, the mootness doctrine often barred review of union election disputes.[309] Yet, in the court's view, appellate intervention was needed to correct the misguided direction of the lower courts, which threatened to destroy the proper enforcement of federal labor law.[310] By positing a choice of dispositional alternatives, the court secured a forum to set out its view of union election law[311] which a dutiful application of *Munsingwear* would not have afforded.[312]

The preceding cases suggest that limited exceptions to the duty to follow *Munsingwear* might be warranted. Yet in numerous instances federal courts, including the Supreme Court, simply dismiss cases moot on appeal without any explanation for their deviation from established practice.[313] To the extent this is done in the face of a timely *Munsing-*

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[309] *Id.* at 444. Under subsequent case law the situation presented here would not be treated as moot, thus obviating the need for the court to reach out and consider the merits in this fashion. *See* Wirtz v. Bottle Blowers Ass'n, 389 U.S. 463, 467 (1968).

[310] 366 F.2d at 442-44.

[311] Significant questions can be raised as to the propriety of defining exceptional circumstances as questions in need of review, and then reviewing the merits, even though the action is moot. *See infra* note 320.

[312] It should be noted that other federal courts have decided the merits of controversies they acknowledge to be moot. *See, e.g.*, United States v. Olson, 604 F.2d 29, 31 (8th Cir. 1979); International Longshoremen's Local 21 v. Reynolds Metals Co., 487 F.2d 696, 697 (9th Cir. 1973), *cert. denied*, 417 U.S. 912 (1974); *cf.* United States v. Cleveland Elec. Illuminating Co., 689 F.2d 66, 68 (6th Cir. 1982) (applying *Munsingwear* to a moot judgment upholding an OSHA inspection warrant, but also deciding the merits so as to expedite matters should the Supreme Court overturn the finding of mootness).

[313] *See, e.g.*, Beneficial Fin. v. United States, 103 S. Ct. 562 (1982); Price Waterhouse v. Panzirer, 103 S. Ct. 434 (1982) (ordering vacation/remand for dismissal with prejudice); Gilligan v. Sweetenham, 405 U.S. 949 (1972); Matthews v. Little, 397 U.S. 94 (1970); Voltaggio v. Caputo, 371 U.S. 232 (1963); United States v. Washington Dep't of Fisheries, 573 F.2d 1118 (9th Cir. 1978), *aff'd*, 443 U.S. 658 (1979); Boyd v. Justices of Special Term, Part I, of Supreme Court, 546 F.2d 526 (2d Cir. 1976); Robinson v. Commissioners Ct., 505 F.2d 674 (5th Cir. 1974); Allen v. Sisters of St. Joseph, 490 F.2d 81 (5th Cir. 1974); United States Servicemen's Fund v. Killeen Indep. School Dist., 489 F.2d 693 (5th Cir. 1974); Hart v. United Steelworkers, 482 F.2d 282 (3d Cir. 1973); Melville v. Cuyahoga County Bd. of Elections, 462 F.2d 486 (6th Cir. 1972); Davis v. Hershey, 430 F.2d 1296 (9th Cir. 1970); Patterson v. International Alliance of Theatrical Stage Employees, 323 F.2d 368 (10th Cir. 1963); Association for the Preservation of Freedom of Choice v. Wagner, 298 F.2d 522 (2d Cir. 1962); 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 547-48; 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 293-94. Each of the circuit court cases involves a

wear request, the practice appears improper.[314] Relevant here is the Supreme Court's decision in *Great Western Sugar Co. v. Nelson.*[315] In *Great Western*, the Court reviewed a Tenth Circuit decision dismissing as moot an appeal of a district court judgment ordering arbitration. The Tenth Circuit did so, despite the timely request for a *Munsingwear* disposition. Describing the law of *Duke Power* and *Munsingwear* as clear, the Court found the Tenth Circuit's approach "totally at odds with the holding of *Duke Power.*"[316] The Court concluded that even if the appellate court's action had been intended to show approval for the district court's decision, "that motive cannot be allowed to excuse its failure to follow the teaching of *Duke Power Co.*"[317]

The position that the duty of the federal courts to follow *Munsingwear* should be observed closely, if not absolutely, has much to commend it.[318] Of primary importance is the premise underlying the moot-

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final judgment which became moot by happenstance, when the argument to apply the *Munsingwear* doctrine is strongest.

[314] On the requirement of a motion to trigger the *Munsingwear* doctrine, see *infra* text accompanying notes 322-33.

[315] 442 U.S. 92 (1979).

[316] *Id.* at 93-94.

[317] *Id.* at 94.

[318] The Court's opinion in *Great Western* indicates that an appellate court's discretion to deviate from established practice is not unfettered. At a minimum some reason beyond the mere desire to approve the lower court's reasoning is required. Beyond that the Court has not spoken clearly, and some suggest the opinion should be so limited. *See* Ringsby Truck Lines v. Western Conference of Teamsters, 686 F.2d 720, 722-23 (9th Cir. 1982) (explaining *Great Western* in part on the basis that the Tenth Circuit was overruled because it gave no explanation for its departure from the *Munsingwear* procedure).

Great Western may be read for the broader proposition that no deviation from established practice is permissible. *Cf.* Finberg v. Sullivan, 658 F.2d 93, 95-96 (3d Cir. 1980) (citing *Great Western* for the proposition that circuit courts do not have the "discretion simply to dismiss the appeal in a moot case and to allow the lower court judgment to stand"). *See generally* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 294 (stating that the Court's decision in *New Left* "seems to reinforce the implication that the appellate court has no discretion"). Some additional support for this proposition may be provided by the Court's recent order in Board of Governors of the Fed. Reserve Sys. v. Security Bancorp, 454 U.S. 1118 (1981). In that litigation, the Ninth Circuit exercised its discretion and refused a *Munsingwear* request in litigation concerning an application to form a bank holding company. The case became moot when the applicants abandoned their venture after the decision but pending a rehearing request. 655 F.2d 164, 168 (9th Cir. 1980). On appeal, the Supreme Court summarily vacated the judgment as moot and remanded for dismissal.

On its face, this action supports the proposition that appellate courts have little or no discretion to ignore a *Munsingwear* request. Ambiguity surrounding the Ninth Cir-

ness doctrine: absent a live case or controversy a court lacks jurisdiction to reach a determination on the merits.[319] If a choice between alternatives were allowed, a review of the merits often would be necessary to exercise that choice.[320] When different consequences flow from the choice, the process begins to resemble a prohibited decision on the merits. Creating a limited group of well-defined exceptions to the *Munsingwear* rule might reduce this problem, but no such scheme is readily apparent.[321] Nevertheless, should a rare instance arise in which excep-

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cuit's decision clouds this conclusion, however. It is unclear from the circuit court's opinion whether its refusal to honor the *Munsingwear* request was predicated upon discretionary power to dismiss moot appeals in appropriate circumstances, or upon a finding that the case was not moot, although the immediate controversy had expired. *Compare Ringsby Truck Lines*, 686 F.2d at 723 (in which the Ninth Circuit treats its *Security Bancorp* opinion as concerning discretionary avoidance of *Munsingwear*) *with* Petition For A Writ of Certiorari at 7, *Security Bancorp*, 454 U.S. 1118 (indicating the Ninth Circuit did not consider the case moot). If the latter concern prompted the lower court's decision, then the Supreme Court's subsequent action is irrelevant to the problem at hand.

Despite *Great Western*, federal appellate courts still appear to be ignoring their duty with little or no justification. *See generally supra* note 313.

[319] In addition to the values discussed in the text, the simplicity a nondiscretionary rule affords should not be overlooked. Such a rule reduces the burden placed on circuit courts in determining how to dispose of mooted appeals, as well as the burden on the Supreme Court of reviewing those choices.

[320] Indeed, the *Wirtz* case reflects that very problem. *See supra* text accompanying notes 306-12. Most commentators have endorsed a strict application of the duty concept, largely because investing the appellate court with discretion would necessitate an analysis of the merits to exercise that discretion. *See* RESTATEMENT (SECOND) § 28 reporter's note at 285 (1982); Note, *Cases Moot on Appeal*, *supra* note 34, at 794 n.146; 50 COLUM. L. REV. 716, 719 n.27 (1950). Further, if courts are given discretion and yet forego a searching analysis of the merits, some lower court cases might be "approved" without thorough consideration by the appellate court. *Cf.* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 281 n.39 (Cum. Supp. 1980) (commenting on the *Wirtz* decision).

[321] As discussed previously, the Court appears to have rejected the most obvious criterion for differentiation, the cause of mootness. *See supra* text accompanying note 154. Differentiation based on the probability of future litigation also appears to have been rejected sub silentio by the Court in *Great Western*. *See supra* note 77.

Nevertheless, the Court does remand for further consideration below, rather than apply the *Munsingwear* doctrine, when mootness is unclear or can be avoided by amendment. *See, e.g.*, Boston Firefighters Union Local 718 v. NAACP, 103 S. Ct. 2076 (1983); Ohio v. Kovacs, 103 S. Ct. 810 (1983); Johnson v. Board of Educ., 449 U.S. 915 (1980); Dupris v. United States, 446 U.S. 980 (1980); Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972); 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 294; Comment, *Disposition of Moot Cases*, *supra* note 16, at 92. Also, when only a portion of a case becomes moot on appeal the usual procedure of vacating the judgment and dismissing the entire case is not followed. *See, e.g.*, Crowell v. Mader,

tional circumstances warrant use of the dismissal alternative, perhaps the Court should sanction a deviation from established practice.

IV. Procedural Requirements to Invoke a *Munsingwear* Disposition

Given that federal appellate courts have a duty to strip mooted judgments of their legal consequences, how is this duty to be invoked? The federal approach appears to require that a motion be made requesting a *Munsingwear* disposition.[322] Otherwise the appeal will be dismissed and the underlying judgment will continue in force.[323] In analyzing the

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444 U.S. 505 (1980); Carlisle Tire & Rubber Co. v. United States Customs Serv., 663 F.2d 210 (D.C. Cir. 1980); Klein v. Califano, 586 F.2d 250 (3d Cir. 1978). Perhaps these should be viewed as instances in which the Court exercises its discretion to "require such further proceedings to be had as may be just under the circumstances," in lieu of the *Munsingwear* procedure. *Cf.* 28 U.S.C. § 2106 (1976).

[322] *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 91 n.73. Authority for the proposition in the text comes from several sources. First, in *Munsingwear* the Court treated the failure of the Government to request the vacation/dismissal procedure in the court of appeals as a waiver of the Government's right to secure the procedure's protection. United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950). Although open to other interpretations, *see infra* note 329, the case may stand for the proposition that a party must raise its right to a *Munsingwear* disposition or that right will be waived. *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 78, 84 (noting the possibility that a motion by the appellant may be required); *cf.* Stern & Gressman, *supra* note 1, § 18.4, at 898-99.

Second, as noted previously, *see supra* note 313 and accompanying text, and acknowledged by the Supreme Court in *Munsingwear*, 340 U.S. at 39 n.2, the Supreme Court at times simply has dismissed mooted appeals within the federal system. In analyzing these exceptions to the general approach, the D.C. Circuit, in Acheson v. Droesse, 197 F.2d 574, 578 (D.C. Cir. 1952), explained that they were instances in which the parties made no *Munsingwear* request.

Third, several authors have criticized the federal approach requiring the application of the vacation/dismissal procedure to strip a mooted judgment of its preclusive consequences, rather than having the consequences flow from the fact of mootness itself, on the ground that the requirement sets "a procedural trap for the unwary." *See* Restatement (Second) § 28 reporter's note (1982); 18 Wright, Miller & Cooper, *supra* note 12, § 4433, at 316-17; Note, *Cases Moot on Appeal*, *supra* note 34, at 794; *cf.* Hart & Wechsler, *supra* note 34, at 113; *Developments*, *supra* note 34, at 847-48. Presumably the trap is that parties might inadvertantly sleep on their rights by failing to request a *Munsingwear* disposition.

Fourth, the large number of cases mooted on appeal in the federal system that are simply dismissed, *see supra* note 313, suggests either a wholesale dereliction of duty by the courts, or the fact that a party must request a *Munsingwear* disposition and, in those cases, failed to do so. *See generally infra* text accompanying notes 328-33.

[323] *See* United States v. Munsingwear, 340 U.S. at 36; Klein v. Califano, 586 F.2d 250, 255 (3d Cir. 1978); 1B Moore's, *supra* note 12, ¶ 0.416[6], at 545; 6A Moore's,

merits of this approach, two issues need to be addressed: First, who may invoke the *Munsingwear* procedure? Second, why require a motion rather than have the judgment's legal consequences automatically determined upon the finding of mootness?

A. Who May Make a Munsingwear *Request?*

In *Munsingwear*, the appellant waived its right to avoid the preclusive consequences of the initial judgment by failing to request the procedure before the court of appeals. As the Court stated:

> In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights. Denial of a motion to vacate would bring the case here. . . . The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself.[324]

At a minimum, then, it appears that the appellant has a right to request the vacation/dismissal procedure, which may be waived by inaction.[325]

Recognizing this, however, does not require the conclusion that only appellants may invoke the procedure. Some courts assert the power to apply the *Munsingwear* doctrine sua sponte.[326] As articulated by Judge

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supra note 1, ¶ 57.13, at 57-127; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 316; Comment, *Disposition of Moot Cases*, *supra* note 16, at 90; *cf.* STERN & GRESSMAN, *supra* note 1, § 18.4.

What preclusive effects the judgment will be accorded appears to turn on (1) whether it is raised in a subsequent action, and (2) whether the later court finds the appropriate tests for res judicata and collateral estoppel satisfied in that instance. The Court's *Munsingwear* decision strongly suggests that lack of appellate review would be an inappropriate consideration for the later court, 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 545-46, although it has been suggested that the later court should not be so bound. *See id.* at 549; Note, *Cases Moot on Appeal*, *supra* note 34, at 794; 50 COLUM. L. REV. 716, 719 (1950).

[324] United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950).

[325] *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 84.

Under either theory supporting the defusing of judgments moot on appeal — fear of error in the decision below or a need to honor a congressional provision of a right to appeal before a judgment becomes permanently binding — the primary purpose is to protect the appellant from the initial judgment's legal consequences. Thus, appellants should be allowed to insist on the application of this procedure created for their protection.

[326] *See, e.g.*, Weaver v. UMW, 492 F.2d 580, 587 n.36 (D.C. Cir. 1973); Masszonia v. Washington, 476 F.2d 915, 922 (D.C. Cir. 1973) (Robinson, J., dissenting) (dissent cited with approval in *Weaver*); *cf.* Division 580, Amalgamated Transit Union v. Central N.Y. Regional Transp. Auth., 578 F.2d 29, 30 (2d Cir. 1978) (court orders *Mun-*

Robinson in his dissent in *Masszonia v. Washington*:

> Long before *Munsingwear* was decided, the Supreme Court declared that the practice it was later to describe in *Munsingwear* was "the duty of the appellate court." To such a duty *Munsingwear* took pains to itself advert. As a judge, I endeavor to discharge what by higher authority I am told is my plain duty whether I am asked by litigants to do so or not. I perceive no obstacle to discharge of our *Munsingwear* duty here simply because the court reviewed in *Munsingwear* omitted a response to it there. In sum, I would abide *Munsingwear sua sponte*.[327]

Judge Robinson's opinion suggests that appellate courts should employ the *Munsingwear* procedure upon a finding of mootness without requiring a motion from a party.[328] Under this view, the Government's waiver in *Munsingwear* might be seen not so much as a failure to request the vacation/dismissal procedure, but as a failure to appeal when the procedure was not provided.[329] If this position were correct, the frequent use of different procedures by federal courts[330] would reflect a wholesale abdication of their duty.[331] A more charitable view is that although courts must follow the *Munsingwear* approach upon a request by a party, they also may do so sua sponte.[332] Although the court can

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singwear disposition over appellee's request for dismissal; no mention of motion by appellant); Wirtz v. Local 125, Laborer's Int'l Union, 375 F.2d 921 (6th Cir. 1966), *rev'd on other grounds*, 389 U.S. 477 (1968) (court orders *Munsingwear* disposition over appellee's request for dismissal; no mention of motion by appellant); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4436, at 344.

[327] 476 F.2d 915, 922 (D.C. Cir. 1973) (Robinson, J., dissenting).

[328] *See* Comment, *Disposition of Moot Cases*, *supra* note 16, at 84 n.38 (suggesting this as one possible interpretation of the appellate court's duty to follow the *Munsingwear* procedure). Regardless of the interests of the parties, courts may have an independent interest in fulfilling the congressional will and maintaining the integrity of the judicial system by denying legal consequences to judgments when appellate consideration has been cut off by mootness. However, when mootness is brought about by settlement, the role of the court to raise *Munsingwear* sua sponte would need to be curtailed to the extent the effect of mootness on appeal is legitimately a subject to be negotiated by the parties.

[329] As stated by the Court in *Munsingwear*, the Government erred by failing to request the vacation/dismissal procedure. Had such a motion been denied, appeal would lie to the Supreme Court. 340 U.S. at 40-41. It is unclear whether the Court was concerned with the Government's failure to request the *Munsingwear* procedure, its failure to appeal when the procedure was not employed, or its failure to both preserve and perfect an appeal from the appellate court's action.

[330] *See supra* note 313 and accompanying text.

[331] *See* 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 546-48.

[332] Tangential support for this view can be derived from the D.C. Circuit's opinions in Acheson v. Droesse, 197 F.2d 574 (D.C. Cir. 1952), and Masszonia v. Washington, 476 F.2d 915 (D.C. Cir. 1973). In *Droesse*, the court opined that all the cases in which

invoke the doctrine, primary responsibility for requesting the procedure lies with the parties, particularly the appellant.[333]

B. Why Is a Munsingwear *Request Required?*

Identifying who may make a *Munsingwear* request still leaves unanswered the more fundamental question: Why should a request be required at all? Why not have the legal consequences of a judgment automatically terminate upon a finding of mootness?[334] At least three arguments support the current federal approach.

First, res judicata and collateral estoppel, the core concerns of the *Munsingwear* doctrine,[335] traditionally have been considered personal defenses, to be raised or waived by the parties in a second suit.[336] Re-

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the Supreme Court simply dismissed actions moot on appeal (acknowledged by the Supreme Court in its *Munsingwear* opinion, 340 U.S. at 39 n.2) involved instances in which the parties made no vacation/dismissal request. 197 F.2d at 578. Unless Judge Robinson meant to imply in *Masszonia* that the Supreme Court misapplied the law in those instances by ignoring its responsibility, or that the responsibility of circuit courts and the Supreme Court diverge in this regard, he can only mean that, in the absence of a party motion, the court retains the right, but not the duty, to raise *Munsingwear* sua sponte.

[333] Any independent interest of appellees in invocation of the *Munsingwear* doctrine arises when they are willing to forego a judgment's preclusive effects in their favor in order to secure vacation of an unwanted precedent below. The instances in which one who was the judgment winner below is faced with an unfavorable precedent of sufficient magnitude to warrant this tradeoff surely are limited.

[334] *See* RESTATEMENT (SECOND) § 28(1) comment a (1982) (discussed *infra* note 341); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 317; *Developments*, *supra* note 34, at 848.

[335] *See supra* note 33.

[336] Federal Rule of Civil Procedure 8(c) lists estoppel and res judicata as affirmative defenses to be raised in the pleadings or waived. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4405, at 34-35. When collateral estoppel is used offensively, the party wishing to invoke it still must raise the matter, even if only as a proffer of evidence at trial. *Cf. id.* at 38. In short, both offensive and defensive use of the preclusion doctrines are personal to the party, who chooses whether or not to exercise the right to invoke them.

Reinforcing this position is the view that the *Munsingwear* doctrine serves to protect the parties, particularly appellants, from the legal consequences of unreviewed judgments. *See supra* note 325. The personal nature of the protection suggests a right of the party to raise or waive the protection. In raising res judicata or collateral estoppel on its own motion, a court reflects an institutional desire to control its docket and to avoid the burden on its resources of repetitive litigation. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4405, at 33. Allocating the responsibility of raising or waiving res judicata and collateral estoppel to the parties, even though these doctrines serve significant public interests, illustrates that the private interests involved predominate. *Id.* at 32-33.

quiring a party's motion to determine the continued effect of a mooted judgment may be another example of party control of the preclusion doctrines.

This theory has weaknesses, however. Requiring a party to raise a defense in an individual case has much less impact than allowing the parties to determine the future effect of a judgment. The decision to request a *Munsingwear* disposition will not only determine the effect of the judgment for that party, but also may do so for all who might use or be affected by it in any other proceedings.[337]

Even if the decision to invoke the *Munsingwear* procedure is analogous to choosing to raise a personal defense, it is not clear that res judicata and collateral estoppel should be treated as personal defenses, given the strong public interests they serve. Recent cases suggest a trend toward invocation of these doctrines by courts sua sponte.[338] As res judicata and collateral estoppel increasingly are seen as public rights, the support by analogy for party control of the *Munsingwear* disposition declines.[339]

Second, the federal approach allows flexibility in the treatment of mooted appeals. When unvarying consequences automatically flow from a finding of mootness on appeal, no motion should be required to achieve that result.[340] This is the position of the Restatement (Second).[341] Even if categories of cases require different results — for example, differences based on the cause of mootness — as long as the appropriate result automatically attaches to cases within the category

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[337] When the *Munsingwear* doctrine is applied, the judgment's legal consequences are determined conclusively by that action. *See* 1B MOORE's, *supra* note 12, ¶ 0.416[6], at 545.

[338] 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4405, at 33-34 & nn.3-4 (and cases cited therein).

[339] While recognizing a trend toward judicial invocation of the preclusion doctrines, Professors Wright, Miller, and Cooper argue that courts nevertheless would refrain from imposing the doctrines on the parties if the parties agreed to relitigation. *Id.* at § 4403, at 12 n.4. Perhaps a requirement of a *Munsingwear* request, at least when joined by all the parties, can be viewed as an agreement to relitigate the issues resolved in the court below should those issues again arise.

[340] The issue of mootness itself would need to be raised by the parties or the court. Since mootness is a factor affecting the jurisdiction of the court, it can be raised on the court's own motion. *See, e.g.*, American Export Lines v. Alvez, 446 U.S. 274 (1980).

[341] RESTATEMENT (SECOND) § 28(1) (1982). Although it is not stated directly, the commentary and reporter's note accompanying this section strongly suggest that the dismissal of the appeal for mootness would automatically terminate the issue preclusion effects of the initial judgment. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 317 (note the citation of the Restatement in note 26).

no motion need be required.[342]

In the federal system, the consequences flowing from a mooted judgment are not necessarily determined by the fact of mootness itself. For example, the system may allow parties to include the continued effect of a judgment as an item for negotiation in settlement.[343] Requiring their motion to invoke *Munsingwear* allows them to effectuate their choice when settlement moots the appeal.[344]

A third explanation for the federal approach is a pragmatic one. Requiring a party to make a *Munsingwear* request may represent a compromise between the automatic termination of a judgment's collateral consequences and a recognition that the values underlying binding final judgments outweigh the virtues of divesting moot judgments of those effects. Because the burden of making a *Munsingwear* request is on the parties, in some instances requests will not be made, and the salutory values of res judicata and collateral estoppel will be preserved.[345]

Even if these justifications withstand analysis, the federal approach is still subject to question. The primary opposing argument is that uninformed parties will fail to make a *Munsingwear* request and thus will be saddled unfairly with the judgment's legal consequences.[346] This concern, however, may be overstated. First, the failure of the parties to know of and follow a procedure is hardly an excuse for its abolition, if it serves other salutory purposes. Second, although a problem theoretically exists, its significance has not been demonstrated. Although a significant number of cases of mootness on appeal have been dismissed,[347] the number of instances in which the *Munsingwear* right was uninten-

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[342] A motion requirement would not be necessary for the operation of a system in which different categories of cases were treated differently in terms of their continued legal authority. Such differences might necessitate use of varied dispositional procedures, however. When collateral consequences attach to some mooted appeals, but not to others, different procedural devices are needed to reflect which of the alternative choices has been made. Dismissal of the appeal when the lower court judgment retains effect, and a vacation/dismissal procedure when it does not, seems as good a division as any. *See The Supreme Court, 1950 Term, supra* note 34, at 173.

[343] *See supra* text accompanying notes 134-40.

[344] *See* Comment, *Disposition of Moot Cases, supra* note 16, at 85 (discussion of alternative interpretations). Should the parties choose to afford the mooted judgment continued effect, no *Munsingwear* request would be made. If they decide to the contrary, then a motion would be made.

[345] To the extent other legal consequences flowing from a judgment, such as its role as precedent, are negated by the vacation/dismissal procedure, their values are preserved as well when no *Munsingwear* request is made.

[346] *See supra* note 322.

[347] *See supra* note 313 and accompanying text.

tionally waived is not available.[348] Further, it is not known how often the underlying judgment was asserted collaterally such that the inadvertent failure to make a *Munsingwear* request made a difference.

Sua sponte court application of the *Munsingwear* procedure is even more difficult to justify. If an interest in precluding collateral consequences from attaching to a mooted judgment exists independent of the parties, then court intervention may protect that interest. Yet the Restatement (Second) position favoring automatic termination of the judgment's legal consequences upon a finding of mootness provides a simpler approach. If the aim is to protect litigants from an inadvertent loss of rights, a court might raise the vacation/dismissal procedure sua sponte. Yet the same result could be accomplished by a court suggesting that a *Munsingwear* motion would be appropriate, leaving the ultimate decision to the parties.[349]

Perhaps the right of appellate courts to raise *Munsingwear* sua sponte gives them discretion to deprive particular mooted judgments of continued effect, leaving others intact. Since the parties retain the concurrent ability to request a *Munsingwear* disposition, an appellate court determination would not infringe important rights of the parties.[350] Yet to allow the court to pick and choose raises the spectre of appellate court overinvolvement in review of the merits of moot controversies.[351]

In summary, if the federal system retains a flexible approach to mootness on appeal, requiring a motion by the parties to invoke the *Munsingwear* doctrine is justified. Otherwise an approach like the Restatement's, with the continuing effect of the judgment automatically

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[348] The federal courts do not keep summary statistics which would allow identification of the number or percentage of cases which become moot on appeal, let alone further subdivide that category into those in which a *Munsingwear* disposition was requested and those in which it was not. Even if that information were available, along with individual identification of the dismissed cases, extensive survey research still would be necessary to determine the percentage of cases in which waiver of the *Munsingwear* procedure was knowing.

[349] *See, e.g.*, Aviation Enterprises v. Orr, 716 F.2d 1403, 1408 n.36 (D.C. Cir. 1983) (*Munsingwear* made by party request at suggestion of the court at oral argument).

[350] In contrast to previous sections of this Article, which often have focused on instances in which a court might ignore the command of *Munsingwear*, even if requested by a party to enforce it, here we confront that class of cases in which the parties made no *Munsingwear* request, but the court seeks to apply the doctrine nonetheless. Assuming that the right to be free from a premature judgment is important to the parties, but the right to be bound by a premature judgment is not, the sua sponte procedure infringes on no important rights of the parties.

[351] *See supra* text accompanying notes 319-20.

determined by mootness, is preferable. It would accomplish the goals of the *Munsingwear* doctrine while protecting the parties from an inadvertent loss of rights.

V. *Munsingwear* AND THE AVOIDANCE OF LEGAL CONSEQUENCES

The Court in *Munsingwear* authorized use of the vacation/dismissal disposition as a means to preserve "the rights of all parties," allowing "future relitigation of the issues between the parties" and preventing the judgment from "spawning *any legal consequences.*"[352] Beyond this, the Court failed to specify its concerns.

By focusing on preventing the mooted judgment from retaining "any legal consequences," the Court seems to suggest that the *Munsingwear* procedure should have broad application, reaching collateral estoppel, res judicata, law of the case and stare decisis.[353] Since vacated judg-

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[352] United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950) (emphasis added).

[353] *See supra* note 12. *See generally* 1B MOORE'S, *supra* note 12, ¶ 0.401 (describing the interrelated nature of these doctrines). While most cases and commentators focus on the four doctrines addressed in the text, the legal consequences of a judgment are not that limited. *See, e.g.*, Doe v. Marshall, 622 F.2d 118, 120 (5th Cir. 1980) (vacating a preliminary injunction moot on appeal but remanding for a determination of appropriate attorney's fees), *cert. denied*, 451 U.S. 993 (1981). The primary additional legal consequence flowing from an adjudication is its potential use as evidence in a subsequent proceeding.

By and large, courts traditionally have been reluctant to allow the findings and judgment from one case to be used as evidence in another, although this position has been criticized. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 318 (E. Cleary 2d ed. 1972). Nevertheless, under the Federal Rules of Evidence, findings in administrative agency proceedings, the judgment of a previous criminal conviction, and judgments as to personal, family or general history, or boundaries may be entered into evidence in appropriate circumstances. FED. R. EVID. 803(8), (22), (23).

Taken literally, the language of *Munsingwear* would forbid this use, since the mooted judgments are to spawn no legal consequences. Further, by vacating the judgment in question, no judgment remains to be introduced into evidence in a subsequent proceeding (although findings may remain extant which could be introduced when sanctioned). From a policy perspective, however, the twin concerns occasioned by mootness on appeal — loss of the statutory right to review and fear of error in the decision below — may not be implicated sufficiently to warrant barring the judgment's evidentiary use. For example, findings and judgments introduced in a later suit are not conclusive on issues raised there, but are only evidence to be weighed by the trier of fact. The parties retain the right to challenge the evidence in the second proceeding. Thus the loss of a right to review is not particularly severe, since the right to challenge the initial findings remains.

Although some concern over the correctness of such judgments continues, it could be further accommodated by discounting the weight such evidence is accorded. When one

ments carry no collateral estoppel, res judicata, or law of the case effects,[354] the Court's choice of a vacation procedure here is evidence of a desire to limit the judgment's collateral consequences at least in these respects. The real issue is whether vacation occasioned by mootness on appeal should be treated like vacations employed in other circumstances.

A. Collateral Estoppel

That the vacation/dismissal procedure is intended to strip mooted judgments of their collateral estoppel effect is settled. In *Munsingwear*, the Government was barred from pursuing damage actions for Munsingwear's alleged violation of price regulations because the issue of violation had been resolved against it in an earlier injunction action.[355] The use of the first judgment in *Munsingwear* to collaterally estop relitigation of the violation issue is precisely the legal consequence which would have been forestalled had the Government properly invoked the vacation/dismissal procedure.[356] The Restatement (Second) is in accord

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considers the limited instances in which judgments and related findings are given evidentiary status, the reliability concern is further diminished. Criminal convictions are given broader evidentiary use than civil judgments because the higher burden of proof involved makes them more reliable. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(22)[01] (1981). As a corollary, the loss of appellate review as an assurance of accuracy should be less of a concern. Use of civil judgments in an evidentiary capacity is limited to instances in which they may substitute for reputation evidence. *See* FED. R. EVID. 803(23) advisory committee note. Given such limited use, the need for appellate review to assure the trustworthiness of the underlying judgment would not seem so high as to justify exclusion of the evidence because mootness interceded to cut off appellate review. Administrative proceedings are given evidentiary weight under the public records exception to the hearsay rule as a type of investigation made pursuant to authority granted by law. *See* FED. R. EVID. 803(8)(c). Such investigations, however, often involve procedures less formal than an administrative hearing, which have not been subject to judicial review. *See* Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 505 F. Supp. 1125, 1147 (E.D. Pa. 1980); United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 365 (D.D.C. 1980); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 581 (2d ed. 1977). Therefore, the loss of appellate review due to mootness need not be viewed as an indication of a lack of trustworthiness which should preclude an administrative decision's evidentiary use.

[354] *Cf.* DeNafo v. Finch, 436 F.2d 737 (3d Cir. 1971); 1B MOORE'S, *supra* note 12, ¶ 0.416[2], at 517-18.

[355] *See supra* text accompanying notes 16-22.

[356] Although the Government originally sued Munsingwear for its alleged price violations in one action with two counts, one for injunctive relief and the other for damages, the parties and the trial court agreed that the counts should be treated separately, with the injunctive action tried first. Bowles v. Munsingwear, Inc., 63 F. Supp. 933,

that judgments moot on appeal should not preclude an issue's relitigation in subsequent actions.[357]

Further, this position is consistent with the two policies animating the concern over the legal effect of mooted judgments. It frees the loser in the initial action from the effect of a decision untested by review and honors the congressional intent that appeal be allowed before a party is conclusively bound by a negative decision.[358] Not surprisingly, the *Munsingwear* procedure often has been linked explicitly to the elimination of the collateral estoppel effects of mooted judgments.[359]

B. Res Judicata

Whether the *Munsingwear* doctrine abrogates a mooted judgment's res judicata effect poses a more difficult question.[360] As a practical mat-

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935 (D. Minn. 1945), *dismissed as moot sub nom.* Fleming v. Munsingwear, Inc., 162 F.2d 125 (8th Cir. 1947). With such an agreement, the suit became two claims so that the first action would create no res judicata barrier for the second. *See* RESTATEMENT OF JUDGMENTS § 62 (1942); *cf.* RESTATEMENT (SECOND) § 26 (1982). Further, as the lower court interpreted the law at that time, the claims for injunctive relief and damages were two separate claims and therefore could not affect each other through res judicata. *See* 162 F.2d at 125. *But cf.* RESTATEMENT OF JUDGMENTS § 66 (1942) (under the Restatement approach the injunction and damage counts would be treated as one claim absent the agreement to hear them separately); RESTATEMENT (SECOND) § 25(2) & comment i (1982). A second damage action for violations arising after the initial suit was filed also was precluded by the finding in the injunction proceeding.

This analysis is clouded somewhat by the Supreme Court's characterization of the question presented in *Munsingwear* as whether res judicata should apply to prohibit litigation of the damage action. United States v. Munsingwear, Inc., 340 U.S. 36, 37-39 (1950). Read in context, it appears that the Court was using the term "res judicata" in its broad sense to encompass both claim preclusion and issue preclusion. *Id.* at 38 (note particularly the quotation from *Southern Pacific R.R. v. United States*); *cf.* 1B MOORE'S, *supra* note 12, ¶¶ 0.401, at 4 n.13, 0.405[1], at 178; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4402, at 8 n.4. However, it must be acknowledged that the Court usually uses the term only in reference to claim preclusion (i.e. merger and bar). *See id.* at n.3.

[357] RESTATEMENT (SECOND) § 18(1) (1982); RESTATEMENT OF JUDGMENTS § 69 (1942); *cf.* Comment, *Disposition of Moot Cases*, *supra* note 16, at 91-92.

[358] *See supra* text accompanying notes 38-42.

[359] *See, e.g.*, Federal Sav. & Loan Ins. Corp. v. Hykel, 468 F.2d 1386, 1388 (3d Cir. 1972); Nader v. Volpe, 446 F.2d 261, 272 (D.C. Cir. 1972); 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 545; 50 COLUM. L. REV. 716, 717 (1950). As illustrated *supra* note 356, relevant cases which address the impact of a *Munsingwear* disposition on the res judicata effect of a judgment may be using the term broadly to encompass collateral estoppel as well. *See generally* cases cited *infra* note 360.

[360] As discussed in the text, the interplay of the *Munsingwear* procedure and res judicata is potentially unclear. Nevertheless, courts and commentators, without ex-

ter, this issue will seldom arise. That the controversy is moot suggests that identical claims, necessary for res judicata to attach, are unlikely to be asserted in a second action.[361] Yet the concern is not ephemeral. A party in a mooted action may have pursued only some of the theories supporting recovery, or available rights to relief. Although other rights or remedies arising out of the same transaction might continue to exist,[362] res judicata would bar a subsequent action to raise them if a final judgment remained outstanding[363] after a finding of mootness on

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tended analysis, have stated that the *Munsingwear* procedure precludes future res judicata effect for a vacated judgment. *See, e.g.*, Klein v. Califano, 586 F.2d 250, 255 (3d Cir. 1978); Inmates v. Owens, 561 F.2d 560, 563 (4th Cir. 1977); FTC v. Food Town Stores, 547 F.2d 247, 249 (4th Cir. 1977); Federal Sav. & Loan Ins. Corp. v. Hykel, 468 F.2d 1386, 1388 (3d Cir. 1972); Nader v. Volpe, 466 F.2d 261, 272 n.72 (D.C. Cir. 1972); *In re* Hintz, 245 F.2d 667, 670 (7th Cir. 1957); 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 546; 50 COLUM. L. REV. 716, 717 (1950). Such statements should not be read too broadly, however. At times, courts use the phrases "res judicata" and "collateral estoppel" interchangeably. Thus a statement addressed to a judgment's res judicata effect may in fact only concern its collateral estoppel applications. *See* Note, *Collateral Estoppel*, *supra* note 12, at 344.

[361] 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 541-42; 50 COLUM. L. REV. 716, 717 (1950).

[362] A slight variation in the facts of *Munsingwear* would pose just such a situation. Suppose the Government had sought only to enjoin the company's violations of price regulations, without pursuing its damage remedy. If deregulation were ordered, the injunction action would become moot, as injunctive relief would no longer be appropriate, but the Government's right to damage relief would remain alive.

Similarly, a party might have a number of common law and statutory rights arising from a given claim. If a party sought relief based on violation of a federal regulation, for example, and that regulation were repealed while appeal was pending, that right to relief might be moot while other common law or statutory grounds could remain. Had the party proceeded only under the federal regulation, the entire case, as presented, would be moot. But it is likely that the plaintiff would want to pursue a subsequent action on a different, nonmooted theory.

The chance of partial assertion of the elements of a claim increases when the concept of a claim is expansive. In RESTATEMENT (SECOND) § 24 (1982), the "claim" to which claim preclusion applies is defined broadly to include "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." While this definition certainly is not the only one available, federal courts appear to be moving in the direction of embracing such a broad transactional test. 1B MOORE'S, *supra* note 12, ¶ 0.410[1], at 359; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4407, at 62.

[363] As a general rule, the doctrine of res judicata prohibits the unauthorized splitting of a claim. RESTATEMENT (SECOND) §§ 24(1), 26(1)(a)-(b) (1982). This includes, *inter alia*, successive suits for forms of relief, or on grounds or theories of the case not presented in the initial action. RESTATEMENT (SECOND) § 25(1)-(2) (1982). Thus, in each of the examples *supra* note 362, subsequent litigation of the type suggested would be prohibited if the initial action were found moot on appeal and the appeal dismissed.

appeal.[364]

Thus the question is a relevant one: Should the vacation/dismissal procedure strip an initial judgment of its claim preclusion power? Courts deprive mooted judgments of their collateral estoppel effects either because the judgments have lost the assurance of correctness review affords[365] or because the judgments are premature within the statutory scheme.[366] These interests, while still present, may be of different moment when claim preclusion is the focus. Fear of error uncorrected by appellate review argues against the use of a mooted judgment in a subsequent proceeding. The strength of that argument varies, however, in the contexts of issue and claim preclusion. Traditionally, the opportunity to review the initial judgment for error has been considered more important to the later use of a judgment as collateral estoppel than as res judicata.[367] The potentially far-reaching consequences of modern collateral estoppel warrant particular concern over the correctness of the underlying judgment. Numerous issues from one lawsuit may be applied conclusively in other proceedings involving different parties. In contrast, the effect of preclusion of a single claim on other persons in other proceedings is far more limited. Assuming the party had a full and fair opportunity to litigate at the trial level, the values of repose may outweigh concern over the correctness of the judgment. If the opportunity for appellate review for the correction of errors is not as essential to res judicata as to collateral estoppel, then loss of review through mootness need not lead to the elimination of the judgment's res judicata effect.[368]

Under such circumstances an appellate court, faced with mootness caused by the unavailability of a suggested theory or the futility of the relief requested, might remand the case to the lower court with instructions that amendment be allowed, if requested, to keep the case alive. *See supra* note 321.

[364] In some instances, such as interlocutory review, the decisions which become moot on appeal would not be final judgments for res judicata purposes. *See supra* note 78 and text accompanying note 92.

[365] *See supra* text accompanying notes 35-37.

[366] *See supra* text accompanying notes 38-42.

[367] *Compare* RESTATEMENT (SECOND) § 28 comment a (1982) (on centrality of appellate review to doctrine of collateral estoppel) *with* 1B MOORE'S, *supra* note 12, ¶ 0.416[5], at 530-31, *and* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 320 n.36 (espousing the general view that res judicata applies to a judgment regardless of the availability of appellate review).

[368] The omission in either the first or second Restatement of Judgments of an exception to claim preclusion for judgments mooted on appeal, along with a recognition of an exception for issue preclusion, supports this view. *Cf.* Comment, *Disposition of Moot Cases*, *supra* note 16, at 92.

If protection of the statutory right to review is key, then at least as to those claims raised below and preserved on appeal, the judgment should lose its res judicata effect. On this theory there is no ground to differentiate res judicata from collateral estoppel. The right to review encompasses the possibility of more favorable collateral estoppel and res judicata consequences should the unfavorable judgment below be overturned.

A different result might be justified, however, with respect to theories of recovery and rights or remedies not asserted below.[369] Here the argument that a right to appellate review has been lost is diminished. Had the appellate process continued, uninterrupted by mootness, these "subclaims" would not have been considered by the appellate court, for as a general rule new matters cannot be raised on appeal.[370] Once the litigation ended, res judicata would prevent their assertion in a subsequent suit on the same claim.[371] Stripping the lower court's decision of res judicata effect as to these matters does not protect the individual from the loss of a statutory right of review. Rather, it resurrects legal avenues once foregone.[372] Nevertheless, at times matters unasserted at the initial trial still may be considered in the litigation, either by the appel-

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[369] *See supra* note 362 (discussing the scope of a single claim under modern doctrine).

[370] *E.g.*, Singleton v. Wulff, 428 U.S. 106, 120 (1976); Country Fairways v. Mottaz, 539 F.2d 637, 642 (7th Cir. 1976); Pierre v. United States, 525 F.2d 933, 936 (5th Cir. 1976); *see* Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652 (1951).

[371] *See* RESTATEMENT (SECOND) § 24 (1982).

[372] *Cf.* Comment, *Disposition of Moot Cases*, *supra* note 16, at 92-93. An analogous argument can be made with respect to issues that, while raised below, were not preserved or presented on appeal. Since as a general rule such issues are not subject to appellate review, no statutory right to their review is lost because of intervening mootness. *See generally* Wangerin, *"Plain Error" and "Fundamental Fairness:" Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DE PAUL L. REV. 753 (1980) (discussing the rule, and its exceptions, that issues must be preserved on appeal); Comment, *Basic and Fundamental Error: The Right Result For the Wrong Reason*, 43 TEMP. L.Q. 228 (1970) (discussing the rule, and its exceptions, that issues must be preserved for appeal). Given this, some have suggested that when the *Munsingwear* procedure is properly invoked, judgments should be purged of their collateral consequences only with respect to matters raised on appeal. As to unappealed issues, the original judgment would remain in effect. *See, e.g.*, Masszonia v. Washington, 476 F.2d 915, 920 (D.C. Cir. 1973) (Robinson, J., dissenting); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 316 n.24. This view does not appear to have been adopted, however, perhaps because of a fear that it would create an incentive to tack frivolous appeals to substantial ones in order to maximize the benefits of a *Munsingwear* disposition should mootness on appeal arise. *Cf. id.*

late court in exceptional circumstances,[373] or by the trial court on remand.[374] Perhaps the loss of this possibility through mootness is sufficient to require that the initial judgment's res judicata effect be expunged as it relates to unasserted matters.

Yet to allow this would undercut the special role res judicata plays in deterring claim splitting. Res judicata and collateral estoppel are animated by common concerns of efficiency and repose. Each serves to prevent relitigation of matters once decided and to set an end point at which a matter is finally resolved.[375] Res judicata goes further and acts as a penalty, exacting forfeiture[376] of unasserted matters transactionally related to the claim as presented. This res judicata function should not be eliminated because of the possibility that matters unasserted during the initial proceeding still may arise. In those limited instances in which application of res judicata principles to unasserted matters raised in subsequent litigation would cause manifest injustice, the later court should have the discretion to deny the res judicata defense.[377]

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[373] *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 120-21 (1976); Youakim v. Miller, 425 U.S. 231, 234 (1976); Hormel v. Helvering, 312 U.S. 552, 556-57 (1941); Morrow v. Greyhound Lines, 541 F.2d 713, 724 (8th Cir. 1976).

[374] If appeal results in remand to the trial court for further proceedings, the district court, in its discretion, may allow amendment to the pleadings to raise the formerly unasserted matter, absent appellate direction to the contrary. *See* 3 J. MOORE, MOORE'S FEDERAL PRACTICE § 15.11, at 15-151 (2d ed. 1983). Post-remand amendment to raise a new right to recovery would often prejudice the defendant if substantial additional time and effort were involved in its resolution. Thus, it would be rarely granted.

[375] *See supra* note 50.

[376] *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4406, at 44. Issue preclusion, when applicable, also works a forfeiture (although to a more limited extent) by generally foreclosing the reassertion of an issue, even though new arguments can be presented in its support. *Id.*

[377] The Restatement (Second) § 26(f) comment i (1982) recognizes that a court, in exceptional circumstances, may deny res judicata application to a judgment which would otherwise appear to support it. How far this authority extends in the federal courts is unclear. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4415, at 128-35. Some have interpreted the Supreme Court's decision in Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981), to suggest that the Court views the exceptional circumstances exception to res judicata narrowly. 18 WRIGHT, MILLER & COOPER (Pocket Part 1982), *supra* note 12, § 4415, at 17-18. Thus, the circumstances which justify an exception to the operation of res judicata may be more limited than those which warrant an appellate court to entertain issues which were not presented below. *Cf.* 1B MOORE'S, *supra* note 12, ¶ 0.405[2], at 189 (suggesting greater flexibility within the confines of a single case to correct errors that would cause injustice than after the case has gone to judgment). *See generally supra* note 373. Nevertheless, at least in the more compelling situations, subsequent litigation will not be prohibited with respect to unas-

C. Law of the Case

If a case, although supposedly moot, finds renewed life,[378] it would seem appropriate for the litigation to be renewed at the point at which the dispute was interrupted.[379] This might be achieved by a broad application of law of the case. Traditionally, law of the case applies to a single law suit, in all its phases, precluding the relitigation of legal issues previously decided in the same case.[380] Yet the doctrine occasionally has been applied to factual determinations as well as legal issues.[381] Further, the literature suggests that law of the case may apply beyond the single law suit to closely related litigation.[382] Under this broad definition, law of the case would provide authority for the litigation to be resumed at the point where it ceased. The court could still reopen issues if the circumstances warranted,[383] but would be able to prevent the parties from completely rearguing their cases.

Although not addressing the issue in terms of law of the case, the Fourth Circuit's recent decision in *Hill v. Western Electric Company*[384] illustrates this approach. In *Hill*, a successful job discrimination class action had been overturned, in part because the named plaintiffs, employees of the defendant, were found as a matter of law to be inadequate class representatives for unsuccessful job applicants. On remand the district court rejected a motion by the unsuccessful applicants to intervene, in part because of the time it would take to retry their claims. The Fourth Circuit brushed aside this concern. The court indi-

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serted matters that would have been given appellate consideration had mootness not interceded, even if the *Munsingwear* doctrine does not compel that result.

[378] *See* 1B MOORE'S, *supra* note 12, ¶ 0.416[6], at 542 n.16.

[379] *Cf. id.*

[380] *See* 1B MOORE'S, *supra* note 12, ¶¶ 0.401, at 3-4, 0.404[1]; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4478, at 788; Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1, 4 (1967).

[381] *See, e.g.*, Bradley v. Milliken, 620 F.2d 1143, 1147-50 (6th Cir.), *cert. denied*, 449 U.S. 870 (1980); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4478, at 800.

[382] *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4478, at 788, 794; *cf.* Antonioli v. Lehigh Coal & Navigation Co., 451 F.2d 1171, 1177 n.22, 1178 (3d Cir. 1971) (successive actions on behalf of same class, with different named plaintiffs, governed by law of the case if res judicata inapplicable). The exact nature of the relationship necessary to support the doctrine's application to separate suits is unclear, but it would seem appropriate to apply it to situations, such as that posited in the text, which really represent one case fortuitously interrupted.

[383] *See* Southern Ry. v. Clift, 260 U.S. 316, 319 (1922); 1B MOORE'S, *supra* note 12, ¶¶ 0.401, at 3-4, 0.404[1], at 119-20; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4478, at 788-90.

[384] 672 F.2d 381 (4th Cir.), *cert. denied*, 103 S. Ct. 318 (1982).

cated that although the district court's vacated judgment could not be used as res judicata or precedent in other litigation,[385] the judgment and supporting findings of fact and conclusions of law could be reinstated in the remanded action[386] once the quasi-jurisdictional defect of inadequate class representation had been cured.[387]

By analogy, if the jurisdictional defect of mootness is cured, a lower court should be allowed to reinstate its previous findings, conclusions and judgment, which could then be subject to appellate review. Although this position has much to commend it, there is both judicial[388] and scholarly[389] support for the proposition that law of the case ceases when the vacation/dismissal procedure is invoked.

D. Stare Decisis

Perhaps the greatest controversy has arisen over the interplay of the *Munsingwear* doctrine and stare decisis, for if the mooted case is significant, a question of its continued vitality as precedent is likely to arise.

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[385] *Id.* at 387.

[386] The court justified its position on policy grounds, indicating that the approach would save judicial resources and avoid the risk of inconsistent judicial resolution of issues. *Id.*; *see* Dunlop v. Rhode Island, 398 F. Supp. 1269, 1273 (D.R.I. 1975) (initial decision of trial court vacated on appeal on eleventh amendment grounds could not be used as collateral estoppel in an identical suit subsequently brought by the federal government as a substituted plaintiff, but the findings of the earlier proceeding could be adopted in the second proceeding).

[387] 672 F.2d at 388. The court in *Hill* acknowledged that the propriety of reinstatement would be limited if "the error or defect . . . infected the merits of the very determination sought to be reinstated." *Id.*

[388] *E.g.*, Johnson v. Board of Educ., 457 U.S. 52 (1982) (per curiam); County of Los Angeles v. Davis, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting); *cf.* United States v. Sarmiento-Rozo, 592 F.2d 1318, 1321 n.2 (5th Cir. 1979). In *Johnson*, the Court discussed the meaning of its previous order in the case, in which it had vacated a judgment and remanded for further consideration in light of subsequent developments, possibly mooting the appeal. The lower courts, without taking further evidence, determined that the developments did not moot the litigation and, relying on law of the case, reaffirmed their previous opinions. Upon a renewed request for review, the Supreme Court agreed the case was not moot, but felt the new developments might have implications for the merits. The Court again granted certiorari, vacated the judgment and remanded, this time for consolidation with a related case. In adopting this procedure, the Court stressed, "[b]ecause we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court or, should an appeal be subsequently be taken, the Court of Appeals." 457 U.S. at 53-54. Whether this is solely the result of vacation or is a necessary concomitant to consolidation with the related case is unclear.

[389] 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 282 n.44 (Cum. Supp. 1980) (discussing *County of Los Angeles v. Davis*).

This is particularly true for institutional litigants, for whom the precedential aspects of a decision may be as important, or more important, than the outcome of the particular claim involved.[390] Therefore, it is crucial to determine whether the Court, in sanctioning the vacation/dismissal procedure, intended that the unreviewed decision be treated as a nullity, as standing for whatever persuasive force its argument retains, or as full precedent.

As its 1979 decision in *County of Los Angeles v. Davis*[391] demonstrates, the Court has not reached a consensus on this issue. In *Davis*, a civil rights action alleging racially discriminatory practices in the hiring of county firefighters became moot pending appeal to the Supreme Court. Justice Brennan, for the majority, ordered vacation and dismissal. Citing *O'Connor v. Donaldson* and *A.L. Mechling Barge Lines v. United States*, he noted, "[o]f necessity our decision 'vacating the judgment of the court of appeals deprives that court's opinion of precedential effect' . . . ."[392] In dissent, Justice Powell, joined by Chief Justice Burger, also citing *O'Connor* and *A.L. Mechling*, disputed this interpretation, finding the effect of the *Munsingwear* procedure more limited.

> Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being law of the case, . . . the expression of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, is likely to be viewed as persuasive authority if not the governing law of the Ninth Circuit.[393]

Review of the cited authority does little to clarify the point. In *O'Connor* the Court found that vacating a circuit court opinion and remanding with directions for the lower court to consider the effect of an omitted jury instruction on the jury's award of damages "deprives the court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case."[394] This language leaves unclear whether vacating the decision below strips it of its precedential effect, its role as law of the case, or both.[395] Further, vacation occa-

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[390] *See supra* note 130.

[391] 440 U.S. 625 (1979).

[392] *Id.* at 634 n.6.

[393] *Id.* at 646 n.10; *accord* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 282 n.44 (Cum. Supp. 1980); Note, *Supreme Court Disposition*, *supra* note 34, at 950 n.24. It is unclear from Justice Powell's opinion whether he believes the vacated decision retains full or only partial precedential value. *Compare infra* text accompanying notes 402-16 *with* text accompanying notes 417-20.

[394] O'Connor v. Donaldson, 422 U.S. 563, 578 n.12 (1975).

[395] *See* Note, *Supreme Court Disposition*, *supra* note 34, at 950 n.24 (interpreting

sioned by a higher court's determination on the merits appears sufficiently different from vacation arising from the appellate court's constitutional inability to decide to distinguish *O'Connor*.[396] *A.L. Mechling*, in contrast, involves the disposition of a case mooted on appeal, but does not expressly delineate its own precedential effect.[397] Thus, while the opinions in *Davis* provide some understanding of the interplay of the *Munsingwear* doctrine and stare decisis, they are hardly dispositive.[398]

In the lower courts, it appears that the majority of recent cases adopt the Brennan view that the vacation/dismissal procedure strips the lower court's judgment of its precedential effect.[399] Unfortunately, most

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O'Connor as involving law of the case rather than stare decisis).

[396] Vacation on the merits usually expresses disagreement with the lower court's position, absent a disclaimer to the contrary. In contrast vacation occasioned by mootness reflects no judgment concerning the validity of the case below. *But cf.* Comment, *Disposition of Moot Cases*, *supra* note 16, at 78.

One possible exception may arise at the Supreme Court level. Some courts distinguish instances in which the Supreme Court first grants certiorari, and then must use the *Munsingwear* procedure when mootness subsequently intervenes, from those in which the Court grants certiorari solely to dispose of a mooted case by the vacation/dismissal procedure. In the former situation the validity of the lower court's ruling is thrown into question; in the latter it is not. *See, e.g.*, Retail Store Employees Local 1001 v. NLRB, 85 Lab. Cas. ¶ 10,993, at 19,843 n.28 (D.C. Cir. 1978) (Robinson, J., dissenting), *rev'd en banc on other grounds*, 627 F.2d 1133 (1979), *rev'd*, 447 U.S. 607 (1980); New York Stock Exch. v. Bloom, 562 F.2d 736, 743 n.6 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978). *See also supra* note 174.

[397] A.L. Mechling Barge Lines v. United States, 368 U.S. 324 (1961).

[398] Tangential comments in other Supreme Court opinions support Justice Brennan's view. *See* Goldwater v. Carter, 444 U.S. 996, 1005 (1979) (Rehnquist, J., concurring); Fortson v. Toombs, 379 U.S. 621, 633 (1965) (Goldberg, J., dissenting).

[399] *See, e.g.*, Iowa Power & Light Co. v. Burlington N., 647 F.2d 796, 812 n.28 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Craig v. County of Los Angeles, 626 F.2d 659, 668 n.9 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); Marshall v. Whittaker Corp., 610 F.2d 1141, 1145 (3d Cir. 1979); Bagby v. Beal, 606 F.2d 411, 414 (3d Cir. 1979); Bowers v. United States Bd. of Parole, 544 F.2d 898, 900 (5th Cir. 1977); Boston Community Media Comm. Minority Caucus v. FCC, 509 F.2d 516 (D.C. Cir. 1975); Garafola v. Benson, 505 F.2d 1212, 1216 n.4 (7th Cir. 1974); Ridley v. McCall, 496 F.2d 213, 214 (5th Cir. 1974); Cabuco-Flores v. INS, 477 F.2d 108, 112 (9th Cir.), *cert. denied*, 414 U.S. 841 (1973); Robert Stigwood Group Ltd. v. Hurwitz, 462 F.2d 910, 914 n.8 (2d Cir. 1972); Swingline, Inc. v. I.B. Kleinert Rubber Co., 399 F.2d 283, 284-85 (C.C.P.A. 1968). This view is supported by several commentators as well. *See* 1B MOORE'S, *supra* note 12, ¶ 0.402[2], at 25 n.3; Note, *Cases Moot on Appeal*, *supra* note 34, at 794. In fact, one student author speculates that the Supreme Court's shift from dismissal of moot appeals to the *Munsingwear* procedure is attributable to the Court's desire to eliminate the stare decisis effect of decisions moot on appeal in the public law area. Comment, *Disposition of Moot Cases*,

fail to articulate their reasoning.[400] Perhaps they view vacation and dismissal as a procedure which renders the litigation a nullity. Or they may find that the *Munsingwear* injunction against according effect to premature judgments applies not only to the preclusive effect of a judgment, but to its precedential effect as well.[401]

Despite this trend, strong arguments can be made that lower court judgments vacated due to mootness should retain their precedential value.[402] Cases moot on appeal presented live controversies before the lower courts. There they received as much consideration as cases to

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supra note 16, at 86.

At least one judge views the fact of mootness on appeal itself, rather than the vacation of the judgment, as the key to the loss of precedential effect. *See* Johnson v. Mississippi, 491 F.2d 94, 95 n.1 (5th Cir. 1974) (Brown, J., dissenting). *But see* Tyson v. Cazes, 363 F.2d 742, 744 n.8 (5th Cir. 1966). Under such a view, when the parties fail to request the vacation/dismissal procedure, a judgment presumably would retain its preclusive effect, but would lose its power as precedent. In contrast, other cases may be read to suggest that loss of precedential effect does not arise from mootness, or through the act of vacation alone, but only takes place when the court of the precedent's origin expressly acknowledges that the case's precedential value has been lost. *See* Cicero v. Olgiati, 410 F. Supp. 1080, 1086 n.2 (S.D.N.Y. 1976).

[400] Tangential support for this position can be drawn from the treatment given unpublished opinions with respect to their precedential value. In both situations fear over the correctness of a decision, due to lack of thoroughness in its consideration, impedes its use as precedent. In most federal courts of appeals, unpublished opinions cannot be cited as precedent; similar treatment might be warranted for judgments moot on appeal. *See generally* Reynolds & Richman, *The Non-precedential Precedent: Limited Publication and No Citation Rules in United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1179-82 (1978).

The analogy is far from perfect, however. The case for a no-citation rule with respect to unpublished opinions is bolstered by a fear that such opinions will not be equally available to counsel: a concern not present in the mootness context. *See id.* at 1187 (discussing the differential access concern with unpublished opinions). Further, an initial decision designated for publication, which later becomes moot on appeal, often will evidence more thorough consideration than an unpublished opinion. *See* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 574, 581, 598-604 (1981) (discussing concern with the lack of thoroughness in consideration in unpublished opinions); Reynolds & Richman, *The Non-precedential Precedent: Limited Publication and No Citation Rules in United States Court of Appeals*, 78 COLUM. L. REV. 1167, 1175 (1978).

[401] *Cf.* Hart & Miller Islands Area Envtl. Group, Inc. v. Corp of Eng'rs, 459 F. Supp. 279, 286 (D. Md. 1978), *rev'd on other grounds*, 621 F.2d 1281 (4th Cir.), *cert. denied*, 449 U.S. 1003 (1980).

[402] *See generally* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 294-95 n.44; Comment, *Disposition of Moot Cases*, *supra* note 16, at 78, 96; Note, *Supreme Court Disposition*, *supra* note 34, at 950 n.24.

which precedent clearly pertains. Since any such decisions reflect a court's considered view, they should be as authoritative as other precedent.[403] By such logic, however, such judgments could be afforded res judicata and collateral estoppel effect, but they are not. Are there sufficient reasons to justify treating a judgment's precedential effect and preclusive effect differently when the vacation/dismissal procedure has been applied?

Two primary factors justify different treatment. First, the doctrines differ in the conclusiveness each would have in a subsequent proceeding. As a general matter, the preclusion doctrines are binding in a later action even if the previous determinations were wrong.[404] Stare decisis, in contrast, is more flexible, allowing leeway to avoid or overturn erroneous determinations.[405] This distinction relates to the concern expressed in the Restatement (Second) that appellate review is essential to enhance the probability of correctness of a lower court judgment.[406] Given the difference in flexibility in the doctrines of preclusion and precedent, the importance of a correct decision is greater for the former than for the latter.

Second, the doctrines differ in their relationship to the general rules governing appealability. A party has a right to appeal an adverse deter-

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[403] *See* 13 WRIGHT, MILLER & COOPER, *supra* note 1, § 3533, at 294-95. However, one might argue that the very act of appeal throws some doubt on the lower court's reasoning, as the losing party evidently felt the judgment sufficiently vulnerable to warrant proceeding further. That a higher court shares this view would be confirmed in those instances in which jurisdiction is granted over discretionary appeals. *See supra* note 396.

[404] Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981); Angel v. Bullington, 330 U.S. 183, 187 (1947); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Reed v. Allen, 286 U.S. 191, 201 (1932); Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325 (1927); Wilson's Ex'r v. Deen, 121 U.S. 525, 534 (1887); 1B MOORE'S, *supra* note 12, ¶ 0.405[2], at 189.

[405] Except in instances in which obedience is owed by a lower court to a higher one, or when the doctrine of interpanel accord applies, courts may avoid precedent when warranted. *See* 1B MOORE'S, *supra* note 12, ¶ 0.402[3.-1] (discussing departure from past precedent). *See also infra* notes 412, 418 (addressing the binding nature of precedent in the circumstances mentioned above). Even a court technically bound by a precedent has many tools available to distinguish the case and avoid the precedent. *See generally* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 77-91 (1960); 1B MOORE'S, *supra* note 12, ¶¶ 0.402[1], at 12 n.16, 0.402[2], at 34, 45 n.50. Finally, in particularly egregious circumstances, a lower court may point out that the precedent by which it feels bound is bad law in hope that the higher court, when given the opportunity on appeal, will concur. *See* Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 11 n.39 (1967).

[406] *See supra* text accompanying notes 35-37.

mination in a suit only if it will be binding on that party later through res judicata or collateral estoppel. A party has no right to appeal an adverse ruling which merely creates an unfavorable precedent.[407] This difference relates to the concern underlying the *Munsingwear* doctrine, that parties should not be affected by judgments which are premature in the statutory scheme.[408] Since unfavorable precedent alone is insufficient to support appellate jurisdiction, loss of an opportunity to overturn unfavorable precedent is not necessarily inconsistent with the statutory intent.[409] When a party seeks both a favorable judgment and supporting precedent on appeal, the former is the central concern the statute recognizes; the latter is only tangential.

In addition to these policy arguments, Judge Robinson of the D.C. Circuit has advanced a procedural argument supporting the continued viability of mooted decisions as precedent in his dissent in *Retail Store Employees Union, Local 1001 v. NLRB*.[410] The case involved appeal of an NLRB decision concerning the "struck product" doctrine. In upholding the Board the majority dismissed a conflicting opinion of the circuit on the ground that it lacked precedential value, having been vacated and dismissed as moot.[411] Judge Robinson argued that the case retained its precedential effect and conclusively determined the instant case under the doctrine of interpanel accord.[412] To support his position,

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[407] *See* J. FLEMING, JR. & G. HAZARD, JR., CIVIL PROCEDURE § 13.5 (2d ed. 1977); 1B MOORE'S, *supra* note 12, ¶ 0.416[5], at 533; 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 203.06, at 3-23, 3-24 (2d ed. 1983); 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3902, at 401 (1976) [hereafter 15 WRIGHT, MILLER & COOPER]; 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4433, at 317; *cf.* Perez v. Ledesma, 401 U.S. 82, 87 n.3 (1971). *But cf.* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333-36 (1980) (stating that "in an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits").

[408] *See supra* text accompanying notes 38-42.

[409] *But cf. supra* note 133.

[410] 85 Lab. Cas. ¶ 10,993 (D.C. Cir. 1978), *rev'd en banc on other grounds*, 627 F.2d 1133 (D.C. Cir. 1979), *rev'd*, 447 U.S. 607 (1980).

[411] *Id.* at 19,841 n.4.

[412] *Id.* at 19,837. Under the doctrine of interpanel accord, a recent decision of one panel of a circuit will bind other panels of the court as precedent, subject only to reversal en banc. *See, e.g.*, United States v. Burns, 662 F.2d 1378, 1383-84 (11th Cir. 1981); Board of Educ. v. Hufstedler, 641 F.2d 68, 70 (2d Cir. 1981); Hamilton v. Roth, 624 F.2d 1204, 1209 (3d Cir. 1980); Trunkline Gas Co. v. FERC, 608 F.2d 582, 583 (5th Cir. 1979); United States v. Caldwell, 543 F.2d 1333, 1369 n.19 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); Doe v. Charleston Area Medical Center, 529 F.2d 638, 642 (4th Cir. 1975); United States v. Mount, 438 F.2d 1072, 1074 (9th Cir.

Judge Robinson carefully distinguished vacation of a judgment from vacation of an opinion. He argued that the former, which *Munsingwear* requires, merely eliminates the judgment and the consequences that flow therefrom: res judicata and collateral estoppel. Precedent is eliminated by vacating the opinion itself.[413] In support he contrasted the *Munsingwear* procedure with the court's usual practice in en banc proceedings of vacating the earlier panel opinion prior to rehearing. From this he concluded:

> Vacatur, expressly or impliedly, either before or during *en banc* hearing is obviously necessary to dissolve the precedent established by the earlier panel opinion. Contrastingly, when a case becomes moot while on appeal, we vacate only the judgment of the case . . . . The practice of vacating the judgment in one set of circumstances but expressly vacating the opinion in another mirrors the view that the two procedures are not interchangeable.[414]

Despite the policy and procedural arguments supporting continued precedential vitality for cases treated under the *Munsingwear* disposition, an appellate court determination would not infringe important rights of the parties.[415] Yet today there are numerous instances in which

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1970); 1B MOORE'S, *supra* note 12, ¶ 0.402[1], at 20 & n.33. However, the rule is not universally accepted, and even when followed it is subject to exception. *See, e.g.*, Le Vick v. Skaggs Co., 701 F.2d 777, 778 (9th Cir. 1983) (avoiding doctrine of interpanel accord when circuit's precedent has been undermined by subsequent Supreme Court decisions); Speigner v. Jago, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979) (rejecting the doctrine of interpanel accord in the Sixth Circuit), *cert. denied*, 444 U.S. 1076 (1980); North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036, 1044-45 (4th Cir.) (application of interpanel accord doctrine not warranted when en banc review not available), *cert. denied*, 434 U.S. 874 (1977).

[413] *See* Retail Store Employees Union, Local 1001 v. NLRB, 85 Lab. Cas. ¶ 10,993, at 19,837-38 (D.C. Cir. 1978), *rev'd en banc on other grounds*, 627 F.2d 1133 (D.C. Cir. 1979), *rev'd*, 447 U.S. 607 (1980).

[414] *Id.* at 19,842 n.12.

[415] *See* United States v. Alessi, 544 F.2d 1139, 1150 n.9 (2d Cir.), *cert. denied*, 429 U.S. 960 (1976); Granville-Smith v. Granville-Smith, 214 F.2d 820 (3d Cir. 1954), *aff'd*, 349 U.S. 1 (1955); United States v. Wolfe, 232 F. Supp. 85, 100-01 (S.D.N.Y. 1964).

In *Granville-Smith* the Third Circuit, addressing the permissibility of a statutory provision of the Virgin Islands concerning jurisdiction in divorce proceedings, indicated it was bound by its previous en banc holding on the matter in Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954). That judgment had been vacated and the case dismissed when it became moot on appeal. 214 F.2d at 820. When *Granville-Smith* came before the Supreme Court, the Court acknowledged without comment the Third Circuit's reliance on *Alton*. 349 U.S. at 4. *But cf.* Ridley v. McCall, 496 F.2d 213, 214 (5th Cir. 1974) (overturning a district court opinion in which the district court felt bound by a previous en banc decision of the Fifth Circuit which

cases vacated as moot continue to be cited by the lower courts.[416]

Other courts take a compromise position, acknowledging that cases treated under the *Munsingwear* procedure lack binding precedential effect, but affording them the persuasive force their logic commands.[417] The opinion is no longer treated as a decision of a particular court binding fellow members of that court and lower courts owing it alle-

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had been vacated and dismissed as moot, since that opinion no longer had any precedential effect). It should be noted that, without expressly overruling *Granville-Smith*, subsequent case law in the Third Circuit appears to have adopted the view that cases treated under the *Munsingwear* doctrine lose their precedential effect. *See* Third Circuit cases cited *supra* note 399.

In *Alessi*, the Second Circuit indicated that it could rely on its previous decision in United States v. Ford, 237 F.2d 57 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957), as precedent, even though that case had been vacated and dismissed after it became moot on appeal. 544 F.2d at 1150 n.9. In doing so, the court explicitly rejected the position of a different panel within the circuit, in United States v. Beckerman, 516 F.2d 905, 906 (2d Cir. 1975), which had ruled that because the judgment in *Ford* had been vacated, that case lacked precedential effect.

[416] Courts often cite cases which have been vacated as moot without discussion of their continued precedential effect. *E.g.*, Franklin v. Shields, 569 F.2d 784, 790 n.21 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978) (citing cases vacated and remanded as moot); Coralluzzo v. New York State Parole Bd., 566 F.2d 375, 378 (2d Cir.), *cert. granted*, 434 U.S. 996 (1977), *cert. dismissed*, 435 U.S. 912 (1978) and United States *ex rel.* Richerson v. Wolff, 525 F.2d 797, 804 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976) (both citing United States *ex rel.* Johnson v. Chairman N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated and remanded for dismissal as moot*, 419 U.S. 1015 (1974)); Childs v. United States Bd. of Parole, 511 F.2d 1270, 1275, 1278-81 (D.C. Cir. 1974) (citing a number of cases vacated and remanded for dismissal as moot); United States v. Meriwether, 486 F.2d 498, 503 (5th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974) and United States v. Smith, 427 F.2d 1164 (9th Cir.), *cert. denied*, 400 U.S. 880 (1970) (both citing United States v. Ford, 237 F.2d 57 (2d. 1956), *vacated and remanded for dismissal as moot*, 355 U.S. 38 (1957)); Spartacus Youth League v. Board of Trustees, 502 F. Supp. 789, 798 (N.D. Ill. 1980) (citing New Left Educ. Project v. Board of Regents, 326 F. Supp. 158 (W.D. Tex. 1970), *vacated and remanded for dismissal as moot*, 414 U.S. 807 (1973)); *see* Note, *Supreme Court Disposition*, *supra* note 34, at 950 n.24.

[417] *See, e.g.*, Blake v. Zant, 513 F. Supp. 772, 780 n.3 (S.D. Ga. 1981), *rev'd on other grounds*, 718 F.2d 979 (11th Cir. 1983); Voyles v. Watkins, 489 F. Supp. 901, 910 n.5 (N.D. Miss. 1980); Hart & Miller Islands Area Envtl. Group v. Corp of Eng'rs, 459 F. Supp. 279, 285-86 (D. Md. 1978), *rev'd on other grounds*, 621 F.2d 1281 (4th Cir.), *cert. denied*, 449 U.S. 1003 (1980); Bennett v. Local 456, Int'l Bhd. of Teamsters, 459 F. Supp. 223, 231 n.17 (S.D.N.Y. 1978); Cicero v. Olgiati, 410 F. Supp. 1080, 1086 n.2 (S.D.N.Y. 1976); *cf.* Comment, *Disposition of Moot Cases*, *supra* note 16, at 93 n.84. It should be noted that some courts that indicate, in the abstract, that vacating a judgment deprives a case of precedential effect, *see supra* note 399, might still sanction the limited precedential value described here.

giance,[418] but it is not ignored. Rather it is viewed pragmatically, used for the strength of its logic and as a guide to the position the higher authority ultimately may adopt.[419]

This last approach seems best. It accommodates the reality that a considered decision was handed down with the concern that further appellate review has been lost.[420]

VI. CONCLUSION

To date, the Supreme Court appears to have adopted a relatively simple approach to the treatment of decisions moot on appeal. As a general rule, judgments in such cases are vacated and the cases are remanded for dismissal, at least when requested by a party. Through this disposition, the lower court's decision is purged of all its legal consequences, including collateral estoppel, res judicata, law of the case and stare decisis. Exceptions exist for mooted appeals of state court judgments and nonjudicial administrative decisions.

Despite the Supreme Court's guidance, lower courts have not followed it uniformly. Two reasons may account for this. First, the Su-

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[418] For a discussion of the binding nature of precedent in such circumstances, see 1B MOORE'S, *supra* note 12, ¶¶ 0.402[1], at 12-14, 0.402[2], at 25-27; Kelman, *supra* note 405; *supra* note 412 (discussion of interpanel accord).

[419] *See* Gutierrez v. Aero Mayflower Transit Co., 22 Fair Empl. Prac. Cas. 447, 449-50 (N.D. Cal. 1979). In *Gutierrez* the district court recognized that the Ninth Circuit's opinion in Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979), had lost its precedential value after being vacated as moot by the Supreme Court, but followed it nonetheless, stating: "This court is persuaded however that the interpretation . . . set forth in *Davis* is sound and, in any event, that it will be readopted by the Ninth Circuit in future cases." *Id.* at 449. *Cf.* Jefferys v. R.W. Harmon & Sons, 22 Fair Empl. Prac. Cas. 1635, 1636 (W.D. Tenn. 1980). *But cf.* Craig v. County of Los Angeles, 626 F.2d 659, 668 n.9 (9th Cir. 1980) (recognizing that its earlier opinion in *Davis v. County of Los Angeles*, having been vacated, is no longer binding), *cert. denied*, 450 U.S. 919 (1981); Gay v. Waiters & Dairy Lunchmen's Union Local 30, 489 F. Supp. 282, 298 (N.D. Cal. 1980) (indicating that after the vacation of the judgment in *Davis v. County of Los Angeles* questions presented therein must be treated as open in the Ninth Circuit), *aff'd on other grounds*, 694 F.2d 531 (9th Cir. 1982).

[420] As described more fully, *supra* note 400, a partial analogy may be drawn between the precedential treatment to be accorded unpublished opinions and judgments moot on appeal. While it is a minority position, citation of unpublished opinions is allowed in the Fourth, Sixth and Tenth Circuits. *See* 4TH CIR. R. 18(d); 6TH CIR. R. 24(b); 10TH CIR. R. 17(c). With the exception of the Tenth Circuit, the precedential use these rules allow appears more limited than that suggested in the text for decisions moot on appeal. Given the reasons present for limiting the use of unpublished opinions, however, this difference is not surprising. *See generally supra* note 400.

preme Court's positions in this area often remain unarticulated because most cases are resolved through summary dispositions. The Court's positions are presented only by example, not through reasoned opinions. As a consequence, substantial lower court opinions and scholarly commentary promote alternative treatments for cases moot on appeal, at odds with Supreme Court practice.

Second, significant arguments support an approach to mootness on appeal different from that adopted by the Supreme Court. Tension exists between the desire to afford completed lower court decisions full legal effect in subsequent litigation, promoting consistency and efficiency by limiting relitigation of matters once resolved, and a concern that such effect should be limited because a right to appellate consideration has been lost.

The Supreme Court leans toward strict limits. It starts with the premise that Congress intended the appellate process, if initiated, to run its course before legal consequences would attach permanently to the decision of a lower tribunal. Taken to its extreme, this congressional intent argument could be construed to apply to all instances of mootness on appeal, and to reach all legal consequences flowing from a judgment.

Substantial doubt exists, however, as to the initial premise, particularly as to its across the board application. Without this underpinning, at least a limited use of mooted judgments in subsequent proceedings seems justified. Whether the current rationale will give way to a more limited construction of congressional intent, or be replaced by a correction of error theory such as that underlying the Restatement (Second) approach, is unclear. Whatever course ultimately is chosen, the Supreme Court should undertake soon to clarify the doctrinal confusion that currently reigns.