BYU Law Review

Volume 1975 | Issue 1 Article 11

5-1-1975

Constitutional Law--Mootness--De Funis v. Odegaard

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itself, violate the ban on sex discrimination contained in Title VII of the Civil Rights Act of 1964.[70] The court stated:

> The threshold question is whether disparity of treatment between pregnancy-related disabilities can be classified as discrimination based on sex. If, as footnote 20 [in Geduldig] seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified — or less justified in the employment context than in some other context — can never be reached.[71]

Thus, pregnant women appear to have lost the protection formerly guaranteed them under Title VII of the Civil Rights Act of 1964. This need not have occurred. In allowing California to refuse to insure coverage for pregnancy, the Court did not have to deny that discrimination against pregnant women is sex discrimination.

Constitutional Law — MOOTNESS — *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

Marco DeFunis applied for admission to the University of Washington Law School for the 1971–72 school year but was denied admittance.[1] After his rejection, DeFunis, a white, learned that several minority applicants had been preferentially considered and accepted with lower academic qualifications than his.[2]

DeFunis commenced an action in a Washington state court seeking to compel his admission. The trial court granted DeFunis a temporary injunction allowing him to enter law school in September of 1971, and subsequently ruled that the admissions procedures violated the equal protection clause.[3] The Supreme Court of Washington reversed the lower court, ruling DeFunis had not demonstrated, as a matter of fact, that the law school's admissions procedures were unconstitutional.[4] The United States Supreme Court granted certiorari[5] and the judgment of

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[70] 42 U.S.C. § 2000e-2(a) (1970).

[71] 2 CCH EMP. PRACT. G. at 5639.

[1] The class was to be limited to 150 students; 1601 applications were received. 416 U.S. 312, 314 (1974).

[2] Certain minority groups are given preferential treatment by the admissions committee. These groups include Black, Chicano, Native, and Filipino Americans. In determining the probability of success in law school, less weight was placed on the grade-point averages and admission test scores of members of these groups than of other applicants. DeFunis v. Odegaard, 82 Wash. 2d 1121, 507 P.2d 1169, 1175 (1973) (en banc).

[3] DeFunis v. Odegaard, No. 741727 (Wash. Super. Ct. King Co. 1971) (oral decision), found in 1 A. GINGER, DEFUNIS VERSUS ODEGAARD AND THE UNIVERSITY OF WASHINGTON, THE UNIVERSITY ADMISSIONS CASE 115 (1974).

[4] 82 Wash. 2d 11, 507 P.2d 1169 (1973) (en banc).

[5] 414 U.S. 1038 (1973).

the Washington Supreme Court was stayed until final disposition of the case, thus permitting DeFunis to remain in school.[6]

By the time set for oral argument DeFunis had already registered for his final quarter of law school. In a per curiam opinion, the Court declared the case moot and declined to rule on the merits "because the petitioner will complete his law school studies at the end of the term for which he is now registered regardless of any decision the Court might reach on the merits of the litigation."[7]

I. BACKGROUND

Mootness has its origin in the common law doctrine that courts are powerless to render opinions where no actual controversy exists[8] and is predicated on the proposition that "federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them."[9] A case is moot when, after initial compliance with ripeness[10] and standing[11] requirements, subsequent events such as settle-

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[6]The stay was issued by Mr. Justice Douglas as Circuit Justice in the Ninth Circuit. 416 U.S. at 315.

[7]*Id.* at 319-20.

[8]Mills v. Green 159 U.S. 651, 653 (1895); *See* Note, 53 HARV. L. REV. 628 (1940); Note, 34 HARV. L. REV. 416 (1921).

[9]North Carolina v. Rice, 404 U.S. 244, 246 (1971). The policy of the Court has always been to hear only cases involving concrete disagreements between parties actually at odds and to avoid expending limited judicial resources on abstract questions or hypothetical situations. *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (the case or controversy requirement should "limit the business of federal courts to questions presented in an adversary context and in form historically viewed as capable of resolution through the judicial process"); Marye v. Parsons, 114 U.S. 325, 330 (1884); Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850). *Compare* Bickel, *The Supreme Court, 1960 Term-Forward: The Passive Virtues,* 75 HARV. L. REV. 40 (1961) (Professor Bickel suggests the Court make more advantageous use of the doctrines to effectively regulate its caseload) *with* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 9 (1959) (Professor Wechsler offers the view that "the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts").

[10]The doctrine of ripeness requires that the plaintiff must have already suffered or be in imminent threat of injury before an action may be brought. *See* United Public Workers v. Mitchell, 330 U.S. 75 (1946).

> The power of courts, and ultimately of this court, to pass upon the Constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.

Id. at 89-90. *Accord,* International Longshoreman's Union v. Boyd, 347 U.S. 222 (1953); K. DAVIS, ADMINISTRATIVE LAW TREATISE 160-62 (3d ed. 1972); Davis, *Ripeness of Governmental Action for Judicial Review,* 68 HARV. L. REV. 1122, 1133 (1955).

[11]Standing is required of plaintiffs as a necessary element of the case or controversy requirement in all types of actions. *See* C. WRIGHT, FEDERAL COURTS 39 (2d ed. 1970). In *Baker v. Carr,* 369 U.S. 186 (1962), standing was characterized in the following manner:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This

ment by the parties,[12] a change in the law,[13] or the passage of time[14] obviate the need for adjudication because a decision would no longer directly affect the parties.[15] The justifications most frequently given for the mootness doctrine are: (1) prevention of unnecessary use of judicial resources;[16] (2) assurance of sufficient adverseness for issues to be competently and forcefully presented on both sides of a dispute;[17] and (3) avoidance of unnecessary precedent.[18]

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is the gist of standing.

Id. at 188. A plaintiff must have been injured or be subject to future injury in order to have standing to sue. Flast v. Cohen, 392 U.S. 83 (1968) (a taxpayer, for example, may have standing if there is a sufficient nexus between his status as a taxpayer and the alleged wrongful activity); Sierra Club v. Morton, 405 U.S. 727 (1972) (a landowner may have standing to contest the erection of an amusement park on his land, but a concerned environmentalist onlooker may lack a sufficient stake in the dispute to have standing). *See also* United States *ex rel* Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953); Davis, *Standing: Taxpayers and Others* 35 U. CHI. L. REV. 601 (1968).

[12]Stewart v. Southern Ry., 315 U.S. 283, 284 (1942) (case remanded to district court with directions that it be dismissed as moot because the parties had settled); Danciger Oil and Refining Co. v. Smith, 290 U.S. 599 (1933) (upon settlement case remanded "with directions to dismiss . . . upon the ground that the cause is moot").

[13]Hall v. Beals, 396 U.S. 45 (1969) (change in voting durational residency requirements from six to two months removed plaintiffs from the injured class); United States v. Alaska Steamship Co., 253 U.S. 113 (1920) (passage of the Transportation Act of 1920 eliminated the alleged wrong, hence an injunction was no longer needed to protect the complainants).

[14]Doremus v. Board of Education, 342 U.S. 429, 432-33 (1952) (case declared moot because child in question had graduated from public school before appeal was taken to the Court); Atherton Mills v. Johnston, 259 U.S. 13, 15-16 (1922) ("The lapse of time since the case was heard . . . has brought the minor . . . to an age which is not . . . affected by the act. The Act, even if valid, cannot affect him further.").

[15]*See* A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 329, n. 11 (1961) ("the challenged order is now only of academic interest . . . ."); California v. San Pablo and T. R. Co. 149 U.S. 308, 341 (1893) ("the court is not empowered to decide moot questions or abstract propositions . . . which cannot affect the result as to the thing in issue in the case before it"). *See also* Note, 17 DEPAUL L. REV. 590 (1968); Note, *Cases Moot on Appeal: A Limit of the Judicial Power,* 103 U. PA. L. J. 772 (1955).

[16]*See, e.g.,* Note, *Mootness on Appeal in the Supreme Court,* 83 HARV. L. REV. 1672, 1675 (1970) ("The rationale for this limitation (mootness) is often stated in terms of judicial economy."); Note, 53 HARV. L. REV. 628, 629 (1940) ("In part the doctrine is based on the court's desire not to waste time in the futile decision of abstract questions . . . ."); Note, *Cases in Equity That Become Moot on Appeal,* 34 HARV. L. REV. 416, 417-18 (1920) ("Underlying all the decisions, however, is the perhaps laudable fear that courts will waste valuable time in rendering opinions that will serve no useful purpose except the satisfaction of one litigant's will to win."); Note, *Cases Moot on Appeal: A Limit on the Judicial Power,* 103 U. PA. L. REV. 772, 775 (1955) ("courts prefer not to enter decrees which will have no effect on the present status of the parties, and will dismiss such cases in order to devote their time to the decision of live controversies").

[17]East Tenn., Va. & Ga. R.R. v. Southern Tel. Co. 125 U.S. 695 (1888); Diamond, *Federal Jurisdiction to Decide Moot Cases,* 94 U. PA. L. REV. 125, 130 (1946); Note, *Mootness on Appeal in the Supreme Court,* 83 HARV. L. REV. 1672, 1677-78 (1970); Note, 53 HARV. L. REV. 628, 630 n.13 (1940); Note, *Declaratory Judgments in the Federal Courts,* 49 HARV. L. REV. 1351, 1352 (1936) (No court may decide moot cases since it is the "sole function of courts to adjudicate issues of present rights actually disputed by adverse parties.").

[18]*See* note, *The Mootness Doctrine in the Supreme Court,* 88 HARV. L. REV. 373, 376 n.14 (1974) ("Another purpose served by the mootness doctrine is the preservation of flexibility in

Today, mootness is considered a doctrine of constitutional dimensions based in article III[19] which limits the judicial power of the federal courts to "cases or controversies."[20] Parties must have adverse legal positions related to a real dispute at all stages of appellate review if a reviewing court is to have jurisdiction.[21] Thus, not only must a litigant initially demonstrate the existence of an actual controversy but also must demonstrate that a controversy continues to exist throughout the duration of the lawsuit.[22]

By its interpretation of the "case or controversy" requirement, the Court has retained considerable flexibility and discretion in determining whether a case remains justiciable.[23] In exercising this discretion, the Court has created certain exceptions to the mootness rule. Although it is difficult to determine the exact parameters of such exceptions,[24] certain categories are fairly well defined.[25] These exceptions include

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the law by not creating unnecessary precedent."), citing P. BATOR, P. MISHKIN, D. SHAPIRO, AND H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 110 (2d ed. 1973). *See also* Note, 53 HARV. L. REV. 630 (1940).

[19]The courts have not always considered mootness a constitutional doctrine. "Inasmuch as no case in the federal courts has ever mentioned the federal Constitution in this connection (mootness), it seems that there is no definite constitutional mandate against a decision on the merits." Note, *Cases in Equity That Become Moot On Appeal,* 34 HARV. L. REV. 416, 417 (1920).

In recent years the Court has connected the mootness doctrine directly with the article III case or controversy requirement. Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.") (citing Diamond, *Federal Jurisdiction to Decide Moot Cases,* 94 U. PA. L. REV. 125 (1946); Note, *Cases Moot on Appeal: A Limit on the Judicial Power,* 103 U. PA. L. REV. 772 (1955). *See also* S.E.C. v. Medical Comm. for Human Rights, 404 U.S. 403, 407 (1972); Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969); Sibron v. New York, 392 U.S. 40, 57 (1968) (there exists a "constitutional rule against entertaining moot controversies").

[20]*See* U.S. Const. art. III, § 2; A. BICKEL, THE LEAST DANGEROUS BRANCH 114 (1962); HARRIS, THE JUDICIAL POWER OF THE UNITED STATES (1940); C. WRIGHT, FEDERAL COURTS, 34-38 (2d ed. 1970); Bork, *Neutral Principles and 1st Amendment Problems,* 47 IND. L.J. 1 (1971); Note, *The Non-justiciable Controversy,* 48 VA. L. REV. 922 (1962).

[21]North Carolina v. Rice, 404 U.S. 244, 246 (1971).

[22]While standing and ripeness are concerned with whether an actual controversy exists initially, mootness is concerned with whether an actual controversy continues to exist. *See* notes 10 & 11 *supra.* Because the mootness inquiry is usually raised only after a court has been satisfied that the litigant has made a colorable allegation of injury, it has been suggested that in considering mootness the Court has more leeway than in determining standing or ripeness. Note, *Mootness in the Supreme Court,* 88 HARV. L. REV. 373, 377-78 (1974).

[23]*See, e.g.,* Flast v. Cohen 392 U.S. 83, 97 (1968); Note, *The Mootness Doctrine in The Supreme Court,* 88 HARV. L. REV. 373, 377 (1974) ("The broadly phrased case or controversy requirement leaves the Court with substantial discretion to determine whether a case is justiciable in borderline situations.").

[24]*See* Note, *Mootness on Appeal in the Supreme Court,* 83 HARV. L. REV. 1672, 1673 (1970) ("Fixed definition, categorization, and differentiation (of the mootness doctrine) are fruitless endeavors.") citing Diamond, *Federal Jurisdiction to Decide Moot Cases,* 94 U. PA. L. REV. 125, and Kates, *Memorandum of Law of Mootness — Part I,* 3 CLEARINGHOUSE REV. 213 (1970).

[25]In addition to the exceptions treated in detail in this case note, another exception fre-

cases presenting issues of a recurring nature which evade review and cases where the defendant has voluntarily ceased to participate in the allegedly illegal activity.

A. Recurring Issues Which Evade Review

Occasionally cases present recurring matters which, because of the limited time of actual controversy, would avoid adjudication or appellate review if no exception to the mootness rule were available.[26] Examples of this type of situation include disputes over short-term licenses[27] and short-term administrative orders[28] which are moot at the appellate level because the licenses have expired or the orders have ceased to be operative.[29] Federal courts will consider such cases if it can be reasonably expected that the parties to the action will become embroiled in a similar dispute in the future,[30] and if it is evident that the dispute will again be

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quently recognized by the courts is applied in cases where there exists a high likelihood that collateral consequences will adversely affect the aggrieved party in the future. Criminal defendants are the most frequent beneficiaries of this exception. Pollard v. United States, 352 U.S. 354 (1957); United States v. Morgan, 346 U.S. 502, 512-13 (1954); Fiswick v. United States, 329 U.S. 211, 222 (1946); and Note, 53 VA. L. REV. 403 (1967). In *Sibron v. New York,* 392 U.S. 40, (1968), for example, the defendant had completely served his six-month jail sentence by the time his appeal reached the United States Supreme Court, but the Court did not apply the mootness doctrine because of the "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Id.* at 55. The collateral consequence exception generally finds application only in criminal proceedings and, therefore, has limited application in this case note. It should be noted, however, that the collateral consequences exception has on occasion been used in civil cases when a penalty or some form of disciplinary action is involved. *See* Scoggins v. Lincoln University, 291 F. Supp. 161 (W.D. Mo., 1968) and Estaban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo., 1968). *See generally* Singer, *Justiciability and Recent Supreme Court Cases,* 21 ALA. L. REV. 229, 258-63 (1969) (author suggests that the collateral consequences exception should apply in all civil as well as criminal cases).

[26]Moore v. Ogilvie, 394 U.S. 814 (1968); Carrol v. President, 393 U.S. 175 (1968); Southern Pacific v. ICC, 219 U.S. 498 (1910); United States v. W. T. Grant, Co., 345 U.S. 629 (1953).

[27]*See, e.g.,* Travelers Ins. Co. v. Prewitt, 200 U.S. 450 (1906); Securities Mutual Life Ins. Co. v. Prewitt, 200 U.S. 446 (1906).

[28]*See, e.g.,* Porter v. Lee, 328 U.S. 246, 251-52 (1946); Boise City Irr. & Land Co. v. Clark, 131 Fed. 415, 418-19 (9th Cir. 1904).

[29]Due to the relatively short term of the licenses and orders involved, such cases invariably would be moot on appeal. As indicated in Note, *Cases Moot on Appeal: A Limit on the Judicial Power,* 103 U. PA. L. REV. 772, 782-83 (1955) such cases were formerly dismissed as presenting no issue capable of adjudication, but today most courts will look beyond the effects of the expiration and allow the appeal on the merits if the denial may be of future consequence to the applicant. *Compare* Securities Mutual Life Ins. Co. v. Prewitt, 200 U.S. 446, 450 (1906), *with* Rayahel v. McCampell, 55 F.2d 221 (2d Cir., 1932), *and* Leonard & Leonard v. Earle, 279 U.S. 392, 398 (1929).

[30]In determining whether to apply the repetitious issue exception, the Court is most concerned with the probability of recurrence of the allegedly wrongful conduct. The standard was set down in *Maryland Casualty Co. v. Pacific Coal and Oil Co.,* 312 U.S. 270, 273 (1941), where the Court refused to apply an exception to mootness in the absence of evidence that the prospect of a future dispute between the parties was one of "immediacy and reality." *See, e.g.,* Golden v. Zwickler, 394 U.S. 103, 109-10 (1969). (The plaintiff was seeking permis-

moot on appeal.[31] In *Southern Pacific v. Interstate Commerce Commission*,[32] for example, the parties were concerned with the validity of an ICC cease-and-desist order which was to last for 2 years. By the time the Supreme Court was to hear the case, the 2-year period had elapsed. The Court nevertheless considered the merits of the case, reasoning that such short-term orders should be examined despite the termination of the particular order, because it was likely that similar orders would subsequently be issued, but would evade review if the mootness doctrine were strictly followed.[33]

In *Roe v. Wade* [34] a recurring situation was presented where a woman initiated a class action questioning the constitutionality of an anti-abortion statute.[35] Although the plaintiff was pregnant at the time the suit was filed, and thus had standing to bring suit, when the case reached the Supreme Court she was no longer pregnant and her case was technically moot. The Court, however, applied the recurring issue exception and considered the merits and indicated that there existed a reasonable possibility that in the future the plaintiff or a member of the class she represented would be similarly situated, i.e., pregnant, and affected by the challenged statute.[36] Because the issue would again be moot upon reaching advanced appellate review, the Court concluded that the interests of justice would not be served with so rigid an interpretation of the law as to "exclude cases with issues which would otherwise escape adjudication."[37]

Central to the recurring issue exception applied in *Southern Pacific* and *Roe* is the Court's view that the controversy between the parties was broader than the particular issues which had become moot. In such circumstances, if an exception to mootness were not available, the aggrieved party would never be allowed his day in court despite the possibility of continual, though not continuous, interference with his rights.

The Court does not always insist that the original plaintiff to the

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sion from the Court to distribute political pamphlets against a candidate for the state legislature. The case was dismissed as moot when it was brought to the court's attention that the candidate had accepted a judgeship which was to last for 14 years. The Court reasoned that it was "highly unlikely" that the dispute would recur in the future.).

[31]Roe v. Wade, 410 U.S. 113, 125 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1968); Carroll v. Princess Anne, 393 U.S. 175, 178-79 (1968); Southern Pacific v. ICC, 219 U.S. 498, 515 (1910).

[32]219 U.S. 498 (1911).

[33]*Id.* at 515.

[34]410 U.S. 113 (1973).

[35]*Id.* at 120.

[36]*Id.* at 125. It is not clear from the Court's opinion whether the repetitious issue exception was applicable only because the original plaintiff would again become pregnant or because any member of the plaintiff's class could again become pregnant. The language "pregnancy often comes more than once to the same woman" suggests that the court was concerned with the rights of the entire class. *Id.*

[37]*Id.*

action must be the person likely to be injured in subsequent disputes. In class actions such as *Roe* the Court has shown a willingness to apply the exception, even if the original plaintiff's personal dispute has become moot, as long as there is a reasonable possibility that someone in the plaintiff's class will be subject to similar injury in the future.[38]

Even in the absence of a formal class action in compliance with federal standards, the Court occasionally has been willing to apply the recurring issue exception though the plaintiff has lost a personal interest in the dispute if the court considers the interests of a recognizable group to be at stake and sufficiently represented by the plaintiff. In *Richardson v. Ramirez*,[39] for example, three ex-felons brought suit questioning the constitutionality of a Califonria law which disenfranchised convicted felons. The defendants registered the plaintiffs to vote but the California Supreme Court rejected the contention that the case was moot viewing the case as a class action presenting a matter of "broad public interest, . . . likely to recur,"[40] and subsequently invalidated the questioned law.[41] The United States Supreme Court decided the case on its merits.[42] The Court determined that the case was not moot, and deemed significant the fact that the California Supreme Court had treated the case as a class action between all ex-felons and all election officials in the state.[43] Similarly,

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[38] *The Supreme Court, 1973 Term,* 88 HARV. L. REV. 41, 107 (1974) ("[C]urrent practice in the federal courts allows individuals who belonged to a class at the outset of litigation to continue serving in a representative capacity after membership in the class has terminated, without regard to the applicability of exceptions to the mootness doctrine."); *see* note 67 *infra.*

Another possible explanation for the Court's willingness to relax somewhat the requirements for application of the recurring issue exception is the significant public interest involved in many actions which involve substantial numbers of people. *See, e.g.,* American Party v. White, 415 U.S. 767, 770 n.1 (1974); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Note, *Mootness in the Supreme Court,* 88 HARV. L. REV. 373, 388 (1974); Note, *Mootness on Appeal,* 83 HARV. L. REV. 1672, 1685 (1970). Many state courts have recognized the judicial economy in deciding cases involving questions of great public interest when it is evident that the controversy meets the requirements for justiciability even though the case is moot as to the original plaintiff. State *ex. rel.* Steere v. Franklin County Farm Bureau, 172 Kan. 179, 239 P.2d 570 (1951); Golden v. People *ex rel.* Baker, 101 Colo. 381, 74 P.2d 715 (1937); First National Bank v. State, 65 P.2d 1154 (Arizona, 1937); Pitt v. Belote, 108 Fla. 246, 146 S. 380 (1935); Piper v. Hawley 179 Cal. 10, 175 P. 419 (California, 1918). Federal courts, however, will not allow public interest alone as sufficient grounds to allow determination of a moot dispute, even though public interest is frequently mentioned when considering application of an exception to mootness.

[39] 418 U.S. 24 (1974).

[40] Ramirez v. Brown, 9 Cal. 3d 199, 216-17, 507 P.2d 1345, 1347, 107 Cal. Rptr. 137, 149 (1973).

[41] *Id.* at 216-17, 507 P.2d at 1347, 107 Cal. Rptr. at 149.

[42] 418 U.S. 24, 37 (1974).

[43] *Id.* The Court stated that:

> [W]hile the Supreme Court of California did not in so many words say that it was permitting respondents to proceed by way of a "class action," the fact that the Court's process recited that the named registrars were subject to it "individually and as representatives of the class of all other county clerks and registrars of voters," and the fact that the beneficiaries . . . were not merely the named appellants . . . indicates that the

lenged admissions policy, and since no class action had been filed there was no longer a "definite and concrete" controversy for adjudication.

In considering whether an exception to the mootness rule should be applied, the Court reasoned that the voluntary cessation exception was inappropriate because the defendant had not ceased the conduct complained of by the plaintiff, rather, time and other circumstances had interacted to change the plaintiff's status to such an extent that the defendant's actions no longer affected him.[57] The Court also held the recurring issue exception inapplicable since the plaintiff would soon graduate and never again be subjected to the admissions procedures, and it was unlikely the issue would "evade review" as a result of mootness if ever raised again.[58]

Four justices dissented,[59] arguing that a continuing controversy existed in that something might prevent the plaintiff from finishing the term then placing him in a position to be denied readmission.[60] The dissenters also argued that the voluntary cessation exception was applicable because the defendant had voluntarily decided not to prevent the plaintiff's graduation and had failed to demonstrate there was not even a "mere possibility" that the plaintiff would be subjected to the challenged admissions policy.[61]

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[57] *Id.* at 318.

[58] *Id.* at 319. The Court implicitly recognized the great public interest in the case but declined to consider the merits on that basis alone.

[59] *Id.* at 348.

[60] *Id.*

[61] *Id.* at 349. The dissenters also urged that the public interest would be best served by an adjudication on the merits. *Id.* at 350.

Upon concluding that the case was moot, the judgment was vacated and the cause remanded to the Supreme Court of Washington "for such proceedings as by that court may be deemed appropriate." *Id.* at 320. It would also have been permissible for the Court to dismiss the appeal rather than vacate the lower court's judgment. The main justifications for vacating, as opposed to dismissing, the appeal are the possible collateral estoppel consequences if the lower court's judgment were permitted to stand, and the possibility of unjust unforeseen consequences. *See* United States v. Munsingwear, Inc., 340 U.S. 36 (1950); New Orleans Flour Inspectors v. Glover, 160 U.S. 170 (1895); Comment, 23 U. CHI. L. REV. 77, 93 (1955) ("The Supreme Court has apparently adopted reversal of the lower court judgment of the disposition for moot appeals in an effort to prevent unforeseen and undesirable effects.") It is unclear why the Court vacated the Washington Supreme Court's judgment in *DeFunis*. It may have been because the Court did not want to give *DeFunis* stare decisis effect in Washington. But, regardless of whether the decision was vacated or left standing, it will remain in the record and no doubt be referred to in the future. Comment, 23 U. CHI. L. REV. 77, 93 (1955) ("If the opinion below is officially reported, it will always remain in the volume; even if the decision is vacated, the force of the reasoning remains.").

It is also doubtful whether the Court has the authority to vacate a state judgment which has become moot on appeal since state courts are not bound by article III's case or controversy requirement and are, therefore, free to make their own determinations as to mootness. North Carolina v. Rice, 404 U.S. 244, 246 (1971); Liner v. Jafco, Inc., 375 U.S. 301, 304 (1964); Note, *Mootness in the Supreme Court*, 88 HARV. L. REV. 373, 393 n. 104 (1974).

action must be the person likely to be injured in subsequent disputes. In class actions such as *Roe* the Court has shown a willingness to apply the exception, even if the original plaintiff's personal dispute has become moot, as long as there is a reasonable possibility that someone in the plaintiff's class will be subject to similar injury in the future.[38]

Even in the absence of a formal class action in compliance with federal standards, the Court occasionally has been willing to apply the recurring issue exception though the plaintiff has lost a personal interest in the dispute if the court considers the interests of a recognizable group to be at stake and sufficiently represented by the plaintiff. In *Richardson v. Ramirez*,[39] for example, three ex-felons brought suit questioning the constitutionality of a Califonria law which disenfranchised convicted felons. The defendants registered the plaintiffs to vote but the California Supreme Court rejected the contention that the case was moot viewing the case as a class action presenting a matter of "broad public interest, . . . likely to recur,"[40] and subsequently invalidated the questioned law.[41] The United States Supreme Court decided the case on its merits.[42] The Court determined that the case was not moot, and deemed significant the fact that the California Supreme Court had treated the case as a class action between all ex-felons and all election officials in the state.[43] Similarly,

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[38] *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 107 (1974) ("[C]urrent practice in the federal courts allows individuals who belonged to a class at the outset of litigation to continue serving in a representative capacity after membership in the class has terminated, without regard to the applicability of exceptions to the mootness doctrine."); *see* note 67 *infra*.

Another possible explanation for the Court's willingness to relax somewhat the requirements for application of the recurring issue exception is the significant public interest involved in many actions which involve substantial numbers of people. *See, e.g.*, American Party v. White, 415 U.S. 767, 770 n.1 (1974); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Note, *Mootness in the Supreme Court*, 88 HARV. L. REV. 373, 388 (1974); Note, *Mootness on Appeal*, 83 HARV. L. REV. 1672, 1685 (1970). Many state courts have recognized the judicial economy in deciding cases involving questions of great public interest when it is evident that the controversy meets the requirements for justiciability even though the case is moot as to the original plaintiff. State *ex. rel.* Steere v. Franklin County Farm Bureau, 172 Kan. 179, 239 P.2d 570 (1951); Golden v. People *ex rel.* Baker, 101 Colo. 381, 74 P.2d 715 (1937); First National Bank v. State, 65 P.2d 1154 (Arizona, 1937); Pitt v. Belote, 108 Fla. 246, 146 S. 380 (1935); Piper v. Hawley 179 Cal. 10, 175 P. 419 (California, 1918). Federal courts, however, will not allow public interest alone as sufficient grounds to allow determination of a moot dispute, even though public interest is frequently mentioned when considering application of an exception to mootness.

[39] 418 U.S. 24 (1974).

[40] Ramirez v. Brown, 9 Cal. 3d 199, 216-17, 507 P.2d 1345, 1347, 107 Cal. Rptr. 137, 149 (1973).

[41] *Id.* at 216-17, 507 P.2d at 1347, 107 Cal. Rptr. at 149.

[42] 418 U.S. 24, 37 (1974).

[43] *Id.* The Court stated that:

> [W]hile the Supreme Court of California did not in so many words say that it was permitting respondents to proceed by way of a "class action," the fact that the Court's process recited that the named registrars were subject to it "individually and as representatives of the class of all other county clerks and registrars of voters," and the fact that the beneficiaries . . . were not merely the named appellants . . . indicates that the

in *Moore v. Ogilvie,*[44] the Court applied the recurring issue exception in a case where no formal class action had been filed. In *Moore* the plaintiffs questioned the constitutionality of the statutory requirements in Illinois for presidential electors.[45] In applying an exception to the mootness rule, the Court reasoned that the problem was capable of repetition and that the rights of all future candidates would be affected.[46] No suggestion was made that the original plaintiffs would likely be subjected again to the allegedly illegal election policies.

In cases very similar to *Moore,* however, the Court, in its discretion, has characterized the plaintiff's case as seeking only personal relief and dismissed the case as moot once the plaintiff loses his stake in the outcome. An example of such a characterization is found in *Brockington v. Rhodes,*[47] where the plaintiff challenged the constitutionality of the congressional candidacy requirements in Ohio and sought as his sole relief to have his name placed on the ballot in the November 1968 election. Because the election had been held when the case reached the Supreme Court, the case was declared moot.[48] The Court did not apply the recurring issue exception because "the appellant did not allege that he intended to run for office in any future election" and did not consider the rights of those similarly situated because "of the limited nature of the relief sought."[49]

B. Voluntary Cessation of Allegedly Illegal Conduct.

The recurring issue rationale also applies where a defendant attempts to avoid judicial inquiry into the legality of his conduct by simply ceasing the activities that gave rise to the lawsuit.[50] To allow a defendant to avoid possible adverse rulings from a court by merely discontinuing allegedly improper conduct would disserve justice since the defendant would retain the unrestricted potential to renew the improper conduct at any time in the future.[51] The Court has thus consistently held that

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Court treated the action as one brought for the benefit of the class . . . .

[44]394 U.S. 814 (1968).

[45]*Id.* at 815.

[46]*Id.* at 816.

[47]396 U.S. 41 (1969).

[48]*Id.* at 44.

[49]*Id.* at 43. Both *Moore* and *Brockington* were election cases and involved plaintiffs whose cases had been arguably mooted by the passage of time. The similarity between *Moore* and *Brockington* serves to illustrate the substantial discretion available to the Court in mootness considerations.

[50]United States v. W. T. Grant Co., 345 U.S. 629, 632-33 (1952); Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944); United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 309 (1897); Securities & Exchange Commission v. Medical Committee, 404 U.S. 403, 406 (1973).

[51]The possibility that the defendant will resume the allegedly unlawful conduct in the future is, of course, the main justification for reaching the merits of a case where the de-

voluntary cessation of allegedly illegal conduct does not moot a case.[52]

An example of the voluntary cessation exception is found in *United States v. Trans-Missouri Freight Association*.[53] In that case the United States sought to have an allegedly unlawful combination enjoined from further activities. After prevailing in the lower courts, the defendant association dissolved itself before the Court could consider the merit of the plaintiff's appeal. The court declined, however, to dismiss the case as moot, reasoning that the plaintiff deserved to have its rights adjudicated regardless of the voluntary dissolution.[54] Crucial to the decision was the Court's recognition that if the matter were deemed moot the defendant would be left with the unrestricted right to reorganize and to commit similar acts in the future.

The Court has limited its application of the voluntary cessation exception to those cases in which there exists a reasonable probability that the wrong will be repeated.[55]

II. INSTANT CASE

The Court found the dispute in *DeFunis* moot despite arguments by both parties to the contrary.[56] Because the defendant had given his assurance that the plaintiff would be allowed to graduate, the Court concluded that the plaintiff no longer had a personal interest in the chal-

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fendant has discontinued the acts complained of prior to a judicial determination. Note, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125, 143 (1946) (Where a defendant goes out of business "for no apparent reason except that litigation is pending against him, the jurisdiction of the court is not defeated."); Walling v. Reuter Co., 321 U.S. 671 (1944); SEC v. Lawson, 24 F. Supp. 360 (D. Md. 1938).

[52]United States v. W. T. Grant, 345 U.S. 629, 632 (1952); *see* note 50 *supra*.

[53]166 U.S. 290, 307-10 (1897).

[54]*Id.* In *Trans-Missouri* the plaintiff was, of course, the public whose rights were brought to the attention of the court through its representative, the United States Government. *Trans-Missouri* illustrates the Court's use of the voluntary cessation exception in a dispute which had significant impact upon the general public. Although not applying a public interest exception per se, the Court relied heavily upon potential rights of the public which would go unresolved if the case were not heard. *Id.*

[55]The "reasonable probability" test was first stated in *United States v. Aluminum Company of America*, 148 F.2d 416, 488 (2d Cir., sitting as court of last resort, 1945) ("To disarm the Court it must appear that there is no reasonable expectation that the wrong will be repeated.") The test was adopted by the Supreme Court in *United States v. W. T. Grant*, 345 U.S. 629, 633 (1952).

In cases where the defendant voluntarily agrees to satisfy the plaintiff's demands, the Court occasionally has held the defendant's statements reliable enough to moot the case. *See, e.g.*, Gerende v. Elections Board, 341 U.S. 56 (1951) (statement by the government officials of the State of Maryland that the words "by force or violence" would be added to a challenged loyalty oath for candidates for public office was considered sufficient to moot the issue); *see also* Ehlert v. United States, 402 U.S. 99, 107 (1971) (The court accepted a statement by Army officials that self-declared conscientious objectors would be given a chance to present their pleas for noncombat duty after induction.).

[56]Brief for Petitioner at B 13 - B 18, Brief for Respondent at B 6 - B 9, DeFunis v. Odegaard, 416 U.S. 312 (1974).

lenged admissions policy, and since no class action had been filed there was no longer a "definite and concrete" controversy for adjudication.

In considering whether an exception to the mootness rule should be applied, the Court reasoned that the voluntary cessation exception was inappropriate because the defendant had not ceased the conduct complained of by the plaintiff, rather, time and other circumstances had interacted to change the plaintiff's status to such an extent that the defendant's actions no longer affected him.[57] The Court also held the recurring issue exception inapplicable since the plaintiff would soon graduate and never again be subjected to the admissions procedures, and it was unlikely the issue would "evade review" as a result of mootness if ever raised again.[58]

Four justices dissented,[59] arguing that a continuing controversy existed in that something might prevent the plaintiff from finishing the term then placing him in a position to be denied readmission.[60] The dissenters also argued that the voluntary cessation exception was applicable because the defendant had voluntarily decided not to prevent the plaintiff's graduation and had failed to demonstrate there was not even a "mere possibility" that the plaintiff would be subjected to the challenged admissions policy.[61]

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[57] *Id.* at 318.

[58] *Id.* at 319. The Court implicitly recognized the great public interest in the case but declined to consider the merits on that basis alone.

[59] *Id.* at 348.

[60] *Id.*

[61] *Id.* at 349. The dissenters also urged that the public interest would be best served by an adjudication on the merits. *Id.* at 350.

Upon concluding that the case was moot, the judgment was vacated and the cause remanded to the Supreme Court of Washington "for such proceedings as by that court may be deemed appropriate." *Id.* at 320. It would also have been permissible for the Court to dismiss the appeal rather than vacate the lower court's judgment. The main justifications for vacating, as opposed to dismissing, the appeal are the possible collateral estoppel consequences if the lower court's judgment were permitted to stand, and the possibility of unjust unforeseen consequences. *See* United States v. Munsingwear, Inc., 340 U.S. 36 (1950); New Orleans Flour Inspectors v. Glover, 160 U.S. 170 (1895); Comment, 23 U. CHI. L. REV. 77, 93 (1955) ("The Supreme Court has apparently adopted reversal of the lower court judgment of the disposition for moot appeals in an effort to prevent unforeseen and undesirable effects.") It is unclear why the Court vacated the Washington Supreme Court's judgment in *DeFunis*. It may have been because the Court did not want to give *DeFunis* stare decisis effect in Washington. But, regardless of whether the decision was vacated or left standing, it will remain in the record and no doubt be referred to in the future. Comment, 23 U. CHI. L. REV. 77, 93 (1955) ("If the opinion below is officially reported, it will always remain in the volume; even if the decision is vacated, the force of the reasoning remains.").

It is also doubtful whether the Court has the authority to vacate a state judgment which has become moot on appeal since state courts are not bound by article III's case or controversy requirement and are, therefore, free to make their own determinations as to mootness. North Carolina v. Rice, 404 U.S. 244, 246 (1971); Liner v. Jafco, Inc., 375 U.S. 301, 304 (1964); Note, *Mootness in the Supreme Court*, 88 HARV. L. REV. 373, 393 n. 104 (1974).

III. ANALYSIS

By declaring *DeFunis* moot, the Court avoided the complex constitutional issues presented by the case.[62] This decision not to reach the merits has support in the record and can be harmonized with the Court's prior holdings. Due to the flexibility of the mootness doctrine, however, it appears the Court could have, within its discretion, reached the merits, though to do so would have required considerable judicial manipulation of the mootness doctrine.

The Court's determination that there was no continuing controversy between the parties is justifiable on the basis of the factual circumstances. Because the plaintiff had registered for his last quarter of law school he was no longer in a position to be affected by the admissions policy unless he failed to complete the quarter.[63] While it was possible that something could happen to prevent the plaintiff from completing his studies, it was too unlikely to justify a contrary conclusion by the Court. Since admittance to the law school was all the plaintiff sought, the Court was simply not in a position to grant any effective relief.

It was also proper for the Court to determine not to apply the voluntary cessation exception. The plaintiff could no longer be affected by the defendant's admissions policy because of the passage of time and the plaintiff's normal progress in law school, not because of anything the defendant had done. Even if the Court had concluded that the defendant had voluntarily ceased the allegedly illegal conduct, it does not appear that the voluntary cessation exception would have been applicable. The application of this exception has always required a "reasonable expectation" that the defendant will return to his old ways and harm the plaintiff in the future.[64] This reasonable expectation test was not met in *DeFunis* since it was improbable that the plaintiff would ever again be confronted with the admissions procedure.

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[62]Justice Brennan, in dissent, suggested that the reason for the Court's decision in *DeFunis* was because the Court did not want to address the important and complicated constitutional issues presented. 416 U.S. at 350. *See also The Supreme Court, 1973 Term,* 88 HARV. L. REV. 43, 46 (1974) ("[I]t seems fair to conclude that factors other than the constitutional foundations of the mootness doctrine influenced last term's disputes over whether an action presented a live case or controversy.") citing Richardson v. Ramirez, 94 S. Ct. 2655 (1974); Village of Belle Terre v. Boraas, 94 S. Ct. 1536 (1974).

[63]There also existed the probability that the plaintiff would seek admission to a graduate law program at the University or admission into one of the University's other graduate courses. This possibility, though not argued in the case, may have provided sufficient grounds for determining that the plaintiff was personally in jeopardy of being subjected to the discriminatory admissions procedures in the future, had the Court wished to construe it as such, since all University officials were named as defendants rather than only those connected with the law school.

[64]The main justification for the voluntary cessation exception is that the defendant should not be permitted to avoid judicial determination of the propriety of his acts by simply refraining from the alleged wrongful conduct and be left free to continue the conduct in the future. United States v. Trans-Missouri Freight, 166 U.S. 290 (1897). If there is no reasonable

The characterization of the plaintiff's case as totally personal rather than representing the rights of a class was crucial in the Court's determination that the recurring issue exception was inapplicable.[65] Once so characterized, a summary determination that the recurring issue exception was inappropriate sufficed since the Court has never invoked this exception without a reasonable probability that the parties' dispute would recur.[66] In *DeFunis,* as stated above, there existed no such reasonable probability.

If, however, the plaintiff's action in *DeFunis* were characterized as representing the interests of a group, a stronger argument would exist for applying the recurring issue exception since it would be likely that someone in the represented group would be harmed by the questioned admissions practice in the future. The record supplies at least some support for the proposition that *DeFunis* qualified as a group action. A substantial number of people apply to the University of Washington Law School every year. Many of these applicants are no doubt similarly situated to the plaintiff in *DeFunis* and concerned with, and likely to be affected by, the outcome of his appeal. While it is true that *DeFunis* had not been filed as a class action[67] the Court has not always required a formal class action in compliance with federal law before recognizing a group interest for purposes of invoking the recurring issue exception. In *Moore v. Ogilvie,*[68] for example, no class action had been filed, but the Court nevertheless applied the recurring issue exception in order to protect the future well-being of all persons affected by the election process in Illinois, though there was no allegation of future injury and no indication of concern over the possibility that the original plaintiffs would seek reelection.

Even if the Court had chosen to characterize *DeFunis* as a group action, the recurring issue exception would have been inapplicable

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possibility that the defendant will recommit the challenged activity, then there is no justification for applying the exception. *See* note 51 *supra.*

[65]The assumption by the majority that *DeFunis* represented a case in which the plaintiff was seeking only personal relief was not entirely justified. While it was true that the plaintiff brought the original action because he simply wanted to get in — and then out — of law school, subsequent developments in the case greatly increased the status of the case as one representing the rights of the members of a substantially large group of people. The plaintiff himself later sought to obtain class action status. *See* Plaintiff's Motion to Constitute Case a Class Action and Reinstate Judgment of the Superior Court, DeFunis v. Odegaard, No. 42198 (Wash., filed May 1, 1974).

[66]*See* Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270, 273 (1941); and note 30 *supra.*

[67]In cases filed as formal class actions, the Court has allowed resolution on the merits despite the fact that the original plaintiff who brought the action has lost a personal interest in the outcome of the appeal. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); Sosna v. Iowa, 95 S. Ct. 553, 558 (1975) ("Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent.").

[68]394 U.S. 814 (1968).

because the issue in *DeFunis* was not likely to evade subsequent review, a factor central to the application of this exception.[69]

To disregard the evading review requirement would eliminate one of the main theoretical bases for an exception to the mootness doctrine. The courts have long recognized the value of reaching the merits in arguably moot cases if the plaintiff would otherwise never have the opportunity for judicial review. But if a moot issue will not likely be moot the next time it is considered for review and the original plaintiff will no longer be affected by the challenged conduct, the Court will dismiss the case because no actual controversy exists between the parties. Harsh as it may sometimes be, the judiciary has long recognized the value in waiting until a real dispute exists before it will intervene. Any Washington state case, at least, which presented the same issue as *DeFunis* would reach the United States Supreme Court with relative haste since the Washington Supreme Court had already ruled on the matter.[70]

Consequently, in order for the Court to reach the merits in *DeFunis,* it would have been necessary to characterize the case as a group action even though the plaintiff had not brought suit as such[71] and to disregard the "evading review" requirement of the recurring issue exception.

It is somewhat persuasive, however, that the Court should have reached the substantive issues in *DeFunis* because the case appeared to have the characteristics of a justiciable controversy.[72] The filing of 26 amici curiae briefs demonstrated the thorough presentation of the issues.[73] *DeFunis* was not lacking in adverseness.

Another attractive argument in favor of reaching the merits in *DeFunis* was that the Court has always enjoyed substantial discretion in mootness determinations and was at liberty to exercise that discretion in reaching

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[69]*See* note 31 and accompanying text *supra.*

[70]416 U.S. at 319. For the issue in *DeFunis* to receive expeditious review would require a case originating in Washington and challenging the admissions procedures of the University of Washington. While other law schools may have policies which also give preferential treatment to minority groups, the differences would likely be sufficient to require full adjudication in the lower courts before reaching the U. S. Supreme Court on appeal. *See also* D. Kates, Jr. & W. Bailer, *Mootness in Judicial Proceedings: Toward a Coherent Theory,* 62 CAL. L. REV. 1385, 1440 (1974).

It should be noted that *DeFunis* presented the Court with a unique fact situation in that the plaintiff was in a position to control whether effective relief could be granted. The plaintiff could have avoided any mootness inquiry by not enrolling in his last quarter of school. In other cases where the passage of time has mooted the issue, the plaintiffs have not had such control over the situation. Roe v. Wade, 410 U.S. 113 (1973); Moore v. Ogilvie, 394 U.S. 814 (1968).

[71]416 U.S. at 314: "DeFunis brought the suit on behalf of himself alone, and not as the representative of any class. . . ."

[72]In dissent, Mr. Justice Brennan states: "The case is . . . ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues." *Id.* at 350.

[73]*Id.* For a complete digest of the transcripts, documents, and briefs associated with *DeFunis see* 1, 2, 3 A. GINGER, DEFUNIS VERSUS ODEGAARD AND THE UNIVERSITY OF WASHINGTON, THE UNIVERSITY ADMISSIONS CASE (1974).

the important constitutional issues present in the case. It is otherwise difficult to reconcile the Court's decision in *Brockington v. Rhodes*[74] with that in *Moore v. Ogilvie*.[75] In both cases, the plaintiffs sought only personal relief and made no allegation of future injury. Nevertheless, *Brockington* was declared moot while *Moore* was determined on its merits. While it may be argued that the Court had greater interest in reaching the merits of *Moore* because the challenged conduct arose from one of the Court's prior decisions,[76] it appears that the difference between *Moore* and *Brockington* is best explained as an indication of the Court's discretion in mootness inquiries. But the Court has never considered this discretion to be completely unfettered. The discretion was available in *Moore* and *Brockington* because the issues would evade future review whereas *DeFunis* presented issues apparently capable of review in subsequent cases. Thus there was no clear precedent for reaching the merits in *DeFunis*; to have done so would have undercut the efficacy of the mootness doctrine by ignoring the constitutional demands of article III and leaving the Court free to utilize the doctrine precisely as it will.[77]

IV. Conclusion

DeFunis left complex constitutional issues unresolved. Perhaps the public interest would have been better served had the Court confronted these issues. But mootness, at least in theory, has never been a respecter of issues and there existed no clear precedent for reaching the merits in *DeFunis* without expanding the Court's discretion to the point of eviscerating the mootness doctrine.

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[74]396 U.S. 41 (1969).

[75]394 U.S. 815.

[76]MacDougall v. Green, 335 U.S. 281 (1947). Another difference in the cases is the form of relief sought. In *Brockington* the plaintiff sought a writ of mandamus which is an extraordinary remedy under Ohio law (396 U.S. 41, 43-44 (1969)), while the plaintiffs in *Moore* sought declaratory relief and an injunction (394 U.S. 815 (1968)). But since the courts were equipped to grant the requested relief in either case, this distinction does not appear vital in a mootness determination.

[77]It has been suggested by several commentators that the mootness doctrine should be ignored in any case which involves the rights of a substantial group of people. See Singer, *Justiciability and Recent Supreme Court Cases*, 21 Ala. L. Rev. 229, 268 (1969); Comment, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 Colum. L. Rev. 867, 875 (1965). But it does not appear that so drastic a repudiation of a constitutional doctrine founded in the common law is necessary. *See* Note, *Mootness in the Supreme Court*, 88 Harv. L. Rev. 373, 389 n.84 (1974).