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The Supreme Court lacks jurisdiction to decide moot cases.[1] A case becomes moot when the controversy that originally existed between the parties terminates before adjudication by the Court.[2] The Court's disposition of a moot case may determine the collateral estoppel effect of the decision below. If the Court simply dismisses the case, leaving the lower court judgment undisturbed, collateral estoppel may preclude relitigation of issues by the same parties in a subsequent suit. If the Court vacates the lower court judgment, it nullifies the preclusive effect of that judgment.[3]

When mootness prevents review of a state decision, the Supreme Court traditionally permits the state to determine the collateral estoppel effect by remanding to the state court for proceedings deemed appropriate by that court.[4] But when a moot case comes from a federal court, the Supreme Court usually vacates the lower court judgment and remands the case with directions to dismiss it.[5] Under this *"Munsingwear"*[6] procedure, federal cases mooted pending Supreme

1. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974); North Carolina v. Rice, 404 U.S. 244 (1971).

2. *See* DeFunis v. Odegaard, 416 U.S. at 318-20.

This Note examines the procedure the Supreme Court should follow in disposing of cases once they become moot. The complex issues involved in determining when a case is substantively moot fall beyond its scope. Nevertheless, the "procedural aspects [of mootness] are largely intertwined with the substantive," R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 885 (5th ed. 1978), and reference to several sources discussing mootness standards should inform decisions concerning appropriate mootness procedure. *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533 (1975 & 1980 Supp.); Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970).

3. One might suppose that when a similar dispute is likely to recur between the same parties, judicial economy would be served by resolving issues in the present case rather than deferring them to future litigation. Indeed, the Supreme Court has refused to find such cases moot. *See* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-16 (1911). *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 380-95 (1974). It is only in cases where a dispute recurs despite the apparent improbability of repetition, or where a different claim turns on the same issue, *see* text at note 17 *infra*, that collateral estoppel, and therefore the method of disposing of moot cases, assume importance.

4. *See* NAACP v. Committee on Offenses Against the Administration of Justice, 385 U.S. 40 (1958); Chaisson v. Southcoast Corp., 350 U.S. 899 (1955).

5. *E.g.*, Hopper v. Barnett, 439 U.S. 1401 (1978); Connecticut State Bd. of Parole v. Bey, 404 U.S. 879 (1971). *See* United States v. Munsingwear, 340 U.S. 36 (1950) (dictum). In *Munsingwear*, the Supreme Court did not distinguish between cases becoming moot before and after its decision on the certiorari petition. The Court used the phrase "a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits." 340 U.S. at 39.

6. The vacate and remand procedure is commonly referred to as the *Munsingwear* procedure, after United States v. Munsingwear, 340 U.S. 36 (1950), the case in which the Supreme Court first formally embraced this method of disposing of moot cases.

Court action have no collateral estoppel effects.[7]

Recently, in *Velsicol Chemical Corp. v. United States*,[8] the Government urged the Supreme Court to follow the *Munsingwear* procedure only in those federal cases the Court would have considered on the merits had the controversy continued.[9] The Government argued that if the *Velsicol* case were found moot, the Court should deny certiorari without vacating the lower court judgment. Had the case not been mooted, the Government contended, the Court would have denied certiorari, thereby leaving the court of appeals judgment, and its preclusive effects, intact.[10] The Court denied certiorari in *Velsicol* without indicating whether the case was moot,[11] and hence failed to formally adopt the Government's proposal.

In response to the Government's novel proposal in *Velsicol*, this Note reconsiders the procedures by which the Supreme Court could dispose of moot cases. Section I examines the collateral estoppel effects of the Supreme Court's present procedure and the Government's proposal in *Velsicol*. Section II concludes that both procedures afford excessive protection from collateral estoppel because they misconceive the purpose of Supreme Court review. The Note suggests that, when faced with a moot federal petition for certiorari, the Supreme Court should either deny the petition or, if certiorari has already been granted, dismiss the case.

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7. *See* United States v. Munsingwear, 340 U.S. 36 (1950) (dictum).

The doctrines of collateral estoppel, res judicata, and stare decisis are intertwined and often confused. This Note examines the collateral estoppel effects of various Supreme Court dispositions of moot cases, and leaves implications for res judicata and stare decisis to footnotes. *See* notes 24 & 37 *infra*.

Collateral estoppel is defined *infra* at text accompanying note 13. Under the doctrine of stare decisis, when one court announces a rule of law in a decision, all other courts owing obedience to the first court must apply that rule to cases they hear. Stare decisis applies to later lawsuits between the same or different parties. Res judicata bars parties to the first suit from relitigating the cause of action of that lawsuit, including any matter that could have been decided there. It applies only to parties to the first lawsuit or those in privity with them. *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.401, at 11-16 (2d ed. 1974).

All three effects may accompany one decision: Suppose that *A* brings an action against *B* for breach of contract made in 1979. *B* pleads infancy as a defense, and it is proved at trial that *B* was born in 1960. The trial court renders a judgment for *B* because he was under 21 when he entered into the contract. The state supreme court reverses the judgment, holding that no one over age 18 is an infant for purposes of avoiding a contract. Res judicata precludes *A*, who miscalculated the damages he incurred, from bringing another action on the same contract. Under collateral estoppel, *B* is precluded from relitigating his birth date in a later action by *A* on a different contract. Under stare decisis, eighteen years will be the age of infancy for purposes of avoiding contracts in all future actions in the state courts, between *A* and *B* or any other parties.

8. 435 U.S. 942 (1978).

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

10. *Id.* at 4-8.

11. 435 U.S. at 942. For a description of the *Velsicol* facts, see note 28 *infra*.

I. COLLATERAL ESTOPPEL AND THE *MUNSINGWEAR* AND *VELSICOL* PROCEDURES

The doctrine of collateral estoppel conserves the resources of courts and litigants by barring relitigation of previously decided issues:[12] "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[13] This "issue preclusion" restrains only those parties who had a full and fair opportunity to litigate the issue in a prior suit.[14] To the extent that a procedure for disposing of moot cases prevents collateral estoppel in subsequent suits, it imposes a burden on courts and litigants by allowing relitigation of issues.

The federal courts can only consider live controversies; once a case becomes moot it is beyond their jurisdiction.[15] If a case is mooted while still in the trial court, the court will dismiss it, leaving the parties' legal relations unchanged.[16] If the case becomes moot during appeal, however, the appellate court's disposition of the case may determine the collateral estoppel effect of issues decided in the lower court. Consider, for example, this possibility: A union sues an employer, seeking an injunction to enforce a collective bargaining agreement. The federal district court holds that the agreement violates federal labor laws, and therefore renders judgment for the employer. During an appeal by the union, bankruptcy proceedings against the employer begin in another court. The circuit court of appeals finds the labor case moot because the agreement can no longer be enforced against the employer. Unable to review the legality of the agreement, the court of appeals vacates the district court judgment and remands the case with instructions to dismiss as moot. This procedure prevents the unreviewed judgment from binding the union in bankruptcy court, where it may file a claim for damages for breach of the agreement.[17] If the court of appeals did not vacate the district court judgment, collateral estoppel would prevent the union from relitigating the legality of the agreement in the bankruptcy

12. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

13. RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977) [hereinafter cited as RESTATEMENT 2D.] *See also* RESTATEMENT OF JUDGMENTS § 68 (1942) [hereinafter cited as RESTATEMENT].

14. *See* Huang Tang v. Aetna Life Ins. Co., 523 F.2d 811 (9th Cir. 1975); Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964); Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 606-07, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 (1962), *cert. denied*, 372 U.S. 966 (1963); RESTATEMENT 2D, *supra* note 13, at § 68.1(e)(iii).

15. *See* note 1 *supra*.

16. *See, e.g.*, Disabled in Action of Penn., Inc. v. Coleman, 448 F. Supp. 109 (E.D. Pa. 1978); Usery v. Sears, Roebuck & Co., 421 F. Supp. 411 (N.D. Iowa 1976).

17. These are substantially the facts of Robb v. New York Joint Board, Amalgamated Clothing Workers of America, 506 F.2d 1246 (2d Cir. 1974).

court.[18]

In *United States v. Munsingwear*,[19] the Supreme Court directed lower federal appellate courts to vacate and remand for dismissal all moot cases coming before them.[20] This procedure, observed the court, "eliminates a judgment, review of which was prevented through happenstance."[21] Consistent with the common-law rule that collateral estoppel should not attach to an unreviewed judgment,[22] the Court commanded a procedure that denies collateral estoppel effects to all district court judgments mooted before appellate review. Had the Court stopped there, its *Munsingwear* decision might have correctly balanced the need to protect appellants in moot cases from collateral estoppel and the conservation of judicial resources promoted by collateral estoppel. Unfortunately, dictum in the *Munsingwear* opinion extended the vacate-and-remand procedure one step further.

Although the *Munsingwear* case involved disposition of a moot case by a court of appeals, the Supreme Court added that its own procedure was the same: "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a

18. *See* Goldsmith v. M. Jackman & Sons, Inc., 327 F.2d 184, 185 (10th Cir. 1964); Paull v. Archer-Daniels-Midland Co., 313 F.2d 612, 617 (8th Cir. 1963).

19. 340 U.S. 36 (1950).

20. 340 U.S. at 39-40 (citing Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936)).

In *Munsingwear*, the Government brought an action for violations of regulations that fixed maximum prices. The parties agreed to try the suit for an injunction first and hold a treble damages count in abeyance. The district court held that Munsingwear had complied with the regulations, and it dismissed the count seeking an injunction.

While appeal by the Government was pending, the price ceilings were lifted. The court of appeals dismissed the appeal as moot, leaving the district court judgment intact. The district court then dismissed the treble damages count; under collateral estoppel, the Government was bound by the unreversed judgment in the injunction suit.

It was this dismissal that the Supreme Court upheld in United States v. Munsingwear, 340 U.S. 36 (1950). The Court held that because the Government had made no motion to vacate the judgment when it appealed the dismissal of the injunction count, it must now be bound by the judgment. This holding was criticized in *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818, 848 (1952) (suggesting that a court in a subsequent action should not give the judgment collateral estoppel effect even if the appeal in the first action were merely dismissed as moot).

21. 340 U.S. at 40. Although the *Munsingwear* Court emphasized mootness through "happenstance," proof that petitioners caused the case to be mooted apparently does not warrant preclusion. *See* New Left Educ. Project v. Board of Regents of the Univ. of Texas Sys., 472 F.2d 218 (5th Cir.), *vacated and remanded for dismissal as moot*, 414 U.S. 807 (1973).

22. *See* RESTATEMENT 2D, *supra* note 13, at § 68.1(a). The right to appeal may be limited in some jurisdictions to cases involving more than a minimum dollar amount. *See* 4 AM. JUR. 2D, *Appeal and Error* §§ 20-23 (1962). The unappealable judgment in one case could preclude relitigation of an issue in another case if the amounts involved in both cases fell short of the minimum.

direction to dismiss."[23] Such a practice preserves the petitioner's chance to relitigate issues never addressed by the Supreme Court,[24] but it sacrifices the resources of courts and respondents who must retry issues already decided in the respondent's favor by an appellate court. These sacrifices led directly to the *Velsicol* proposal for altering the Supreme Court's *Munsingwear* procedure. Nevertheless, the dictum in *Munsingwear* remains the sole Supreme Court statement on the issue in the last thirty years.

In *Velsicol Chemical Corporation v. United States*,[25] the Government questioned whether the *Munsingwear* procedure was appropriate in cases becoming moot before the Supreme Court decides whether to grant certiorari.[26] After a federal court of appeals decided against Velsicol,[27] the case was apparently mooted. Velsicol petitioned the Supreme Court for certiorari, requesting that the Court follow the *Munsingwear* procedure in order to preclude collateral estoppel effects from the unreviewed court of appeals judgment.[28] The Government opposed Velsicol's petition, arguing that

23. 340 U.S. at 39 (footnote omitted).

24. Although vacation of the lower court judgment precludes collateral estoppel, the court's decision continues to carry weight as a matter of stare decisis. *See* Hirsch v. Pick-Mt. Laurel Corp., 436 F. Supp. 1342, 1351 (D.N.J. 1977) and Hirsch v. Local 1694, Intl. Longshoremen's Assn., 430 F. Supp. 1101, 1104 (D. Del. 1977) (both citing as precedent Samoff v. Building and Constr. Trades Council, 475 F.2d 203 (3d Cir.), *vacated and remanded for dismissal as moot*, 414 U.S. 808 (1973)); East Tenn. Tenants' Assn. Fairview Chapter v. Harris, 82 F.R.D. 204, 206 (E.D. Tenn. 1979) (citing as precedent Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated and remanded for dismissal as moot*, 409 U.S. 815 (1972)); American Airlines v. Civil Aeronautics Bd., 235 F.2d 845, 852 (D.C. Cir. 1956) (citing as precedent Eastern Airlines v. Civil Aeronautics Bd., 185 F.2d 426 (D.C. Cir. 1950), *vacated and remanded for dismissal as moot*, 341 U.S. 901 (1951)); Richardson v. United States, 273 F.2d 144, 147 n.1 (8th Cir. 1959) ("We do not believe the action taken by the Supreme Court [vacation of the judgment for mootness in a certain case] in any way impairs the weight to be given our decision in that case").

But cf. O'Connor v. Donaldson, 422 U.S. 563 (1975), where the Supreme Court vacated a judgment of the court of appeals and remanded the case to that court, saying: "Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case. See *United States v. Munsingwear*, 340 U.S. 36." 422 U.S. at 577 n.12. By "precedential effect" the Court presumably meant the law to be applied when issues reappeared in the same action and not stare decisis effect in other cases. Nevertheless, this phrase was quoted in County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979), where it almost necessarily, though mistakenly, referred to stare decisis.

25. 435 U.S. 942 (1978).

26. Brief for the United States, *supra* note 9, at 4-8. The Government conceded the suitability of the *Munsingwear* procedure in cases becoming moot after grant of certiorari. *Id.* at 5.

27. Velsicol Chem. Corp. v. Parsons, 561 F.2d 671 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

28. Brief for United States, *supra* note 9, at 4-8. Velsicol was trying to prevent certain evidence from being presented to a grand jury investigating the corporation's conduct in proceedings before the Environmental Protection Agency. Velsicol claimed that the evidence was protected by the attorney-client privilege and the work product rule. Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 6-12, Velsicol Chem. Corp. v. United States, 435 U.S. 942 (1978). After losing in both the district court and the court of appeals, Velsicol was unable to get a stay of judgment from either the court of appeals

the Supreme Court would have denied certiorari had the controversy continued, and that it would therefore be unfair to vacate the judgment.[29] The Government suggested an alternative to the *Munsingwear* procedure in cases mooted after circuit court review: the Supreme Court should decide whether it would have granted the petition for certiorari had the case not been mooted. Where the Court would have denied the petition, it should still deny it despite mootness, thereby preserving collateral estoppel effects of the lower court judgments. Where the Court would have granted the petition, the Court should follow the *Munsingwear* vacate-and-remand procedure.[30]

The Government's *Velsicol* proposal met strong opposition from the petitioner and silence from the Court. Velsicol dubbed the procedure "completely unprecedented," "new-fangled," and "a departure from . . . uniform practice."[31] In both *Velsicol* and *Local 102, International Ladies' Garment Workers' Union v. United States*,[32] a 1979 case in which the Government again urged the new procedure,[33] the Court denied the certiorari petitions and left the lower court decisions intact. The Court may have either adopted the *Velsicol* procedure without announcement, or simply found that the cases were not moot. The Court should remedy the resulting uncertainty: express reconsideration of the appropriate disposition of moot cases would help both to inform the legal community and to reform present practice.

The controversy surrounding disposition of moot cases reflects the tension between conserving judicial resources and ensuring that parties have a full and fair opportunity to litigate disputes. The doc-

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or the Circuit Justice. Brief for United States, *supra* note 9, at 3. By the time the petition for certiorari was filed, the challenged evidence had been presented to the grand jury. Presumably, Velsicol feared the Government would raise the judgment to prevent litigation of the privilege questions at trial.

29. Brief for United States, *supra* note 9, at 4-6.

30. Brief for United States, *supra* note 9, at 6. The Government also suggested that where mootness was uncertain, the Court, if it otherwise would have granted the petition, should remand the case to the court of appeals to decide whether a live controversy remained. In cases where mootness was discovered after the petition had been granted, the Court should vacate the judgment and remand with instructions to dismiss the complaint. *Id.* at 5.

In certain classes of federal cases, losers in lower courts have an appeal of right to the Supreme Court. *See* R. STERN & E. GRESSMAN, *supra* note 2, at §§ 2.5-.7 (appeals from courts of appeals); *id.* at §§ 2.9-.10, 2.12-.15 (appeals from district courts). If one of those cases became moot after judgment was rendered below but before the appeal was decided, the *Velsicol* procedure would require the Court to vacate the judgment and remand the case for dismissal as moot.

31. Petitioner's Reply Memorandum at 1, 2, 4, Velsicol Chem. Corp. v. United States, 435 U.S. 942 (1978). *But see* Perlstein v. Hiatt, 328 U.S. 822 (1946) (dismissal for mootness of a petition for certiorari previously granted, without vacating the judgment).

32. 439 U.S. 1070 (1979).

33. *See* Memorandum for the United States in Opposition at 4 n.4, Local 102, Intl. Ladies' Garment Workers Union v. United States, 439 U.S. 1070 (1979).

trine of collateral estoppel promotes judicial economy: it precludes courts and litigants from spending resources to relitigate matters that have already been decided.[34] The mootness doctrine serves judicial economy as well: adjudication of moot cases consumes scarce resources that could be better spent resolving live disputes.[35] When the Supreme Court confronts a case mooted following circuit court review, it can therefore achieve a double economy by refusing to consider the merits of the case and by preserving the collateral estoppel effects of judgments in the lower courts. In *Munsingwear*, the court refused to take full advantage of this economy, apparently because it felt opportunity for Supreme Court review was a necessary component of the "full and fair opportunity to litigate" required before collateral estoppel can apply.[36] As a result, issues decided by a federal circuit court in a subsequently mooted case can always be relitigated in a later suit, consuming judicial resources at both the trial and appellate levels.[37]

The proposed *Velsicol* procedure would preserve most of the lower federal court resources sacrificed under the *Munsingwear* procedure. Since the Supreme Court denies certiorari in the vast majority of cases,[38] the *Velsicol* procedure would probably extend collateral estoppel effects to judgments in most cases mooted after circuit court review. Unfortunately, the *Velsicol* procedure requires

34. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 7, ¶ 0.441 [2] at 3779. Collateral estoppel may also serve to protect the integrity of the judicial process from the embarrassment of inconsistent adjudications.

35. *See* Kates & Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 CALIF. L. REV. 1385, 1472 (1974); Note, *supra* note 3, at 374.

36. 340 U.S. 36, 40 (1950).

37. One commentator has argued that the *Munsingwear* procedure also interferes with the res judicata effect of judgments. *See* Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77, 92-93 (1955). Res judicata bars parties from raising claims that could have been settled in a prior suit: "The law of res judicata . . . reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so." RESTATEMENT (SECOND) OF JUDGMENTS § 61, comment a at 80-81 (Tent. Draft No. 1, 1973). Yet the *Munsingwear* procedure permits litigants to bring a claim in a second suit that could more conveniently have been adjudicated in the first, thereby further taxing judicial resources.

The Court could modify the *Munsingwear* procedure to prevent such a result by vacating the judgment and remanding with instructions to dismiss with prejudice. The petitioner could then relitigate the issue but not the cause of action. As a second alternative, the Supreme Court could merely deny the petition for certiorari as moot, leaving it up to later courts to give the proper preclusive effects. *See* Note, *Res Judicata Effects of Dismissing an Appeal as Moot*, 50 COLUM. L. REV. 716, 719 (1950). A judgment left standing by such a denial of certiorari would be given normal res judicata effect, and, except on issues raised in the petition, normal collateral estoppel effect. *Cf.* Comment, *supra*, at 92-93 ("In the absence of factors recommending reversal or vacation of the lower decree, it is suggested that all moot appeals to the Supreme Court ought to be dismissed so as to gain whatever res judicata benefits there may be").

38. Of the 2496 petitions filed from July, 1978, through June, 1979, only 142 were granted. ADMINISTRATIVE OFFICE, UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR A-5 (1979) [hereinafter cited as REPORT]. Actually, some of the petitions granted were among those 622 pending on June 30, 1978. On June 30, 1979, 589 petitions were pending. Similar

sacrifice of Supreme Court resources to achieve the savings of collateral estoppel below. The *Velsicol* procedure requires the Supreme Court to determine the "certworthiness" of moot petitions in most cases. Although some petitions might be easily decided,[39] others would call for sustained study.[40] And since many moot cases involve issues that the parties will never relitigate regardless of how the Court disposes of the case, much of the time the Justices spend deciding the certworthiness of moot cases would be wasted.[41] The case for the *Velsicol* procedure therefore seems less than compelling, even if we assume that conserving judicial resources is the only goal of mootness procedure.

The Government could have made an alternative and more persuasive argument in *Velsicol*. Instead of asking the Justices to spend their valuable time reviewing the certworthiness of cases they can not consider on the merits,[42] the Government should have challenged the underlying assumption of the *Munsingwear* procedure: that the "full and fair opportunity to litigate" prerequisite for collateral estoppel must include an opportunity for Supreme Court review. The historic purpose of Supreme Court review calls that assumption into question. And if a full and fair opportunity to litigate does not include Supreme Court review, there remains no reason to deny collateral estoppel to judgments in cases mooted after review by the circuit courts of appeal.

II. A Mootness Procedure Consistent with the Purposes of Supreme Court Review

In *Munsingwear*, the Supreme Court concluded that parties should not suffer collateral estoppel if mootness denies them any stage of appellate review of an unfavorable judgment. *Munsingwear*

ratios of about 5-7% have prevailed in the recent past. *See* G. Casper & R. Posner, The Workload of the Supreme Court 59 (1976).

Certiorari is granted upon affirmative votes of four or more Justices. *See* R. Stern & E. Gressman, *supra* note 2, at § 5.4.

39. Associate Justice William Brennan has observed that: "In a substantial percentage of cases I find that I need read only the 'Questions Presented' to decide how I will dispose of the case." Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 477 (1973).

40. *See* Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 88 (1959).

41. If the Court were to decide a moot case on the merits, it could at least prevent further litigation that uncertainty in the law can cause. *See* Kates & Barker, *supra* note 35, at 1429-31. By contrast, the Court's decision regarding certworthiness under the *Velsicol* procedure would affect only the parties to the lawsuit, and would permit uncertainty to continue. An appropriate compromise might be to modify the *Velsicol* procedure so that the Court would deny moot certiorari petitions only when they obviously would not have merited review absent mootness. If there is any possibility that the petition would have been granted, the Court would vacate the judgment, and remand for dismissal.

42. *See* note 1 *supra* and accompanying text.

prescribed the same procedure for disposition of moot cases in circuit courts, where appeal of right is the rule, as in the Supreme Court, where review is usually discretionary and appeal of right is the rare exception.[43] The Supreme Court's power to choose which cases it will hear suggests that the purpose of Supreme Court review differs from the purpose of review by the circuit courts. That difference in purpose should inform the Court's definition of what constitutes a "full and fair opportunity to litigate." This Section argues that, since the primary purpose of Supreme Court review is to establish general principles of law rather than to do justice between the particular parties in a case, Supreme Court review[44] should not be considered part of the full and fair opportunity to litigate requisite before collateral estoppel can attach to a lower court judgment.

Once a federal district court decides a case, appellate review promotes the interests both of particular litigants and of society in general. Review protects the litigants from erroneous lower court rulings as to their rights and duties. More generally, review enables superior courts to modify and expand the law as society changes and to assure uniformity of law within a jurisdiction.[45] An appellate decision, whether rendered in the Supreme Court or in a court of appeals, inevitably affects both the litigants in the case at issue and the entire jurisdiction bound by stare decisis to follow the decision. Although review at each level produces both effects, the purpose of review changes when a case moves from a circuit court to the Supreme Court.

A central purpose of circuit court review is to do justice between particular litigants. Congress has provided that litigants may appeal all final decisions of federal district courts.[46] A litigant unhappy with the final decision of a district court almost without exception[47] has recourse to a circuit court of appeals. This universal opportunity

43. Federal statutes require the Court to review lower court interpretations of federal law in some cases, including those in which a federal statute is held unconstitutional, 28 U.S.C. § 1252 (1976), and those in which a state statute is held repugnant to federal law, 28 U.S.C. § 1254(2) (1976). In the 1971-72 Term, only 8.5% of the cases docketed in the Supreme Court were within the obligatory appeals jurisdiction of the Court. *See* REPORT, *supra* note 38, at A-8.

44. As used in the remainder of this Note, "Supreme Court review" includes both the decision whether to grant the certiorari petition and the deliberations on the merits of the case after certiorari is granted.

45. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 2-3 (1976); Kurland, *Jurisdiction in the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 617, 618-19 (1974).

46. *See* 28 U.S.C. § 1291 (1976).

47. In a few narrow classes of cases, litigants can appeal a district court judgment directly to the Supreme Court. *See, e.g.*, 28 U.S.C. § 1252 (1976) (allowing direct appeal when a district court holds a federal statute unconstitutional in any civil action to which the United States is a party); 28 U.S.C. § 1253 (1976) (allowing direct appeal from certain decisions of a three-judge district court panel). For a thorough discussion, see R. STERN & E. GRESSMAN, *supra* note 2, at §§ 2.9-.15.

to appeal suggests that Congress believes a first appeal to be part of the minimum procedure due every litigant.[48] Further, it suggests that a litigant denied all opportunity to appeal by reason of mootness has not enjoyed the full and fair opportunity to litigate that is required before collateral estoppel can attach to a lower court judgment. When a circuit court of appeals vacates a district court judgment in a moot case and remands the case for dismissal, it therefore protects litigants from unwarranted collateral estoppel effects.[49]

Correcting injustices suffered by particular litigants is a much less central purpose when the Supreme Court reviews circuit court decisions. Although Supreme Court decisions alter the rights and duties of parties to the case at issue, that effect is but an incidental step toward achieving a much more important purpose of Supreme Court review: to develop uniform national rules of law that meet the needs of a changing society. Chief Justice Taft best explained this general purpose of Supreme Court review:

> No litigant is entitled to more than two chances, namely to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decisions among the intermediate courts of appeal.[50]

Taft's words suggest that the opportunity for Supreme Court review is a privilege bestowed solely because it benefits the public generally; it is not an essential element of a particular party's full and fair opportunity to litigate.

This conclusion seems especially compelling in cases falling within the Court's discretionary certiorari jurisdiction. Supreme Court Rule 17 illustrates the more general purposes the Supreme Court considers in deciding when to grant certiorari:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in con-

48. *Cf.* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 257-58 (1928) (discussing establishment of courts of appeals as courts of last resort for "ordinary" cases as opposed to cases "fit" for Supreme Court review).

49. This procedure is consistent with the common-law rule denying collateral estoppel effects to unreviewed judgments. *See* text at note 22 *supra*.

50. *Hearings Before the Comm. on the Judiciary of the House of Representatives on H.R. 10479*, 67th Cong., 2d Sess. 2 (1922), *quoted in* Dick v. New York Life Ins. Co., 359 U.S. 437, 452 (1959) (Frankfurter, J., dissenting).

> flict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by the Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.[51]

Indeed, "the major purpose of a certiorari petition is to demonstrate that the case is . . . of sufficient general significance, and not simply of importance to the parties in the case, to warrant review."[52]

The Supreme Court very rarely grants a certiorari petition out of concern for injustice suffered by a particular party below.[53] Instead, the vast majority of petitioners are denied review for reasons unrelated to their personal merits, and a small minority gain review solely because their case affords an opportunity to address an important national legal issue.[54] For no merit of their own, a few petitioners receive a third chance to litigate their dispute; for no fault of their own, a few respondents must litigate yet a third time. Because the decision to grant a petition for certiorari is infrequent and substantially unrelated to the degree of injustice suffered by a particular petitioner, Supreme Court review of the petition surpasses the collateral estoppel requirement of a full and fair opportunity to litigate. A petitioner whose case is mooted after review in a circuit court, but before the Supreme Court considers his petition, therefore loses a slim chance at Supreme Court review but has already enjoyed a full opportunity to litigate his dispute. Collateral estoppel should therefore attach to circuit court judgments in cases mooted before Supreme Court review.[55]

Some might argue that the chance of gaining Supreme Court re-

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51. SUP. CT. R. 17 (1980).

52. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 72 (9th ed. 1975). *See also* Address by Chief Justice Vinson Before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi-vii ("A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose").

53. On rare occasions, the Court may grant a petition to prevent a grave miscarriage of justice. *See, e.g.*, McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 13 & n.14 (1949).

54. *See* note 38 *supra*.

55. The discussion here relates only to cases within the Court's certiorari jurisdiction. Different issues may be involved in cases within the Court's obligatory appeals jurisdiction. *See* note 57 *infra*.

view through writ of certiorari, however slim, still constitutes part of a full opportunity to litigate because the Supreme Court determines the rights and duties of particular parties in cases it reviews. But the Court only incidentally determines these rights and duties as it settles the law in the context of an actual controversy. Supreme Court decisions affect particular litigants because few parties would otherwise petition for certiorari, and the Court relies on dissatisfied litigants to bring questions before it.[56] Furthermore, the Court needs interested litigants to advance the most persuasive arguments on both sides of the issues presented. When litigants lack that interest — in moot cases, for example — the Court will not decide the case. Supreme Court decisions therefore determine rights and duties of particular parties solely to enable the Court to prescribe law generally, and not to provide parties a third chance to litigate their private dispute.

The central purpose of Supreme Court review suggests that lack of opportunity to appeal to the Supreme Court should not prevent collateral estoppel attaching to a lower court judgment, as long as the litigants had an opportunity to receive appellate review in a circuit court. The Supreme Court should therefore discard the *Munsingwear* procedure in federal cases mooted after appellate review. Instead, when the Court identifies as moot a case within its certiorari jurisdiction, it should deny the petition without vacating the lower court judgment.[57] Even when the case is mooted after the Court grants the petition, the same reasoning dictates that the collateral estoppel effects of lower court judgments should be preserved.[58] In

56. *See* L. FULLER, THE MORALITY OF LAW 57 (1964).

57. Disposition of moot cases within the Supreme Court's appeals jurisdiction requires a somewhat different analysis. Cases appealed directly from district courts, *see* note 47 *supra*, have had no other appellate review. In these cases, as in cases mooted before judgment by a circuit court, the *Munsingwear* procedure is appropriate. Moot cases already reviewed by a circuit court present a more difficult question. How the Court should dispose of these cases depends on the rationale for obligatory review.

One possible justification for obligatory review of cases where a federal court of appeals has held a state statute repugnant to federal law, *see* 28 U.S.C. § 1254(2) (1976), is that Congress feared that federal appeals judges would be insensitive to state concerns. *See* Tushnet, *The Mandatory Jurisdiction of the Supreme Court — Some Recent Developments*, 46 U. CIN. L. REV. 347, 352-55 (1977). If this is true, and if congressional concern was directed at the interests of individual litigants as well as the sovereignty of state legislatures, then an appellant denied Supreme Court review by the mooting of his case should not be bound by the court of appeals judgment.

Another possible explanation for the Court's obligatory jurisdiction over certain cases appealed from the circuit courts is that Congress decided that the issues in these cases are important enough to warrant the Court's time and energy. If so, the difference between certiorari and appeals cases is that, in the former, the Court judges the importance of a case while, in the latter, Congress identifies entire classes of cases of sufficient importance to demand uniform, authoritative resolution. *See id.* at 358-65. If this is the rationale behind the Court's obligatory appeals jurisdiction, the Court should simply dismiss appeals when they become moot.

58. Statistically, a litigant whose petition has been granted stands a much better chance of winning than one whose petition is still under consideration by the Court. A majority of the cases that the Court reviews on the merits are reversed, *see* Harper & Leibowitz, *What the*

such a situation, the Court should simply dismiss the case, thereby leaving lower court judgments intact.

CONCLUSION

The Supreme Court should change the procedure by which it disposes of federal cases mooted after appellate review. The *Munsingwear* procedure, under which an appellate court vacates the lower court judgment in a moot case and remands the case for dismissal, prevents all collateral estoppel effects of the lower court judgment. That result is appropriate when mootness denies a litigant all opportunity to appeal a trial court judgment. But once a judgment is rendered in a circuit court of appeals, collateral estoppel should attach even if mootness denies a petitioner Supreme Court review on certiorari. The purpose of Supreme Court review indicates that it is a step beyond the "full and fair opportunity to litigate" required before collateral estoppel can apply.

In proposing a new procedure in *Velsicol*, the Government recognized the loss of judicial resources and the unfairness to respondents caused by the *Munsingwear* procedure. But instead of arguing that the requirements of collateral estoppel are satisfied short of Supreme Court review, the Government urged the Court to consider the "certworthiness" of moot cases, and to allow collateral estoppel in moot cases where the petition for certiorari would have been denied. The *Velsicol* procedure is seriously flawed, for it achieves the judicial economy of collateral estoppel in the lower courts only by requiring greater efforts from the Supreme Court. This Note suggests a remedy for that flaw: since collateral estoppel can fairly attach to an appeals court judgment even where mootness has prevented Supreme Court review, the Supreme Court should simply deny certiorari in federal cases mooted after review by a circuit court. And if the petition for certiorari has already been granted, the Court should simply dismiss the case.[59]

Supreme Court Did Not Do During the 1952 Term, 102 U. PA. L. REV. 427, 447-48 (1954), while only a small fraction of petitions are approved for review, *see* note 38 *supra*. In neither case, however, has a petitioner been denied an element of a full and fair opportunity to litigate.

59. Throughout this Note, it has been assumed that if the Court merely denies or dismisses certiorari in a moot case, a later court will allow full collateral estoppel effect to attach to the earlier lower court judgment unless other considerations warrant an exception. *See* RESTATEMENT 2D, *supra* note 13, at § 68.1. An alternative approach would be to limit the collateral estoppel effect, allowing preclusion at the district and circuit court levels, but permitting the Supreme Court to consider and decide the issue in a later case involving the same parties. This approach, however, would require the Supreme Court, in deciding the later case, to review the record in the earlier case.