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United States Parole Commission v. Geraghty

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2/16 → There are conflicts

Case is probably moot & could be Reversed Summarily. If not, it is in conflict with other Circuits, & probably is a Grant.

The named π no longer presents a live controversy, & the DC had not certified a class. CA 3 erred in failing to hold that case is moot.

1-15-79

Respondent argues the case is interlocutory, as the court below ordered a remand to permit the government to present evidence as to how the parole system works. But the decision indicated strongly what the court's views of the merits were, and the mootness + class actions holdings seem highly suspect. I would grant or reverse summarily on mootness. Paul

Case also presents other issues, including holding that Parole Commission's Regs. conflict with Statute.

PRELIMINARY MEMORANDUM

~~December 1, 1978~~ Feb 16, 1979 Conference
List 1, Sheet 21

Cert to CA 3 (Adams, Garth, Lacey, dj)

No. 78-572-CFH

U.S. PAROLE COMM.

v.

GERAGHTY (former prisoner) Federal/Civil (habeas) Timely (w/ 2 extns

SUMMARY: The Government seeks review of a decision of the CA 3 holding (1) that the claim of a former prisoner concerning his eligibility for parole was not moot even though his sentence had expired and the DC had refused to certify the suit as a class action; and (2) that the Parole Commission's parole release guidelines (a) violate the Parole Act by failing to give consideration to the length of a prisoner's sentence and (b) constitute an unconstitutional ex post facto enhancement of the sentence.

moot

CFR + summarily reverse. Paul

FACTS: Resp. Geraghty is a former Chicago policeman who was convicted of demanding shake down payments, in violation of 18 U.S.C. § 1951, and of making false declarations concerning his involvement in the extortion scheme, in violation of 18 U.S.C. 1623. He was sentenced to four years imprisonment. The conviction was affirmed on appeal. United States v. Braasch, 505 F.2d 139 (CA 7), cert. denied, 421 U.S. 910 (1975).

Resp. was sentenced under 18 U.S.C. § 4205(a), which makes a prisoner eligible for parole after service of one-third of the sentence. He was sentenced in the Summer of 1973. Just after the sentence was imposed, the Parole Commission issued its new parole release guidelines, indicating that the nature of the crime committed, as well as institutional behavior and liklihood of recidivism, would be taken into account in fixing the date of parole. The guidelines suggested that resp. should serve between 26 to 26 months in prison, substantially more than the 16 months when he would become eligible for parole.[1/] After his conviction was affirmed, resp. moved to have his sentence reduced pursuant to Fed. R. Crim P. 35. The motion was granted, the DJ finding that his expectations had been frustrated by the new guidelines. Resp.'s sentence was accordingly reduced to 30 months' imprisonment.

Resp. twice sought release on parole, and was twice denied. On his second attempt, the Parole Commission indicated that he would be continued without further consideration of parole until the expiration of his term of imprisonment.

Resp. then filed this civil action in the District Court

1/ As indicated in the pool memo in United States v. Addonizio, cert. pending, No. 78-156, there was apparently a widespread expectation among sentencing judges before the new guidelines were published that prisoners with good institutional records would be released as soon as they became eligible for parole.

for the District of Columbia, seeking declaratory and injunctive relief. The complaint alleged that the guidelines were invalid under the Parole Commission and Reorganization Act, and that they violated the ex post facto provision of the Constitution. Resp. sought certification of the case as a class action on behalf of "all federal prisoners who have been or will become eligible for release on parole."

The action was transferred to the Middle District of Pennsylvania, where resp. was incarcerated, on the theory that it was in reality a petn for a writ of habeas corpus. The DC (Herman) rejected resp.'s motion for class action certification. The court found that the issues raised by resp. were not applicable to all members of the proposed class, and that not all members had the same interest as resp. The court also rejected the argument that the suit should be certified as a class action because of the possibility of mootness on appeal. Petn. 82a. On the merits, the DC found that the parole guidelines were entirely lawful and it denied the relief requested.

Resp. appealed. While the appeal was pending, resp.'s term of imprisonment expired and he was released from prison. The Parole Commission moved to dismiss the appeal as moot, and the CA deferred consideration of the motion pending consideration of the case on the merits.

DECISION BELOW: In a lengthy opinion by Judge Adams, the CA 3 reversed and remanded. The court held : (1) that the suit was properly brought as an action for a declaratory judgment under the Administrative Procedure Act and the Parole Act; (2) that although the suit was moot as to resp., if the DC should have certified the case as a class action, the suit was not moot; (3) that the

DC erred in failing to consider, sua sponte, the possibility of certifying a narrower subclass out of the heterogeneous class specified by resp. The court also indicated (4) that if resp.'s averments about the operation of the parole system were correct, then "the parole guidelines as administered may well be inconsistent with the [Parole Act]," and the parole guidelines "as applied to certain prisoners may violate the ex post facto prohibition." Petn. 65a-66a. Accordingly, the case was remanded for the DC to evaluate the possibility of certifying a subclass and to take evidence on the nature of the parole system. The court left little doubt, however, as to how these issues should be resolved.

With respect to the mootness question, the court accepted that there was no longer a live controversy between resp. and the Parole Commission. The question, therefore, was whether the case fell within one of the exceptions to the mootness doctrine. Resp. suggested two possibilities: that the action was capable of repetition yet evading review, and that the action should be certified as a class action, with the certification "relating back" to the date when the suit was filed.

The court found that the case shared "many characteristics" with actions capable of repetition yet evading review. Admittedly, prisoners with longer sentences would retain their grievances long enough to achieve appellate review. But since prisoners with shorter sentences were particularly impacted by the refusal of the Parole Commission to take sentencing length into account, the court found that "the limited probability of review for a prisoner with a short sentence [was] particularly pertinent." Petn. 27a.

The central thrust of the CA's ruling, however, related to the exception for properly certified class actions. _See_ _Sosna v. Iowa_, 419 U.S. 393, 397-403 (1975). The court rejected the Parole Board's argument, based on _Board of School Commissioners of Indianapolis v. Jacobs_, 420 U.S. 128 (1975 (per curium), that the exception could not apply because the DC had expressly refused to certify the proceeding as a class action. This reading of _Jacobs_, according to the court, was incompatible with other decisions. In particular, the court referred to two lines of cases: those where the grievance is of such short duration that, by the time the district court has been able to rule on the motion to certify the suit as a class action, the grievance has already lapsed, _e.g._, _Gerstein v. Pugh_, 420 U.S. 103, 110 n.11 (1975); and those where the trial court has not certified the case as a class action, but individual complainants with a live controversy have been allowed to intervene in the proceeding, _e.g._, _Baxter v. Palmigiano_, 425 U.S. 308, 310 n. 1 (1976). In light of these authorities, the court suggested that "_certifiability_, not actual certification," is the crucial question. Petn. 21a n. 43. Accordingly, if class certification was appropriate, the mootness of resp.'s claim did not bar adjudication. Petn. 28a.

This did not end the inquiry into class certification, however, for the CA _agreed_ with the DC that the class proposed by resp. was not appropriate for certification. Petn. 28a-30a. Despite this hurdle, the court observed that, under Fed. R. Civ. P. 23(c)(4), the DC has the power to limit the use of overbroad classes by the use of subclasses. The court indicated that this authority may be exercised _sua sponte_. Furthermore, the court found that it was probable that a manageable subclass of prisoners

sharing the same interests as resp. could be defined. The court accordingly held that the DC had abused its discretion by not considering the possibility of certifying a subclass of prisoners _sua sponte_. The case was remanded for evaluation of this possibility. Petn. 32a.

Although this might have ended the matter, the court found that it would "improvidently dissipate judicial effort" not to reach the merits. The court concluded that the parole release guidelines were infirm on two grounds: first, they failed to take into account the length of the sentence imposed by the trial court in determining the date of release; second, as they applied to prisoners sentenced before their adoption, they constituted impermissible _ex post facto_ legislation.

The court suggested that the failure to take length of sentence into account was incompatible with congressional intent in adopting the Parole Commission and Reorganization Act of 1976; the court also intimated that it violated constitutional concepts of separation of powers. The legislative argument was not based on any of the provisions of the Act. Indeed, the court admitted that although the Act requires consideration of a number of specific factors in determining the date of release, the length of sentence is not among them. See 18 U.S.C. § 4207 (1976). Rather, the court focussed on the legislative history, and in particular on the different emphases in the House and Senate Committees and how they were resolved in Conference. Basically, the Senate was primarily interested in firm guidelines that would reduce the disparity in actual time served for similar offenses. The House wanted to continue the practice of releasing prisoners with good institutional behavior upon service of one-third of

their sentence. The Conference stated that its intent was that the Parole Board should "review and consider both the nature and circumstances of the offense and the history and characteristics of the prisoner...." Petn. 43a. Despite this rather broad mandate, the court concluded that "the Commission in effect is following the views of the Senate version of the PCRA, rather than the policies of the Conference Committee." Petn. 44a.

The separation of powers argument was more elusive. But the court suggested that if it were true that the Parole Commission was giving no weight to the judicially-determined sentence in fixing a parole date, "serious questions are raised whether the constitutional protections provided by an independent judiciary are being undermined." Moreover, the court suggested that the assumption of power by the Parole Commission to ignore judicial sentences violated the non-delegation doctrine. "Whether or not federal criminal penalties should be redrafted[,] it is of dubious constitutional propriety to delegate so crucial a legislative function to a non-representative body with no standards other than a direction that the results 'not depreciate the seriousness of the offense' and 'be consistent with the public welfare.'" Petn. 53a.

Turning to the _ex post facto_ issue, the court noted that resp. had been initially sentenced in the summer of 1973, just before the new parole release guidelines were issued. The court did not refer to the fact that resp.'s sentence had subsequently been reduced in 1975 in response to the guidelines. Proceeding on the assumption that the 1973 sentence was of controlling significance, the court concluded that the new

guidelines, if they were being applied in the manner alleged by resp., deprived prisoners under a prior sentence of the "possibility of a substantially more lenient punishment." Petn. 58a. They thus fell afoul of the ex post facto clause. The CA relied on Warden v. Marrero, 417 U.S.653 (1974), where the Court held that for purposes of a repeal of a statute barring parole for certain drug offenders, parole eligibility is determined at the time of sentencing, and is not affected by a subsequent repeal. The Court no in dictum that the converse situation, / "a repealer of parole eligibility previously available to imprisoned offenders[,] would clearly present the serious question under the ex post facto clause of Art. I, §9, cl. 3, of the Constitution, of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the...offense.'" 417 U.S. at 663. In holding that the parole guidelines, as described by resp., violated the ex post facto clause, the court expressly noted its disagreement with the contrary holdings of the 2nd and 6th circuits. Shepard v. Taylor, 556 F.2d 648 (CA 2 1977); Ruip v. United States, 555 F.2d 1331 (CA 6 1977). Because the Parole Board had argued that it engaged in individualized consideration of prisoners, and did not apply the guidelines mechanically, the court indicated that the DC would have to take further evidence on remand.

CONTENTIONS: The SG contends that the CA's mootness decision is in conflict with the decisions of this court and is directly contrary to decisions of other circuit courts of appeals and presents an important question of federal jurisdiction. The holding that the class action exception applies even where the DC has not certified the case as appropriate for a class action is inconsistent with Sosna and Jacobs, supra, which require a

"named plaintiff who has...a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23...." Sosna, 419 U.S., at 402. The "relation back" exception of Gerstein v. Pugh, supra, does not apply, since there can be no contention that the present controversy is so inherently temporary in nature that it is capable of evading judicial review even at the trial court level. Decisions involving intervention, such as Baxter v. Palmigiana, supra, are inapplicable.

Furthermore, the ruling that the trial court erred by failing, sua sponte, to consider the creation of subclasses, is unprecedented, and will create unmanageable difficulties for the district courts. The ruling conflicts with the general principles that it is the responsibility of the litigants, not the judge, to establish the propriety of a class action certification, and that grounds for reversal may not ordinarily be urged on appeal that were available, but not raised, in the district court. The decision exposes the trial courts to reversal and renewed proceedings for failing to construct class action theories that even plaintiff's counsel, with an adversarial interest in the litigation, has not dreamed up. As a result, it impairs the efficient use of judicial resources in class action litigation.

With respect to the CA's ruling that the parole guidelines are infirm because they fail to take length of sentence into account, the SG argues that the CA displayed a complete misunderstanding of the respective roles of the courts and the Parole Commission in determining the length of incarceration. The court imposes a sentence, which under § 4205 sets the minimum required and maximum permissible period of confinement. During

the period between these points, the Commission has substantial discretion to decide whether to grant release on parole, including the power to decline to give weight to the sentence imposed. Until 1970, the Commission exercised this discretion on a case-by-case basis. But in response to widespread criticism that this led to arbitrary and erratic decisions, it began to experiment with structured release criteria, which were formally embodied in the guidelines in 1973. Congress was well aware of the guidelines when in passed the Parole Commission and Reorganization Act in 1976, in fact, the Act in good measure was designed to ratify the guidelines. The Act makes no mention of any obligation of the Commission to give consideration to the length of the prisoner's sentence in applying its guidelines. The legislative history reflects approval of the use of guidelines to reduce the effects of sentencing disparity. Finally, the decision below conflicts with two other courts of appeals that have reviewed the same legislative history and have concluded that the guidelines are consistent with the Act. Garcia v. U.S. Board of Parole, 557 F.2d 100, 107 (CA 7 1977); Banks v. United States, 553 F.2d 37, 40 (CA 8 1977).

Turning to the ex post facto ruling, the SG would distinguish decisions such as Warden v. Marrero, which concern the availability of parole, from the present case, which involves when parole eligibility will be exercised. Resp. was no less eligible for parole after 1973 than he was prior to 1973. During both periods, parole officials had very broad discretion in determining when he would be released. The only difference is that after 1973 the guidelines provide a structure for the exercise of that discretion. They do not alter any justified expectation of parole.

In addition, as the CA noted, the decision below conflicts with the decisions of the CA 6 and CA 2 in Ruip and Shepard, supra.

Resp. Geraghty has filed a motion to substitute members of the putative class as respondents in this court, or in the alternative, to allow these members to intervene. Presumably, this is to defeat the suggestion of mootness. Resp. does not address the mootness issues or the issues concerning the vailidity of the parole guidelines on the merits.

DISCUSSION: The issues in this case bear some relation to those in United States v. Addonizio, No. 78-156, cert. pending, United States v. Edwards, No. 78-157, cert. pending, and Bonanno v. United States, No. 77-1665, cert. pending. To be sure, those cases do not present a facial attack on the Parole Commission guidelines, but involve the question whether the sentencing judge, under either 28 U.S.C. §§ 2255 or 2241, can vindicate his "expectations" about the actual length of imprisonment when these expectations are frustrated by the guidelines. More broadly, however, all of these cases raise issues about the proper allocation of sentencing responsibility between the courts and the Parole Commission. They also share in common a concern about the fairness of having the Parole Commission consider questions of relative culpability after this has been weighed by the trial judge in imposing the initial sentence. Whatever disposition the Court makes of these cases, it would be desireable to consider them together at Conference. The Clerk's Office advises that there is only one response outstanding in the Addonizio, Edwards, Bonanno trilogy--a response from Resp. Edwards which was due November 15. Perhaps the Court should call for a response on the merits in the present case, and when it

arrives relist all of these cases for discussion at the same Conference.

The instant case appears to be a possible candidate for summary reversal on the jurisdictional question. The CA's decision that the class action exception to the mootness doctrine applies in this case rests on two holdings. The first--that the courts of appeals may in effect review the denial of class certification when the action is moot as to the named plaintiff, and may order that the certification "relate back" to date of filing--is without colorable support in the decisions of this Court. The second--that the DC abused its discretion by failing to certify a subclass on its own initiative--is equally unprecedented and quite mischievous. Reversal on the mootness issue would of course mean that the ruling below on the merits would be vacated.

If the Court does not summarily reverse, then the case would appear to be a clear grant on both the jurisdictional and the substantive issues. The ruling below creates circuit conflicts on three points. In holding that the court of appeals may review the denial of class certification when the named plaintiff no longer presents a live controversy, the decision conflicts with Winokur v. Bell Federal Savings & Loan Ass'n., 560 F.2d 271 (CA 7 1977). In holding that the parole guidelines conflict with the 1976 Parole Commission and Reorganization Act, the case conflicts with Garcia, supra (CA 7) and Banks, supra (CA 8). And in holding that the guidelines violate the ex post facto Clause , the decision conflicts with Ruip, supra, (CA 6) and Shepard, supra, (CA 2). The questions involved are of substantial importance because of the uncertainty they creat for prisoners and

because of the decision's potential for interference with the management of the federal parole system. It might be suggested that the decision is not final, because the CA remanded for further proceedings in the DC and that, with the jurisdictional question technically unsettled, the ruling with respect to the parole guidelines is dictum. But finality is not a jurisdictional requisite to certiorari under 28 U.S.C. § 1254(1). And, more fundamentally, the CA left no doubt but that the DC should certify the action as a subclass, and proceed to enter the findings that the Parole Commission does not rely on length of sentence in reaching parole decisions (which is conceded) and that it applies the sentencing guidelines in the overwhelming majority of cases (which does not appear to be in dispute). In these circumstances, the remand hearing on both the jurisdictional and the substantive issues would be a mere formality.

CFR and summarily reverse or grant. There is a motion to substitute members of the putative class or in the alternative to intervene.

11/22/78 Merrill Ops. in petn.

Argued ...., 19... Assigned ...., 19... No. 78-572
Submitted ...., 19... Announced ...., 19...

U. S. PAROLE COMMISSION, ET AL.

vs.

GERAGHTY

Response requested and received.

Geraghty is "out" & his case is moot, but CA3 disagreed - holding that "class should have been certified". "appeal"
There is a conflict with Roper - 78-904.
Satterwhite - 78-1008 held no after case of orig. π mooted out.
Potter would Deny all three
WHR says Geraghty is not best case to grant.

G

Relist this + 78-904 and 78-1008

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
Stewart, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											

(I prefer Roper as factual context seems more typical. But this case also is ok.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 23 FEB 1979

Recirculated: ____________

MEMORANDUM

Re: No. 78-572 - U. S. Parole Comm'n v. Geraghty
No. 78-904 - Deposit Guaranty Nat'l Bank v. Roper
No. 78-1008 - Satterwhite v. City of Greenville

I would be inclined to grant both Geraghty and Roper and to hold Satterwhite. If the Court is settled on granting only one, however, Geraghty should probably be it.

In Satterwhite, the named plaintiff's claim was dismissed on its merits after the DC had already denied class certification without an evidentiary hearing. The CA 5, *en banc*, declined to permit the named plaintiff to represent a putative class of women victimized by sex discrimination, reasoning that Mrs. Satterwhite was not a proper class representative as required by Rule 23. The court thought that once her claim was adjudicated on the merits the ruling could not be ignored. And the merits determination indicated that Mrs. Satterwhite did not have claims typical of the members of the class nor did she have an adequate common interest or nexus with them.

The decision rested on an application of Rule 23, then, and not on the case or controversy doctrine. Moreover, the court placed some emphasis on the fact that a full hearing

Satterwhite had failed to seek an evidentiary hearing or to make an offer of proof regarding the appropriateness of a class action. The court noted that it might be a different case had a hearing been held and certification been improperly denied by the DC. In those circumstances, a record would have been made, the named plaintiff would share no responsibility for the court's error (which might bear on the adequacy of the named plaintiff's representation), and any error of law by the trial court would go uncorrected if the case were dismissed.

In both Geraghty and Roper the named plaintiffs' claims had been mooted by factual circumstances rather than adjudicated to have been meritless from the beginning. Geraghty involves an attack on the Parole Commission's parole release guidelines. The named plaintiff in that case was released from prison upon expiration of his sentence while appeal was pending. The CA 3 held that if class certification was appropriate, the mootness of Geraghty's own claim should not bar adjudication of the case. It noted that Geraghty's attorneys, "while not possessed of a legally continuing relationship with members of the plaintiff class, have nonetheless undertaken this litigation on a class-oriented basis. There is no indication of any diminution of vigor in their efforts despite the release of Geraghty. Indeed, as already observed, they represent another individual plaintiff who now seeks to intervene in the matter. Consequently, there is a

prima facie case of functional adversity, a central element which the mootness doctrine seeks to preserve." Petn. 27a.

In Roper, the named plaintiffs instituted suit as credit card holders to recover for violations of state usery statutes to the extent provided by the National Bank Act. The DC refused to certify a class of 90,000 similarly situated persons. The defendant thereupon tendered to respondents their money demands, interest, and court costs, and the DC dismissed the action. The CA 5 held that the named plaintiffs could appeal the denial of class certification. Judge Rubin, writing for the court, recalled his statement for the court in Satterwhite that good reason exists for permitting the named plaintiff to appeal from denial of class certification, though the plaintiff's claim became moot prior to appellate review, when there had been a full evidentiary hearing on the certification issue. Particularly, unless the named plaintiff were permitted to appeal, review of the certification decision would depend upon the intervention of a putative class member, who is not entitled under a Fifth Circuit case to notice of the individual compromise and who may therefore be unaware that the class is without a representative.

The court thought that a viable controversy existed with respect to the certification issue and that the named plaintiffs were in a position to raise it because they had objected to the defendant's proffered compromise. And even had

they been satisfied with the offer of judgment, they would have maintained a stake in procuring class-wide relief. Moreover, they maintained a nexus with the class and continued to be adequate representatives for purposes of Rule 23, in the court's view. In their response, respondents elaborate on their stake in the prospect of class certification. They explain that substantial expenses have been incurred in the proceeding thus far by the named plaintiffs and that such expenses may exceed the full amount of individual claims. Were the case to proceed as a class action, these expenses would be spread among a larger group of people.

These three cases, then, present the mootness issue in (perhaps) significantly different light. The impropriety of allowing appeal of a denial of class certification is probably the clearest in the Satterwhite situation. That case presents not only case or controversy problems but also Rule 23 problems in regard to adequacy of representation. The named plaintiff's failure to prevail on the merits established that she had not suffered the discrimination assertedly uniting the putative class. Presumably, not having experienced the injury alleged, Satterwhite was not in a position to represent the class in an informed way. As noted above, the court in Satterwhite also placed some weight on the absence of a hearing on the certification question. (Though there may have been no evidentiary hearing in Geraghty either. See Geraghty Petn. 78a).

An affirmance in Satterwhite, then, is not likely to affect the decisions in Geraghty or Roper. Indeed, the CA 5 views Satterwhite and Roper as perfectly reconcilable.

Only if the Court thinks it is more likely than not that Satterwhite will be reversed should the petition in that case be granted; only then will a resolution in that case provide guidance in cases like Geraghty and Roper, which appear to be more common. Reversal of Satterwhite is unlikely, however, in light of this Court's decision in East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977). There the Court held that the named plaintiffs should not have been recognized by the court of appeals as representatives of the class the DC declined to certify because:

> the trial court proceedings made clear that [the named plaintiffs] were not members of the class of discriminatees they purported to represent. . . . The District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury. Id., at 403-404.

Moreover, there is no clear intercircuit conflict on the issue whether a person whose claim was rejected on its merits might properly represent a putative class. See Goodman v. Schlesinger, 584 F.2d 1325 (CA 4 1978) (alleged to conflict with the CA 5's decision but only remanding the case to the DC

for retention on the docket for a reasonable time to permit a proper plaintiff to come forward).

Roper, by contrast, presents the clearest case for allowing appeal of the certification issue. First, it is not even apparent that the named plaintiff's claims were mooted out because they opposed the defendant's proffer of settlement. This was the ground for Judge Thornberry's separate concurrence. Moreover, the named plaintiffs assert a continuing interest in certification -- namely, spreading their litigation costs among the members of the putative plaintiff class. Geraghty does not assert that interest, nor is it clear that it pertains to his suit. There is arguably no Rule 23 adequacy-of-representation problem in Roper because the named plaintiffs at least suffered the same injury as class members and may manage the suit in an informed way.

The Geraghty decision is the most troubling. In that case, there is no indication that the named plaintiff has any interest in representing the putative class. Geraghty's attorneys, rather, are endeavoring to serve as counsel for the class if it/is ultimately certified. Though the court adverted to the possibility of their representing an intervenor, at the time of the appeal apparently no motion to intervene had been advanced.

Considering only the mootness issue, I think it might be prudent and efficient to take both Roper and Geraghty. That is so because an affirmance in Roper would not necessarily mean that Geraghty was properly decided and, relatedly, a reversal in Geraghty would not necessarily dispose of the Roper case. But Geraghty does clearly present the issue whether appeal of a denial of certification may be had when the named plaintiff's claim is truly moot. It presents the sharpest conflict, then, with the CA 7's decision in Winokur v. Bell Federal Savings and Loan Ass'n, 560 F.2d 271 (1977). Thus, if only one petition is to be granted, Geraghty should be the one.

Petitioners in two of the cases seek review of questions other than the mootness issue. In Satterwhite, the only issue is the mootness point. Roper presents a few additional but insubstantial issues; the mootness issue is advanced in the first and second questions presented. Geraghty does involve a few arguably certworthy issues besides the mootness point, which is set forth as the first question presented. The court in Geraghty held that the DC abused its discretion in failing to certify a subclass though subclasses were not suggested by the plaintiff himself. (Second question presented.) Respondent points out, however, that the plaintiff had no chance to suggest that subclasses be created. Though the plaintiff requested that the DC rule on the class motion as soon as practicable, the DC

refused to do so until it was ready to announce its decision on the merits. Had the DC ruled promptly -- prior to its decision on the merits -- the plaintiff would have proposed a redefinition of the class, he says. Thus the decision on this point is not manifestly unreasonable and no inter_circuit conflict is alleged.

The court also intimated that the parole guidelines conflict with the 1976 Parole Commission and Reorganization Act (third question presented), and violate the ex post facto Clause of the Constitution (fourth question presented). Two other circuits have indicated their belief that the guidelines are consistent with the Act. Garcia v. U.S. Bd. of Parole, 557 F.2d 100, 107 (CA 7 1977) (reserving the question, however); Banks v. United States, 553 F.2d 37, 40 (CA 8 1977) (arguably dicta). And two circuits have decided that the guidelines do not affront the ex post facto Clause. Shepard v. Taylor, 556 F.2d 648 (CA 2 1977); Ruip v. United States, 555 F.2d 1331 (CA 6 1977).

Respondent emphasizes, however, that the case was up in the CA on appeal from summary judgment; accordingly, the facts are in dispute. In evaluating the guidelines on their merits the CA based much of its reasoning on Geraghty's allegations, which may or may not be proved. And the factual issues may be developed on remand in such a way as to put Geraghty's case in even a stronger light. Thus, respondent submits, such important

issues should not be adjudicated on essentially hypothecated facts. Respondent has a point. The CA itself noted that:

> Since this case comes before us from a dismissal by summary judgment, and since Geraghty has provided factual support for his characterization of the guidelines, we must take his account as correct for purposes of this appeal. [*]
>
> ---
>
> [*] However, since the Parole Commission has presented contradictory material, and since a large part of Geraghty's proof is inferential, the case cannot be resolved by summary judgment in Geraghty's favor on the basis of the present record. Petn. 36a.

It may be wise to await a determination on remand, then, provided the judgment of the CA is sustained on the jurisdictional issue. But it may be efficient to hear the merits issues as long as the case is here on the jurisdictional point.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 23, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 78-572 - U.S. Parole Commission v. Geraghty;
No. 78-904 - Deposit Guaranty National Bank v. Roper;
No. 78-1008 - Minda Satterwhite v. Greenville, Texas.

The Conference voted to grant one or more of the above cases and was interested in a suggestion as to which should be selected.

I recommend that we grant both Roper and Geraghty and hold Satterwhite. The grant in Roper should be limited to questions 1 and 2 (may named plaintiff whose case has mooted out appeal the denial of class action certification) and in Geraghty to questions 1 (the same as the Roper issue); 3 (are parole guidelines inconsistent with the statute); and 4 (was the *ex post facto* clause violated by applying the guidelines in this case).

I enclose a memorandum about these cases prepared by my clerk, Gary Sasso.

Sincerely yours,

Byron

Enclosure

Justice Powell - The problem with taking Geraghty is that the issues on the merits are complex, although it appears the court below wrongly decided them. Further, I do not see why a decision on the mootness issue in Roper will not take care of Geraghty. I would take only Roper. Paul

February 23, 1979

Court	*Voted on*.................., *19*...	
Argued ...., *19*...	*Assigned* ...., *19*...	No.78-572
Submitted ...., *19*...	*Announced* ...., *19*...	

U. S. PAROLE COMMISSION

vs.

GERAGHTY

Relisted for Mr. Justice White.

Relist for Byron

(Byron would take Geraghty and Roper

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	~~NOT~~ VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.												9 prefer	
Brennan, J.												Roper	
Stewart, J.													
White, J.												but grant of	
Marshall, J.												both would	
Blackmun, J.												be OK	
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 28, 1979

Re: No. 78-572 - U.S. Parole Commission v. Geraghty
No. 78-904 - Deposit Guaranty National Bank v. Roper
No. 78-1008 - Satterwhite v. Greenville, Texas

Dear Byron:

This relates to your letter of February 23 recommending that certiorari be granted in both Roper and Geraghty and that Satterwhite be held for the other two. I fully agree.

I am somewhat disturbed, however, at your proposed limitation of the grant in Geraghty. I think I would feel better if we grant Geraghty across the board. The second issue concerns the propriety of the Third Circuit's ruling that the District Court should have considered the possibility of certifying a subclass of plaintiffs sua sponte. This ruling is really related to the Third Circuit's ruling on the first issue because the Court of Appeals agreed that the plaintiff's proposed class was unmanageable. Thus, unless the trial court had a duty to consider subclass certification sua sponte, the case would be moot even under the rationale of the Court of Appeals. As the SG points out, a rule requiring trial judges to mull over possibly appropriate subclasses would impose unique and unprecedented burdens on trial judges. Yes

In a way, the presence of the second issue in Geraghty makes it an easier case because the Court could reverse on this issue alone.

I am also inclined to feel that the substantive issues in Geraghty are, indeed, ripe. As I read the opinion of the Court of Appeals in its entirety, it seems to me that the District Court is given no discretion on remand.

For these reasons, I am inclined to grant Geraghty on all issues.

Sincerely,

Harry

Mr. Justice White
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 28, 1979

Re: No. 78-572 - U.S. Parole Commission v. Geraghty
No. 78-904 - Deposit Guaranty National Bank v. Roper
No. 78-1008 - Satterwhite v. Greenville, Texas

Dear Byron:

on all issues

This relates to your letter of February 23 recommending that certiorari be granted in both Roper and Geraghty and that Satterwhite be held for the other two. I fully agree.

I am somewhat disturbed, however, at your proposed limitation of the grant in Geraghty. I think I would feel better if we grant Geraghty across the board. The second issue concerns the propriety of the Third Circuit's ruling that the District Court should have considered the possibility of certifying a subclass of plaintiffs sua sponte. This ruling is really related to the Third Circuit's ruling on the first issue because the Court of Appeals agreed that the plaintiff's proposed class was unmanageable. Thus, unless the trial court had a duty to consider subclass certification sua sponte, the case would be moot even under the rationale of the Court of Appeals. As the SG points out, a rule requiring trial judges to mull over possibly appropriate subclasses would impose unique and unprecedented burdens on trial judges.

In a way, the presence of the second issue in Geraghty makes it an easier case because the Court could reverse on this issue alone.

I am also inclined to feel that the substantive issues in Geraghty are, indeed, ripe. As I read the opinion of the Court of Appeals in its entirety, it seems to me that the District Court is given no discretion on remand.

For these reasons, I am inclined to grant Geraghty on all issues.

Sincerely,

Harry

Mr. Justice White
cc: The Conference

I agree with Justice Blackmun. My first recommendation is to take only Roper. But if Geraghty is taken, it should be on all issues. Paul

3/1

Re Geraghty:

(1) HAB claims that Roper supports Geraghty, as we note at pg 6 – I believe it is unnecessary to repeat the cross-cite.

(2) On pg 12, how about

"Absent such identification, the claim of concrete injury is indeed an empty one."

good

Ellen

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

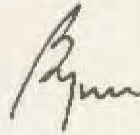
March 1, 1979

Re: No. 78-572: US Parole Comm'n v. Geraghty;
No. 78-904: Deposit Guaranty Nat'l Bank v. Roper;
No. 78-1008: Satterwhite v. Greenville, TX.

Dear Harry,

I do not object to granting Geraghty across the board.

Sincerely yours,



Mr. Justice Blackmun

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 1, 1979

RE: 78-572 - U. S. Parole Commission v. Geraghty

78-904 - Deposit Guaranty National Bank v. Roper

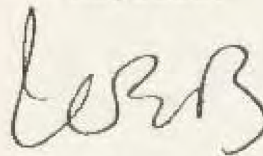
78-1008 - Satterwhite v. Greenville, Texas

MEMORANDUM TO THE CONFERENCE:

I vote as follows:

78-572 - U.S. Parole Commission v. Geraghty	- Grant in full
78-904 - Deposit Guaranty National Bank v. Roper	- Grant Questions 1 and 2
78-1008 - Satterwhite v. Greenville, Texas	- Hold for 78-572 and 78-904.

Regards,



March 2, 1979

Court .... Voted on.................., 19...
Argued ...., 19... Assigned ...., 19... No. 78-572
Submitted ...., 19... Announced ...., 19...

U. S. PAROLE COMMISSION

vs.

GERAGHTY

Relisted for Mr. Justice White.

Grant across board

G

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓											
Stewart, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											

September 28, 1979

78-572 U.S. Parole Commission v. Geraghty

Dear John:

I agree with Bill Brennan that there is no reason for you to recuse in this case.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

September 28, 1979

RE: No. 78-572 United States Parole Commission v. Geraghty

Dear John:

I see no reason whatever why you should recuse yourself in the above.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

September 28, 1979

MEMORANDUM TO THE CONFERENCE

Re: 78-572 - United States Parole Commission v. Geraghty

The briefs on the merits have reminded me that I was a member of the Seventh Circuit panel that affirmed Geraghty's conviction in 1974, see United States v. Braasch, 505 F.2d 139. I did not, however, sit on the panel that subsequently refused to review a reduction in his sentence, see 542 F.2d 442.

Since the appeal on which I did sit raised no questions concerning the severity of Geraghty's sentence--and really had nothing whatsoever to do with the various issues now before us--I do not think there is any reason for me to recuse myself. However, I thought I should advise you of the facts and if there is any contrary feeling on the Court, I would welcome your advice.

Respectfully,

JPS

Dear John-
I agree with Bill Brennan that there is no reason for you to recuse in this case.

er 10/1/79

SUPPLEMENTAL MEMORANDUM

TO: Mr. Justice Powell

FROM: Ellen

DATE: October 1, 1979

RE: US Parole Commission v. Geraghty, No. 78-572

The SG has filed a helpful reply brief addressing some of the key arguments. The brief does not, however, convincingly answer resp's most persuasive point - that denial of class certification must be reviewable to prevent that issue from forever evading review. The SG cites the Jacobs case and the dicta in Spangler v. Pasadena Board of Education to the same effect. As you pointed out, these dicta are controlling if they are the law. But neither case dealt with appeal from a denial of class status, since the actions had been treated as class actions below. Resp has raised strong policy concerns suggesting that the result should be different here. Although I think he is wrong, the answer is not as simple as the SG contends.

DCs can take care of this by certifying class

yes

The SG also answers the motion to intervene filed by 5 prisoners with live claims in this Court, arguing that the Court is without jurisdiction to grant the motion because intervention cannot revive a dead case.

On the merits, the SG adds some current statistics: in 1978, 11% of the PC's decisions delayed release until after the guideline range, while 10% allowed early release.

572

78-[illegible] U. S. Parole Commission v. Geraghty CA3 Argued 10/2/79

As in the preceding case (Deposit Guarantee Bank v Roper), the issue is whether an Art III case or controversy survives where no named π retains a stake in litigation & the court has refused to certify the class.

Here Resp., a prisoner, brought a class action suit challenging the U.S. Parole Guidelines. The DC refused to certify the class & Resp. appealed. But before appeal was argued, Resp was released and he no longer claims any personal interest in the case.

Relying on United Airlines v McDonald, CA3 held absence of an interested π and absence of a certified class did not moot the case.

Jones (for S.G.)

Relies on Jacobs & Pasadena.

No class certified; Resp. released from prison while appeal was pending

This case is different from Roper. There the DC entered judg. vs π - even tho the π never accepted the payment. Here the π was seeking parole - that he accepted. (But Byron sees no difference)

Agrees that ultimate Q in both cases is "mootness".

Here claim itself expired before any class was certified.

After individual claim becomes moot, the individual claimant (named π) no longer can represent the class. Sosna

(This is different from Roper because in this situation the Δ could not "buy-off" the claim in same way. But in theory Parol Bd could moot case by granting parole)

The parole here was in normal course. It was not done to end the law suit.

Flaxman (Resp)

Admits ~~Geraghty~~ Geraghty (Resp) no longer has any personal ~~stake~~ stake

Issue remains: validity of guide-lines.

~~If~~ There is no problem here ~~to~~ as to similar suits being brought by other prisoners. Thus, no problem of S/Lim running vs other prisoners raising same issues.

Jones (Reply)

Vote 4½ to 4½
Chief will ask for memos.

78-572 U.S. Parole Commission v. Geraghty   Conf. 10/5/79

The Chief Justice Reverse
9a different from Roper

Mr. Justice Brennan Affirm

Can't distinguish Roper

Mr. Justice Stewart Reverse

Thinks SG suggest a way to distinguish this from Roper. May be difficult to write out.

Mr. Justice White Affirm

Can't distinguish Roper

Mr. Justice Marshall Affirm

Mr. Justice Blackmun Affirm in Part & Rev. in Part

Named π can't appeal.

But would allow intervenors to carry case forward. (But no one intervened)

Need not reach merits of Guide Lines.

Would allow intervention now either here or on remand.

I don't understand HAB's position. It really is an affirmance

Mr. Justice Powell Reverse

Again, I'll have to see how this writes. It may not be distinguishable in a principled way from way Court has voted in Roper.

No way class here can be disadvantaged. Counsel admits he has any number of clients in prison. But Art III most serious issue in case.

Only way to clarify existing confusion is to revise Rule 23 or go back to pre-Sosna

Mr. Justice Rehnquist Reverse

Easier than Roper - but still not easy.

With some straining, McDonald can be distinguished. We need strain no more than W.J.B. strained in Bowman to avoid Jacobs.

Case also would be moot if π had died before a motion to intervene.

Agree with P.S.

Mr. Justice Stevens Affirm

Logically, this is exactly same as Roper. There must be a period for 30 days in which case is alive whether π dies, withdraws, or is paid off. Here, case was alive on appeal because appeal was taken within 30 days.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 9, 1979

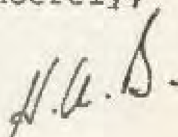
Re: No. 78-752 - United States Parole Commission
v. Geraghty

Dear Chief:

This note will confirm my comment to you yesterday by telephone that, after further examination of this case, my vote is to affirm. Accordingly, now that the case has been assigned to me, I shall endeavor to write it in that direction.

I would have thought, however, that the same person should write this case and No. 78-904, <u>Deposit Guaranty National Bank</u> v. <u>Roper</u>. They fall in the same area and perhaps might have been covered in a single opinion. Inasmuch, however, as you wish to retain <u>Roper</u> for yourself, I suggest that we plan (if the votes in <u>Guaranty</u> hold firm) to bring the two cases down together. I would not wish us to be working at cross-purposes, even to a slight degree.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 16, 1979

Re: No. 78-572 - United States Parole Commission, et al. v. Geraghty

Dear Chief:

This circulation of a proposed opinion in the above case will bring into focus the connection between this case and your pending opinion in No. 78-904, Deposit Guaranty National Bank v. Roper. In my letter of October 9 and in your memorandum of November 1, each of us expressed some concern about conflict between the two opinions.

I have endeavored to draft Geraghty so that it would provide a minimum of tension with Roper. Indeed, as you will observe, Roper is cited in Geraghty several times.

You, of course, already have a Court in Roper. Despite this fact, I call to your attention two minor points in the Roper opinion that might create problems with Geraghty. These are the only ones, I believe, that are of some concern to me:

1. On pp. 6-7 and n.7 in Roper there is an implication that a plaintiff who settles his individual claim may not appeal a denial of a class certification. The case authority cited is the dissenting opinion (although it is not described as a dissent) in United Airlines, Inc. v. McDonald. This does not directly conflict with the opinion in Geraghty, since Geraghty also does not involve a voluntary settlement. I am not persuaded, at least at this point, that the settlement situation is all that easy and clear. I would prefer that it be left open until presented in a "concrete" factual context.

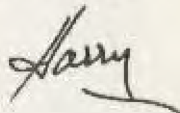
2. On pp. 8-10 your opinion seems to approve the distinction in the Electrical Fittings case between a judgment on the merits and "true" mootness. The Roper opinion states on page 9:

> "The Court perceived the critical distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of a federal court and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal."

If I understand this language, I think it could be read as adopting the Solicitor General's argument that "expiration" of a claim is different for Art. III purposes from a judgment on the merits of the claim. This may not be fully consistent with Geraghty.

I shall be interested in your reactions to this. If my concern as to these two points in Roper is alleviated, I would be in a position to join your opinion in that case.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

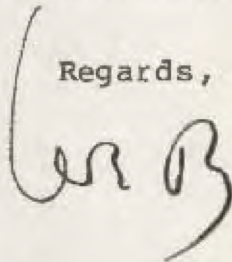
November 16, 1979

Re: 78-572 - U.S. Parole Commission v. Geraghty

Dear Harry:

Your draft and my editorially revised Roper passed in today's circulations. There are some "tensions", e.g., the final sentence on your page 11. This is not surprising between a case with a clear economic and property interest and one with quite a different element. I may need to clarify possible ambiguities; for example, I rest firmly on Roper's economic interest in spreading the legal costs over the class and on the idea that appealability is not terminated by the final judgment here, rather than on any "obligation" of Roper to the putative class. Geraghty does not seem to have a parallel economic interest.

Regards,



Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 16, 1979

Re: 78-572 - United States Parole Commission
v. Geraghty

Dear Harry:

Please join me.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 19, 1979

RE: No. 78-572 United States Parole Commission v. Geraghty

Dear Harry:

I am happy to join your opinion for the Court in the above.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 20, 1979 ✓

Re: No. 78-572 - U.S. Parole Commission
v. John M. Geraghty

Dear Harry,

Please join me.

Sincerely yours,

Byron

Mr. Justice Blackmun

Copies to the Conference

cmc

November 28, 1979

78-572 U.S. Parole Commission v. Geraghty

Dear Harry:

As I was on the "short side" in both Roper and Geraghty, I expect to write a dissent.

I probably will use Geraghty as the principal case for my dissent, with a brief separate dissent in Roper.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1979

Re: No. 78-572 - United States Parole Comm'n v. Geraghty

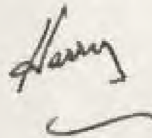
Dear Bill:

I fully understand your concern and discomfiture, for I agree that our past cases seem to move first in one direction and then in another. As a consequence, the drafting of the proposed opinion for this case proved to be, for me at least, a difficult task. I believe, however, that my handling of these past cases, including in particular footnote 7, is an honest one.

I shall recirculate shortly with minor revisions, some of which are occasioned by the changes made by the Chief Justice in his new draft of the opinion in Roper. My changes may or may not alleviate your concerns.

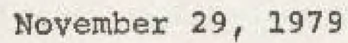
I am not sure that I understand your discomfiture with part V, as expressed in the next to the last paragraph of your letter of November 21. I had thought that the opinion (page 17) indicated that the District Court did not have sua sponte responsibility to construct subclasses. In the new draft, I am emphasizing this, and I believe that the additional language should satisfy your concern on this point.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference


Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 29, 1979

Re: No. 78-572 - U.S. Parole Com. v. Geraghty

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

lfp/ss 12/31/79

MEMORANDUM

TO: Ellen DATE: Dec. 31, 1979

FROM: Lewis F. Powell, Jr.

Geraghty

Having revewed your draft of 12/28, I can well understand why you found it rather difficult to write a dissent. Apart from the absence of a precedent that fairly can be said to be wholly controlling, and in view of the multiplicity of standing cases (both Article III and prudential) including the mootness cases, the Court's opinion presents a "moving" target. It agrees with Roper that the application of Article III must be on an "issue by issue" basis; it bisects the mootness doctrine into "flexible" and "less flexible" cases, and it defines a "live controversy" in a wholly unique way.

Nevertheless, Ellen, your draft is too long - as I am sure you recognize. Nor is my familiarity with the myriad of cases sufficiently familiar to enable me to give you precise guidance as to how best to eliminate five or six pages from the text and perhaps also reduce somewhat the notes. I nevertheless make the following observations.

1. With the rider I have dictated (and attached hereto) the introductory paragraph on page 1 is OK.

2. I also think your part I (pp. 2-6), inclusive) is a fine basis introduction - though it is confined to

non class action cases. The text in Part I is a bit forbidding because of the multiple citation and repetitive citation of the full titles of cases. Possibly you can do something about this.

3. Part II of the draft moves into a discussion of the class action cases. This Part includes six and a half pages of text. It reads well, and is supportive of our position. Yet, I view Part III, commencing on page 13, as the heart of our dissent. To the extent that we will discuss in Part III cases now in Part II, I suggest that we hold our fire on these cases until we are attacking or responding to the Court opinion.

I do think that much of what you have written in Part II is excellent, and I am not sure how best to preserve it without appearing to be repetitious and unduly prolonging the opinion.

What would you think of combining Parts II and III, and weaving your treatment of the authorities discusssed in Part II into our principal attack on the Blackmun opinion that we now make in Part III.

4. After our Part I, I would move directly to a description of what the Blackmun opinion says and really does to Aritlce III mootness. Part III of HAB's opinion commencing at page 8 is a good starting place. He takes quite a few

liberties, as I view it, with prior decisions, paying scant attention to the fact that Gerstein lends no support to HAB because its decision turned on the short time span involved so that cases almost always would evade review. The same situation existed in Sosna, although there a class had been certified - as you correctly emphasize.

I have dictated, and will give you herewith, some random thoughts as to what we might say in response to the Court's new distinction between "flexible" and "less flexible" mootness. I think this can be a focal point of our attack.

Despite what I have said above as to the central importance of HAB's Part III, I suppose what he says commencing at the bottom of page 14 and going through page 15 in his redefinition of "personal stake" actually is the most radical portion of his analysis.

He identifies three "imperatives" of a continuing live dispute: (i) a sharply presented issue, (ii) a concrete factual setting; and (iii) a self interested party who actually is contesting the case.

The last of these imperatives is conspicuously absent in the present case, despite HAB's conclusion that "these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." He then

makes the astonishing statement:

> "Respondent here continues vigorously to advocate his right to have a class certified."

Is there anything in the record that indicates any interest on respondent's part? To be sure his lawyer is here, but he concedes that his client no longer has the slightest interest in the outcome of the litigation.

Then, as you demonstrate quite well, HAB's splitting the mootness "atom" into two, is unprecedented and unsound (see p. 16).

In sum, Ellen, we will have a stronger - and more readable - dissent if we move at a fairly early point to define our targets - drawing them specifically and fairly from HAB's opinion. Then, we should attack them with precedent and logic. As to the precedents, you have already distinguished those Harry relies upon, and emphasized those that support our view. Your task is to do this as a part of our basic rebuttal, rather than spreading them out.

* * *

I know that it is easier for me to suggest this restructuring of the draft than it will be to accomplish this. I will appreciated your doing this, taking such time as may be necessary. Our dissent is important, at least in the interest of continuity of doctrine. We also should let the law schools know that at least some of us think the Court's decision is a radical departure from precedent and principle.

L.F.P., Jr.

ss

MEMORANDUM

TO: Ellen DATE: Dec. 31, 1979

FROM: Lewis F. Powell, Jr.

Geraghty

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What would you think of combining Parts II and III, and weaving your treatment of the authorities discussed in Part II into our principal attack on the Blackmun opinion that we now make in Part III.

4. After our Part I, I would move directly to a description of what the Blackmun opinion says and really does to Aritlce III mootness. Part III commencing at page 8 is a good starting place. He takes quite a few

liberties, as I view it, with prior decisions, paying scant attention to the fact that Gerstein lends no support to HAB because its decision turned on the short time span involved so that cases almost always would evade review. The same situation existed in Roper, although there a class had been certified - as you correctly emphasize.

I have dictated, and will give you herewith, some random thoughts as to what we might say in response to the Court's new distinction between "flexible" and "less flexible" mootness. I think this can be the focal point of a major thrust of our attack.

Despite what I have said above as to the central importance of HAB's Part III, I suppose what he says commencing at the bottom of page 14 and going through page 15 in his redefinition of "personal stake" actually is the most radical portion of his analysis.

He identifies three "imperatives" of a continuing live dispute: (i) a sharply presented issue, (ii) a concrete factual setting; and (iii) a self interested party who actually is contesting the case.

The last of these imperatives is conspicuously absent in the present case, despite HAB's conclusion that "these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." He then

makes the astonishing statement:

> "Respondent here continues vigorously to advocate his right to have a class certified."

Is there anything in the record that indicates any interest on respondent's part? To be sure his lawyer is here, but he concedes that his respondent no longer has the slightest interest in the outcome of the litigation.

Then, as you demonstrate quite well, HAB's splitting the mootness "atom" into two, is unprecedented and unsound (see p. 16).

In sum, Ellen, we will have a stronger - and more readable - dissent if we move at a fairly early point to define our targets - drawing them specifically and fairly from HAB's opinion. Then, we should attack them with precedent and logic. As to the precedents, you have already distinguished those Harry relies upon, and emphasized those that support our view. Your task is to do this as a part of our basic rebuttal, rather than spreading it out.

* * *

I know that it is easier for me to suggest this restructuring of the draft than it will be to accomplish this. I will appreciated your doing this, taking such time as may be necessary. Our dissent is important, at least in the interest of continuity of doctrine. We also should let the law schools know that at least some of us think the Court's decision is a radical departure from precedent and principle.

L.F.P., Jr.

ss

lfp/ss 1/17/80

MEMORANDUM

TO: Ellen DATE: Jan. 17, 1980

FROM: Lewis F. Powell, Jr.

78-572 Geraghty

I have reviewed carefully, and with much interest, the revised draft of 1/16/80 of an opinion in this case. I congratulate you on a closely knit and persuasively reasoned dissent. You have restructured the opinion along the lines I suggested very well indeed. I also thank Greg for doing an early edit to accommodate my time problem.

Apart from self evident editing, I have tried to eliminate what seemed to me to be marginal statements - both in the notes and text. Some, it seemed to me, added little. Others, seemed to reach out a bit for arguments that might be debatable. Actually, my eliminations have not been numerous; yet, when you and Greg reread the opinion, bear in mind that our basic points are so strong, it would be unwise to present marginal arguments.

The long rider I have dictated for page 9 is designed merely for emphasis and increased clarity. But I do raise this rather fundamental question. If, indeed, Roper preserves the essence of Article III should I reconsider my

tentative decision to dissent in that case as well as in Garaghty?

I have not yet reexamined Roper, which I read several weeks ago. I will, of course, do this, and suggest that you complete your preliminary draft of the dissent. Then I would welcome the views of both of you on the question I raise.

The distinction we draw on page 9 appears to put Geraghty in a substantially different light from Roper. This does not surprise me too much, as I have always perceived Geraghty as the more shocking of the two decisions by this Court. Moreover, unless Justice Stewart has changed his mind in Geraghty, he may be a possible join in our dissent. Nor has Justice Rehnquist come to rest, as I understand it.

In order to move this along, I suggest that it go to the printer today, hoping to obtain a Chambers Draft before I leave for Florida tomorrow afternoon. I could then review that and let you know by telephone if I have changes. Meanwhile your co-clerks can review the Chambers Draft. This is an important dissent. The Court is making a major departure from Article III jurisprudence. The law reviews are certain to examine the opinions with care. Ours must be the soundest reasoned even if not the most popular result.

L.F.P., Jr.

ss

er 1/22/80

TO: Mr. Justice Powell

FROM: Ellen

RE: No. 78-572, Geraghty Chambers Draft

Before going to press on this, I'd like to draw your attention to two things:

1. What we say about Art. III here is in some tension with your concurring opinion in United States v. Richardson, 418 U.S. 166 (1974). Particularly at pages 184 and 196-197, you seem to adopt the Harlan view from Flast v. Cohen, that the barriers against the "public action" are prudential only. I think that your more recent opinions for the Court reject that view (Warth v. Seldin, and Gladstone, Realtors, for example), and that Richardson should be read in light of the stricter Art. III limits imposed in those cases.

2. On a more mundane level, I have added some citations and clarified the language of Footnote 6. In the course of editing, I had previously dropped the second paragraph of that footnote, in which I had acknowledged that the obligation to give notice upon settlement and the duty to represent class members have

been imposed by some courts even before certification. It destroys the flow of the footnote to put that thought back in, and I have concluded that it is not inconsistent with what we now say.

Finally, I have found no direct support for the last sentence in note 6. The closest I have come is Newberg's treatise, where he says that the Sosna/Franks result is analogous to the well-settled rule that a trust does not fail for want of a trustee.

File in U. S. Parol Commission v. Geraghty

MR. JUSTICE:

To press?

Ellen

[On the United States v. Richardson concern, I have reflected further and believe that the bridge was crossed in Warth, Simon, and Gladstone. To the extent there are contrary implications in Richardson, they do not survive those Court opinions.

E

what I wrote in

I agree with this. LFP 1/29/80

January 30, 1980

78-572 U.S. Parole Comm. v. Geraghty

Dear Potter and Bill:

I am circulating my dissent in the above case this afternoon.

If my records are correct, both of you voted tentatively as I did at Conference. I believe all of the votes are in except yours. I would welcome company, and therefore invite your comments. Indeed, even if you conclude not to join me, I would still welcome any suggestions - as I view what is written in this case in particular as likely to have a significant effect on Article III jurisprudence.

Although there is some tension between Geraghty and Roper, that you have joined, there are some distinctions. At the practical level (emphasized by the CJ in his Roper opinion) there is a major distinction between the two cases. If Roper were decided the way that I think it should be, members of the putative class - having slept on their rights for nine years more or less - may be barred by the statute of limitations.

In Geraghty, no one will be adversely affected by applying conventional Article III mootness. Geraghty's counsel, as you will remember, was refreshingly candid about this. He agreed that his only client, Geraghty, had nothing whatever to gain by class certification. Moreover, counsel stated that there would be no problem in commencing another suit to test the validity of the parole procedure. There were plenty of available clients still imprisoned with terms long enough to assure they would not be paroled during the course of litigation.

In short, a fresh suit - for which "captured clients" are available - would ensure that the issue is litigated. The reasons principally relied upon in Roper for preserving the class action simply do not exist in Geraghty.

Sincerely,

Mr. Justice Stewart
Mr. Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 1, 1980

Re: No. 78-572 - United States Parole Commission v. Geraghty

Dear Lewis:

Please join me in your dissent in this case. I have joined the Chief's opinion in Roper, and therefore do not anticipate joining your forthcoming dissent in Roper. Frankly, I think our cases on "mootness" are at sixes and sevens, and that any litigant or any court can derive support from statements made in one or another of them. Because I think Harry's opinion for the Court in this case is not lacking in precedental support, and because I think there is undoubted tension between a "join" in Roper and a dissent in this case, I shall probably write separately to explain my position. I hope to do so within the next two or three days.

Sincerely,

wr

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

Recirculate promptly with P.S. & W.H.R. added

February 6, 1980

Re: 78-572 - United States Parole Commission v. Geraghty

Dear Lewis:

Please add my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 11, 1980

Re: 78-572 - U.S. Parole Commission v. Geraghty

Dear Harry:

I have made a final review of this case after reading Lewis' revised dissent in Roper. As you know, I have never viewed these cases as being governed by the same principles; for me the application of traditional concepts of mootness calls for reversal of Geraghty and affirmance of Roper, since the former has no vestige of interest in the litigation.

If Lewis makes some changes in his dissent in this case, I may join him.

Otherwise, I will simply dissent "solo".

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 11, 1980

PERSONAL

Re: 78-572 - U.S. Parole Commission v. Geraghty

Dear Lewis:

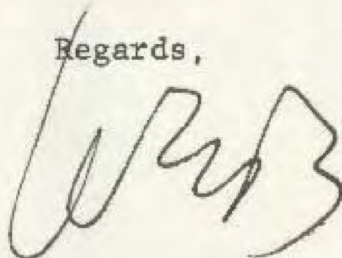
I could join your dissent if

(a) on line 9, page 9, after "paid" you insert "into court but not accepted by plaintiffs . . . .";

(b) change the final sentence of the first full paragraph to read:

"One can disagree with that analysis yet conclude that Roper affords no support for the Court's holding here."

Regards,



Mr. Justice Powell

March 11, 1980

78-572 U.S. Parole Commission v. Geraghty

Dear Chief:

Thank you for your letter of this date.

I am happy to make the changes in my dissent that you suggest.

These will be made, and I hope to circulate by tomorrow.

Welcome aboard!

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 11, 1980

er
Gm
p
DOS
Cheers!

Re: 78-572 - U.S. Parole Commission v. Geraghty

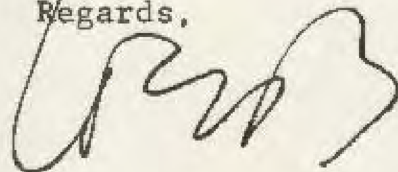
Dear Harry:

I have made a final review of this case after reading Lewis' revised dissent in Roper. As you know, I have never viewed these cases as being governed by the same principles; for me the application of traditional concepts of mootness calls for reversal of Geraghty and affirmance of Roper, since the former has no vestige of interest in the litigation.

If Lewis makes some changes in his dissent in this case, I may join him.

Otherwise, I will simply dissent "solo".

Regards,



Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 12, 1980

Re: 78-572 - United States Parole Commission v. Geraghty

Dear Lewis:

Thank you for the accommodation in your dissent, which I now join.

Regards,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 13, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-572 - United States Parole Comm'n v. Geraghty

On page 11 of the proposed opinion I am inserting the following immediately after the numeral in the eighth line of the second paragraph:

"See also Coopers & Lybrand v. Livesay, 437 U.S., at 469."

HAB.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 13, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-572 - United States Parole Comm'n v. Geraghty

On page 11 of the proposed opinion I am inserting the following immediately after the numeral in the eighth line of the second paragraph:

"See also Coopers & Lybrand v. Livesay, 437 U.S., at 469."

HAB.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
Join L F P 3/12/80	Join HAB 11/19/79	Join L F P 2/6/80	Join HAB 11/20/79	Join HAB 11/29/79	10/8/79 1st draft 11/16/79	dissent 1/30/80 1st draft	Join L F P 2/1/80	Join HAB 11/16/79
					2nd draft 11/29/79	2nd draft 2/8/80		
					3rd draft 2/11/80	3rd draft 2/13/80		
					4th draft 2/25/80	4th draft 3/10/80		
					5th draft 3/12/80	5th draft 3/12/80 6th draft 3/17/80		

78-572 U.S. Parole Comm. v. Geraghty

April 22, 1980

78-572 U.S. Parole Comm'n v. Geraghty

Dear Henry:

I return my opinion in this case with your suggested editorial changes, and in general they seem fine as usual.

Both my clerk and I do have some question as to what seems to me to be an unnecessary use of "hyphens". My impression is that recently your office has been suggesting the addition of more hyphens than usual. I am inclined to leave stylistic decisons of this kind to you, and if your usage is being accepted generally by other Chambers I will acquiesce.

I do note that the Government Printing Office Style Manual (January 1973), page 75, §6.16 addresses the use of a hyphen "to form a temporary or made compound", and states that "restraint should be exercised" in this usage. This would apply, in my view, to "personal stake requirement" and "class action context".

The matter is not one of vast consequence, and accordingly if you will let me know that your present usage of hyphens is being followed uniformly in Court opinions, I will be content. I do think uniformity with respect to stylistic matters of this kind is desirable, and therefore I will rely on your judgment.

Sincerely,

Mr. Henry C. Lind

lfp/ss

STYLISTIC CHANGES

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated:

Recirculated: 29 NOV 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines, could continue his appeal of a ruling denying class certification even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 442 U. S. —, — (1979) (slip op., at 5-6). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at 17.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits.

[*Footnote 2 is on p. 2*]

I

In 1973, the United States Parole Board adopted explicit Parole Release Guidelines for adult prisoners.[3] These guidelines establish a "customary range" of confinement for various classes of offenders. The guidelines utilize a matrix, which combines a "parole prognosis" score (based on the prisoner's age at first conviction, employment background, and other personal factors) and an "offense severity" rating, to yield the "customary" time to be served in prison.

Subsequently, in 1976, Congress enacted the Parole Commission and Reorganization Act (PCRA), Pub. L. 94-233, 90 Stat. 219, 18 U. S. C. §§ 4201-4218. This Act provided the

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440 U. S. 945 (1979). These prisoners, or most of them, now also have been released from incarceration. On September 25, 1979, a supplement to the motion to substitute or intervene was filed, proposing six new substitute respondents or intervenors; each of these is a presently incarcerated federal prisoner who, allegedly, has been adversely affected by the guidelines and who is represented by Geraghty's counsel.

Since we hold that respondent may continue to litigate the class certification issue, there is no need for us to consider whether the motion should be granted in order to prevent the case from being moot. We conclude that the District Court initially should rule on the motion.

[2] See, *e. g.*, *Armour* v. *City of Anniston*, 597 F. 2d 46, 48-49 (CA5 1979); *Susman* v. *Lincoln American Corp.*, 587 F. 2d 866 (CA7 1978), cert. pending, No. 78-1169; *Goodman* v. *Schlesinger*, 584 F. 2d 1325, 1332-1333 (CA4 1978); *Camper* v. *Calumet Petrochemicals, Inc.*, 584 F. 2d 70 (CA5 1978); *Roper* v. *Consurve, Inc.*, 578 F. 2d 1106 (CA5 2978), aff'd *sub nom. Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. — (1979); *Satterwhite* v. *City of Greenville*, 578 F. 2d 987 (CA5 1978) (en banc), cert. pending, No. 78-1008; *Vun Cannon* v. *Breed*, 565 F. 2d 1096 (CA9 1977); *Winokur* v. *Bell Federal Savings & Loan Assn.*, 560 F. 2d 271 (CA7 1977), cert. denied, 435 U. S. 932 (1978); *Lasky* v. *Quinlan*, 558 F. 2d 1133 (CA2 1977); *Kuahulu* v. *Employers Ins. of Wausau*, 557 F. 2d 1334 (CA9 1977); *Boyd* v. *Justices of Special Term*, 546 F. 2d 526 (CA2 1976); *Napier* v. *Gertrude*, 542 F. 2d 825 (CA10 1976), cert. denied, 429 U. S. 1049 (1977).

[3] 38 Fed. Reg. 31942-31945 (1973). The guidelines currently in force appear at 28 CFR § 2.20 (1979).

first legislative authorization for parole release guidelines. It required the newly created Parole Commission to "promulgate rules and regulations establishing guidelines for the powe[r] . . . to grant or deny an application or recommendation to parole any eligible prisoner." § 4203. Before releasing a prisoner on parole, the Commission must find, "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner," that release "would not depreciate the seriousness of his offense or promote disrespect for the law" and that it "would not jeopardize the public welfare." § 4206 (a).

Respondent John M. Geraghty was convicted in the United States District Court for the Northern District of Illinois of conspiracy to commit extortion, in violation of 18 U. S. C. § 1951, and of making false material declarations to a grand jury, in violation of 18 U. S. C. § 1623.[4] On January 25, 1974, two months after initial promulgation of the release guidelines, respondent was sentenced to concurrent prison terms of four years on the conspiracy count and one year on the false declarations count. The United States Court of Appeals for the Seventh Circuit affirmed respondent's convictions. *United States* v. *Braasch*, 505 F. 2d 139 (1974), cert. denied *sub nom. Geraghty* v. *United States*, 421 U. S. 910 (1975).

Sentenced

Geraghty later, pursuant to a motion under Fed. Rule Crim. Proc. 35, obtained from the District Court a reduction of his sentence to 30 months. The court granted the motion because, in the court's view, application of the guidelines would frustrate the sentencing judge's intent with respect to the length of time Geraghty would serve in prison. *United States* v. *Braasch*, No. 72 CR 979 (ND Ill., 1975), appeal dism'd and mandamus denied, 542 F. 2d 442 (CA7 1976).

[4] The extortion count was based on respondent's use of his position as a vice squad officer of the Chicago police force to "shakedown" dispensers of alcoholic beverages; the false declarations concerned his involvement in this scheme.

Geraghty then applied for release on parole. His first application was denied in January 1976 with the following explanation:

"Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26–36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted." App. 5, 24.

If the customary release date applicable to respondent under the guidelines were adhered to, he would not be paroled before serving his entire sentence minus good-time credits. Geraghty applied for parole again in June 1976; that application was denied for the same reasons. He then instituted this civil suit as a class action in the United States District Court for the District of Columbia, challenging the guidelines as inconsistent with the PCRA and the Constitution, and questioning the procedures by which the guidelines were applied to his case.

Respondent sought certification of a class of "all federal prisoners who are or who will become eligible for release on parole." *Id.*, at 17. Without ruling on Geraghty's motion, the court transferred the case to the Middle District of Pennsylvania, where respondent was incarcerated. Geraghty continued to press his motion for class certification, but the court postponed ruling on the motion until it was prepared to render a decision on cross-motions for summary judgment.

The District Court subsequently denied Geraghty's request for class certification and granted summary judgment for petitioners on all the claims Geraghty asserted. 429 F. Supp. 737 (MD Pa. 1977). The court regarded respondent's action

as a petition for a writ of habeas corpus, to which Fed. Rule Civ. Proc. 23 applied only by analogy. It denied class certification as "neither necessary nor appropriate." 429 F. Supp., at 740. A class action was "necessary" only to avoid mootness. The court found such a consideration not comprehended by Rule 23. It found class certification inappropriate because Geraghty raised certain individual issues and, inasmuch as some prisoners might be benefited by the guidelines, because his claims were not typical of the entire proposed class. 429 F. Supp., at 740–741. On the merits, the court ruled that the guidelines are consistent with the PCRA and do not offend the Ex Post Facto Clause, U. S. Const., Art. I, § 9, cl. 3. 429 F. Supp., at 741–744.

Respondent, individually "and on behalf of a class," appealed to the United States Court of Appeals for the Third Circuit. App. 29. Thereafter, another prisoner, Becher, who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, moved to intervene. Becher sought intervention to ensure that the legal issue raised by Geraghty on behalf of the class "will not escape review in the appeal in this case." Pet. to Intervene After Judgment 2. The District Court, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction, denied the petition to intervene. Becher then filed a timely notice of appeal from the denial of intervention. The two appeals were consolidated.

after appeal

On June 30, 1977, before any brief had been filed in the Court of Appeals, Geraghty was mandatorily released from prison; he had served 22 months of his sentence, and had earned good-time credits for the rest. Petitioners then moved to dismiss the appeals as moot. The appellate court reserved decision of the motion to dismiss until consideration of the merits.

after appeal but before any brief filed, Geraghty released

The Court of Appeals, concluding that the litigation was not moot, reversed the judgment of the District Court and re-

manded the case for further proceedings. 579 F. 2d 238 (CA3 1978). If a class had been certified by the District Court, mootness of respondent Geraghty's personal claim would not have rendered the controversy moot. See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393 (1975). The Court of Appeals reasoned that an erroneous *denial* of a class certification should not lead to the opposite result. 579 F. 2d, at 248–252. Rather, certification of a "certifiable" class, that erroneously had been denied, relates back to the original denial and thus preserves jurisdiction. *Ibid.*

On the question whether certification erroneously had been denied, the Court of Appeals held that necessity is not a prerequisite under Rule 23. 579 F. 2d, at 252. The court expressed doubts about the District Court's finding that class certification was "inappropriate." While Geraghty raised some claims not applicable to the entire class of prisoners who are or will become eligible for parole, the District Court could have "certif[ied] certain issues as subject to class adjudication, and . . . limite[d] overbroad classes by the use of sub-classes." *Id.*, at 253. Failure "to consider these options constituted a failure properly to exercise discretion. Indeed, this authority may be exercised *sua sponte*." *Ibid.* The Court of Appeals also held that refusal to certify because of a potential conflict of interest between Geraghty and other members of the putative class was error. The subclass mechanism would have remedied this problem as well. *Id.*, at 252–253. Thus, the Court of Appeals reversed the denial of class certification and remanded the case to the District Court for an initial evaluation of the proper subclasses. *Id.*, at 254. The court also remanded the motion for intervention. *Id.*, at 245, n. 21.[5]

In order to avoid "improvidently dissipat[ing] judicial effort," *id.*, at 254, the Court of Appeals went on to consider whether the trial court had decided the merits of respondent's case properly. The District Court's entry of summary judg-

[5] Apparently Becher, too, has now been released from prison.

ment was found to be error because "if Geraghty's recapitulation of the function and genesis of the guidelines is supported by the evidence," the guidelines "may well be" unauthorized or unconstitutional. *Id.*, at 259, 268. Thus, the dispute on the merits also was remanded for further factual development.

II

Article III of the Constitution limits federal "judicial Power," that is, federal court jurisdiction, to "Cases" and "Controversies." This case or controversy limitation serves "two complementary" purposes. *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Ibid.* Likewise, mootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969).

It is clear that the controversy over the validity of the Parole Release Guidelines is still a "live" one between petitioners and at least some members of the class respondent seeks to represent. This is demonstrated by the fact that prisoners currently affected by the guidelines have moved to be substituted, or to intervene, as "named" respondents in this Court. See n. 1, *supra*. We therefore are concerned here with the second aspect of mootness, that is, the parties' interest in the litigation. The Court has referred to this concept as the "personal stake" requirement. *E. g., Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755 (1976); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

The personal stake requirement relates to the first purpose of the case or controversy doctrine—limiting judicial power

to disputes capable of judicial resolution. The Court in *Flast* v. *Cohen*, 392 U. S., at 100–101, stated:

> "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. . . . Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker* v. *Carr*, [369 U. S.], at 204, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests,' *Aetna Life Insurance Co.* v. *Haworth*, [300 U. S.], at 240–241."

See also *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 216–218 (1974).

The "personal stake" aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973).

III

On several occasions the Court has considered the application of the "personal stake" requirement in the class action context. In *Sosna* v. *Iowa*, 419 U. S. 393 (1975), it held that

mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot. It reasoned that "even though appellees . . . might not again enforce the Iowa durational residency requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified." *Id.*, at 400. The Court stated specifically that an Art. III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.*, at 402.[8]

Although one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation. *E. g., Gerstein* v. *Pugh*, 420 U. S. 103, 110, n. 11 (1975). The "capable of repetition, yet evading review" doctrine, to be sure, was developed outside the class action context. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 514–515 (1911). But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal

[8] The claim in *Sosna* also fit the traditional category of actions that are deemed not moot despite the litigant's loss of personal stake, that is, those "capable of repetition, yet evading review." See *Southern Pacific Terminal Co.*, v. *ICC*, 219 U. S. 498, 515 (1911). In *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 753–755, however, the Court held that the class action aspect of mootness doctrine does not depend on the class claim's being so inherently transitory that it meets the "capable of repetition, yet evading review" standard.

stake. See, *e. g., Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975); *Roe* v. *Wade,* 410 U. S. 113, 123-125 (1973). Since the litigant faces some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.

When, however, there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim. *E. g., Franks* v. *Bowman Transportation Co.,* 424 U. S., at 752-757. See *Kremens* v. *Bartley,* 431 U. S. 119, 129-130 (1977). Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. The Court considered this possibility in *Gerstein* v. *Pugh,* 420 U. S., at 110, n. 11. *Gerstein* was an action challenging pretrial detention conditions. The Court assumed that the named plaintiffs were no longer in custody awaiting trial at the time the trial court certified a class of pretrial detainees. There was no indication that the particular named plaintiffs might again be subject to pretrial detention. Nonetheless, the case was held not to be moot because:

> "The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Ibid.*

See also *Sosna* v. *Iowa,* 419 U. S., at 402, n. 11.

In two different contexts the Court has stated that the proposed class representative who proceeds to a judgment on the merits may appeal *denial* of class certification. First, this assumption was "an important ingredient," *Deposit Guaranty Nat. Bank v. Roper, ante*, p. — (slip op., at 10), in the rejection of interlocutory appeals, "as of right," of class certification denials. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978). The Court reasoned that denial of class status will not necessarily be the "death knell" of a small claimant action, since there still remains "the prospect of prevailing on the merits and reversing an order denying class certification." *Ibid.*

What about the denial of interlocutory appeal in Lybrand?

Second, in *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393–395 (1977), the Court held that a putative class member may intervene, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims have been satisfied and judgment entered in their favor. Underlying that decision was the view that "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs." *Id.*, at 393. And today, the Court holds that named plaintiffs whose claims are satisfied through entry of judgment over their objections may appeal the denial of a class certification ruling. *Deposit Guaranty Nat. Bank* v. *Roper, ante*, p. —.

Gerstein, *McDonald*, and *Roper* are all examples of cases found not to be moot, despite the loss of a "personal stake" in the merits of the litigation by the proposed class representative. The interest of the named plaintiffs in *Gerstein* was precisely the same as that of Geraghty here. Similarly, after judgment had been entered in their favor, the named plaintiffs in *McDonald* had no continuing narrow personal stake in the outcome of the class claims. And in *Roper* the Court points out that an individual controversy is rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment. *Ante*, p. — (slip op., at 6).

Gerstein said to be identical

These cases demonstrate the flexible character of the Art. III mootness doctrine.[7] As has been noted in the past, Art. III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). "[T]he justiciability doctrine [is] one of uncertain and shifting contours." *Flast* v. *Cohen*, 392 U. S., at 97.

IV

Perhaps somewhat anticipating today's decision in *Roper*, petitioners argue that the situation presented is entirely different when mootness of the individual claim is caused by "expiration" of the claim, rather than by a judgment on the claim. They assert that a proposed class representative who individually prevails on the merits still has a "personal stake" in the outcome of the litigation, while the named plaintiff whose claim is truly moot does not. In the latter situation, where no class has been certified, there is no party before the

[7] Three of the Court's cases might be described as adopting a less flexible approach. In *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975), and in *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), dismissal of putative class suits, as moot, was ordered after the named plaintiffs' claims became moot. And in *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976), it was indicated that the action would have been moot, upon expiration of the named plaintiffs' claims, had not the United States intervened as a party plaintiff. Each of these, however, was a case in which there was an attempt to appeal the merits without first having obtained proper certification of a class. In each case it was the defendant who petitioned this Court for review. As is observed subsequently in the text, appeal from denial of class classification is permitted in some circumstances where appeal on the merits is not. In the situation where the proposed class representative has lost a "personal stake," the merits cannot be reached until a class properly is certified. Although the Court perhaps could have remanded *Jacobs* and *Weinstein* for reconsideration of the class certification issue, as the Court of Appeals did here, the parties in those cases did not suggest "relation back" of class certification. Thus we do not find this line of cases dispositive of the question now before us.

court with a live claim, and it follows, it is said, that we have no jurisdiction to consider whether a class should have been certified. Brief for Petitioners 37–39.

We do not find this distinction persuasive. As has been noted earlier, Geraghty's "personal stake" in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*. Further, the opinion in *Roper* indicates that the approach to take in applying Art. III is issue by issue. "Nor does a confession of judgment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Ante*, p. — (slip op., at 7). See also *United Airlines, Inc.* v. *McDonald*, 432 U. S., at 392; *Powell* v. *McCormack*, 395 U. S., at 497.

Similarly, the fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class. "The denial of class certification stands as an adjudication of one of the issues litigated," *Roper, ante,* p. — (slip op., at 9). We think that in determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits "expires," we must look to the nature of the "personal stake" in the class certification claim. Determining Art. III's "uncertain and shifting contours," see *Flast* v. *Cohen*, 392 U. S., at 97, with respect to nontraditional forms of litigation, such as the class action, requires reference to the purposes of the case or controversy requirement.

Application of the personal stake requirement to a procedural claim, such as the right to represent a class, is not automatic or readily resolved. A "legally cognizable interest," as the Court described it in *Powell* v. *McCormack*, 395 U. S., at 496, in the traditional sense rarely ever exists with respect to the class certification claim.[8] The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims. See, *e. g.*, Advisory Committee Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 427–429; Note, Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1321–1323, 1329–1330 (1976). Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so,[9] these benefits generally are byproducts of the class action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the rules are met. This "right" is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the "personal stake" requirement. See *Roper*, *ante*, p. — (slip op., at 10–11).

As noted above, the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual

[8] Were the class an indispensable party, the named plaintiff's interests in certification would approach a "legally cognizable interest."

[9] See, *e. g.*, Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F. R. D. 375 (1972).

setting and self-interested parties vigorously advocating opposing positions. *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 753–756; *Baker* v. *Carr*, 369 U. S., at 204; *Poe* v. *Ullman*, 367 U. S., at 503 (plurality opinion). We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply presented issue. In *Sosna* v. *Iowa* it was recognized that a named plaintiff whose claim on the merits expires *after* class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.

We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied.[10] The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. See *Roper*, *ante*, p. — (slip op., at 10). If, on appeal, it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot.

[10] We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification. See *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393–394, and n. 14 (1977).

Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. "[I]t does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' Rule 23 (a)." *Sosna* v. *Iowa*, 419 U. S., at 403. We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue.[11]

We need not decide here whether Geraghty is a proper representative for the purpose of representing the class on the merits. No class as yet has been certified. Upon remand, the District Court can determine whether Geraghty may continue to press the class claims or whether another representative would be appropriate. We decide only that Geraghty was a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined. Thus, it was not improper for the Court of Appeals to consider whether the District Court should have granted class certification.

V

We turn now to the question whether the Court of Appeals' decision on the District Court's class certification ruling was proper. Petitioners assert that the Court of Appeals erred in requiring the District Court to consider the possibility of certifying subclasses *sua sponte*. Petitioners strenuously contend that placing the burden of identifying and constructing subclasses on the trial court creates unmanageable difficulties. Brief for Petitioners 43–51. We feel that the Court of Appeals' decision here does not impose undue burdens on the dis-

[11] See, *e. g.*, Comment, A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions, 54 Texas L. Rev. 1289, 1331–1332 (1976); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 602–608.

trict courts. Respondent had no real opportunity to request certification of subclasses after the class he proposed was rejected. The District Court denied class certification at the same time it rendered its adverse decision on the merits. Requesting subclass certification at that time would have been a futile act. The District Court was not about to invest effort in deciding the subclass question after it had ruled that no relief on the merits was available. The remand merely gives respondent the opportunity to perform his function in the adversary system. On remand, however, it is not the District Court that is to bear the burden of constructing subclasses. That burden is upon the respondent and it is he who is required to submit proposals to the court. The court has no *sua sponte* obligation so to act. With this modification, the Court of Appeals' remand of the case for consideration of subclasses was a proper disposition.

It would be inappropriate for this Court to reach the merits of this controversy in the present posture of the case. Our holding that the case is not moot extends only to the appeal of the class certification denial. If the District Court again denies class certification, and that decision is affirmed, the controversy on the merits will be moot. Furthermore, although the Court of Appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of respondent's case until after it is determined affirmatively that a class properly can be certified.

The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

pp 16-18

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: ______________

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SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines, could continue his appeal of a ruling denying class certification even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 442 U. S. —, — (1979) (slip op., at 5-6). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at 17.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits.

[*Footnote 2 is on p. 2*]

I

In 1973, the United States Parole Board adopted explicit Parole Release Guidelines for adult prisoners.[3] These guidelines establish a "customary range" of confinement for various classes of offenders. The guidelines utilize a matrix, which combines a "parole prognosis" score (based on the prisoner's age at first conviction, employment background, and other personal factors) and an "offense severity" rating, to yield the "customary" time to be served in prison.

Subsequently, in 1976, Congress enacted the Parole Commission and Reorganization Act (PCRA), Pub. L. 94-233, 90 Stat. 219, 18 U. S. C. §§ 4201-4218. This Act provided the

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440 U. S. 945 (1979). These prisoners, or most of them, now also have been released from incarceration. On September 25, 1979, a supplement to the motion to substitute or intervene was filed, proposing six new substitute respondents or intervenors; each of these is a presently incarcerated federal prisoner who, allegedly, has been adversely affected by the guidelines and who is represented by Geraghty's counsel.

Since we hold that respondent may continue to litigate the class certification issue, there is no need for us to consider whether the motion should be granted in order to prevent the case from being moot. We conclude that the District Court initially should rule on the motion.

[2] See, *e. g.*, *Armour* v. *City of Anniston*, 597 F. 2d 46, 48-49 (CA5 1979); *Susman* v. *Lincoln American Corp.*, 587 F. 2d 866 (CA7 1978), cert. pending, No. 78-1169; *Goodman* v. *Schlesinger*, 584 F. 2d 1325, 1332-1333 (CA4 1978); *Camper* v. *Calumet Petrochemicals, Inc.*, 584 F. 2d 70 (CA5 1978); *Roper* v. *Consurve, Inc.*, 578 F. 2d 1106 (CA5 2978), aff'd *sub nom. Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. — (1979); *Satterwhite* v. *City of Greenville*, 578 F. 2d 987 (CA5 1978) (en banc), cert. pending, No. 78-1008; *Vun Cannon* v. *Breed*, 565 F. 2d 1096 (CA9 1977); *Winokur* v. *Bell Federal Savings & Loan Assn.*, 560 F. 2d 271 (CA7 1977), cert. denied, 435 U. S. 932 (1978); *Lasky* v. *Quinlan*, 558 F. 2d 1133 (CA2 1977); *Kuahulu* v. *Employers Ins. of Wausau*, 557 F. 2d 1334 (CA9 1977); *Boyd* v. *Justices of Special Term*, 546 F. 2d 526 (CA2 1976); *Napier* v. *Gertrude*, 542 F. 2d 825 (CA10 1976), cert. denied, 429 U. S. 1049 (1977).

[3] 38 Fed. Reg. 31942-31945 (1973). The guidelines currently in force appear at 28 CFR § 2.20 (1979).

first legislative authorization for parole release guidelines. It required the newly created Parole Commission to "promulgate rules and regulations establishing guidelines for the powe[r] . . . to grant or deny an application or recommendation to parole any eligible prisoner." § 4203. Before releasing a prisoner on parole, the Commission must find, "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner," that release "would not depreciate the seriousness of his offense or promote disrespect for the law" and that it "would not jeopardize the public welfare." § 4206 (a).

Respondent John M. Geraghty was convicted in the United States District Court for the Northern District of Illinois of conspiracy to commit extortion, in violation of 18 U. S. C. § 1951, and of making false material declarations to a grand jury, in violation of 18 U. S. C. § 1623.[4] On January 25, 1974, two months after initial promulgation of the release guidelines, respondent was sentenced to concurrent prison terms of four years on the conspiracy count and one year on the false declarations count. The United States Court of Appeals for the Seventh Circuit affirmed respondent's convictions. *United States* v. *Braasch*, 505 F. 2d 139 (1974), cert. denied *sub nom. Geraghty* v. *United States*, 421 U. S. 910 (1975).

Geraghty later, pursuant to a motion under Fed. Rule Crim. Proc. 35, obtained from the District Court a reduction of his sentence to 30 months. The court granted the motion because, in the court's view, application of the guidelines would frustrate the sentencing judge's intent with respect to the length of time Geraghty would serve in prison. *United States* v. *Braasch*, No. 72 CR 979 (ND Ill., 1975), appeal dism'd and mandamus denied, 542 F. 2d 442 (CA7 1976).

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[4] The extortion count was based on respondent's use of his position as a vice squad officer of the Chicago police force to "shakedown" dispensers of alcoholic beverages; the false declarations concerned his involvement in this scheme.

Geraghty then applied for release on parole. His first application was denied in January 1976 with the following explanation:

> "Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26–36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted." App. 5, 24.

If the customary release date applicable to respondent under the guidelines were adhered to, he would not be paroled before serving his entire sentence minus good-time credits. Geraghty applied for parole again in June 1976; that application was denied for the same reasons. He then instituted this civil suit as a class action in the United States District Court for the District of Columbia, challenging the guidelines as inconsistent with the PCRA and the Constitution, and questioning the procedures by which the guidelines were applied to his case.

Respondent sought certification of a class of "all federal prisoners who are or who will become eligible for release on parole." *Id.*, at 17. Without ruling on Geraghty's motion, the court transferred the case to the Middle District of Pennsylvania, where respondent was incarcerated. Geraghty continued to press his motion for class certification, but the court postponed ruling on the motion until it was prepared to render a decision on cross-motions for summary judgment.

The District Court subsequently denied Geraghty's request for class certification and granted summary judgment for petitioners on all the claims Geraghty asserted. 429 F. Supp. 737 (MD Pa. 1977). The court regarded respondent's action

as a petition for a writ of habeas corpus, to which Fed. Rule Civ. Proc. 23 applied only by analogy. It denied class certification as "neither necessary nor appropriate." 429 F. Supp., at 740. A class action was "necessary" only to avoid mootness. The court found such a consideration not comprehended by Rule 23. It found class certification inappropriate because Geraghty raised certain individual issues and, inasmuch as some prisoners might be benefited by the guidelines, because his claims were not typical of the entire proposed class. 429 F. Supp., at 740–741. On the merits, the court ruled that the guidelines are consistent with the PCRA and do not offend the Ex Post Facto Clause, U. S. Const., Art. I, § 9, cl. 3. 429 F. Supp., at 741–744.

Respondent, individually "and on behalf of a class," appealed to the United States Court of Appeals for the Third Circuit. App. 29. Thereafter, another prisoner, Becher, who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, moved to intervene. Becher sought intervention to ensure that the legal issue raised by Geraghty on behalf of the class "will not escape review in the appeal in this case." Pet. to Intervene After Judgment 2. The District Court, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction, denied the petition to intervene. Becher then filed a timely notice of appeal from the denial of intervention. The two appeals were consolidated.

On June 30, 1977, before any brief had been filed in the Court of Appeals, Geraghty was mandatorily released from prison; he had served 22 months of his sentence, and had earned good-time credits for the rest. Petitioners then moved to dismiss the appeals as moot. The appellate court reserved decision of the motion to dismiss until consideration of the merits.

The Court of Appeals, concluding that the litigation was not moot, reversed the judgment of the District Court and re-

manded the case for further proceedings. 579 F. 2d 238 (CA3 1978). If a class had been certified by the District Court, mootness of respondent Geraghty's personal claim would not have rendered the controversy moot. See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393 (1975). The Court of Appeals reasoned that an erroneous *denial* of a class certification should not lead to the opposite result. 579 F. 2d, at 248–252. Rather, certification of a "certifiable" class, that erroneously had been denied, relates back to the original denial and thus preserves jurisdiction. *Ibid.*

On the question whether certification erroneously had been denied, the Court of Appeals held that necessity is not a prerequisite under Rule 23. 579 F. 2d, at 252. The court expressed doubts about the District Court's finding that class certification was "inappropriate." While Geraghty raised some claims not applicable to the entire class of prisoners who are or will become eligible for parole, the District Court could have "certif[ied] certain issues as subject to class adjudication, and . . . limite[d] overbroad classes by the use of sub-classes." *Id.*, at 253. Failure "to consider these options constituted a failure properly to exercise discretion. Indeed, this authority may be exercised *sua sponte*." *Ibid.* The Court of Appeals also held that refusal to certify because of a potential conflict of interest between Geraghty and other members of the putative class was error. The subclass mechanism would have remedied this problem as well. *Id.*, at 252–253. Thus, the Court of Appeals reversed the denial of class certification and remanded the case to the District Court for an initial evaluation of the proper subclasses. *Id.*, at 254. The court also remanded the motion for intervention. *Id.*, at 245, n. 21.[5]

In order to avoid "improvidently dissipat[ing] judicial effort," *id.*, at 254, the Court of Appeals went on to consider whether the trial court had decided the merits of respondent's case properly. The District Court's entry of summary judg-

[5] Apparently Becher, too, has now been released from prison.

ment was found to be error because "if Geraghty's recapitulation of the function and genesis of the guidelines is supported by the evidence," the guidelines "may well be" unauthorized or unconstitutional. *Id.*, at 259, 268. Thus, the dispute on the merits also was remanded for further factual development.

II

Article III of the Constitution limits federal "judicial Power," that is, federal court jurisdiction, to "Cases" and "Controversies." This case or controversy limitation serves "two complementary" purposes. *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Ibid.* Likewise, mootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969).

It is clear that the controversy over the validity of the Parole Release Guidelines is still a "live" one between petitioners and at least some members of the class respondent seeks to represent. This is demonstrated by the fact that prisoners currently affected by the guidelines have moved to be substituted, or to intervene, as "named" respondents in this Court. See n. 1, *supra*. We therefore are concerned here with the second aspect of mootness, that is, the parties' interest in the litigation. The Court has referred to this concept as the "personal stake" requirement. *E. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755 (1976); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

The personal stake requirement relates to the first purpose of the case or controversy doctrine—limiting judicial power

to disputes capable of judicial resolution. The Court in *Flast* v. *Cohen*, 392 U. S., at 100–101, stated:

> "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. . . . Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker* v. *Carr*, [369 U. S.], at 204, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests,' *Aetna Life Insurance Co.* v. *Haworth*, [300 U. S.], at 240–241."

See also *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 216–218 (1974).

The "personal stake" aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973).

III

On several occasions the Court has considered the application of the "personal-stake" requirement in the class action context. In *Sosna* v. *Iowa*, 419 U. S. 393 (1975), it held that

mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot. It reasoned that "even though appellees . . . might not again enforce the Iowa durational residency requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified." *Id.*, at 400. The Court stated specifically that an Art. III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.*, at 402.[6]

Although one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation. *E. g.*, *Gerstein* v. *Pugh*, 420 U. S. 103, 110, n. 11 (1975). The "capable of repetition, yet evading review" doctrine, to be sure, was developed outside the class action context. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 514–515 (1911). But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal

[6] The claim in *Sosna* also fit the traditional category of actions that are deemed not moot despite the litigant's loss of personal stake, that is, those "capable of repetition, yet evading review." See *Southern Pacific Terminal Co.*, v. *ICC*, 219 U. S. 498, 515 (1911). In *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 753–755, however, the Court held that the class action aspect of mootness doctrine does not depend on the class claim's being so inherently transitory that it meets the "capable of repetition, yet evading review" standard.

stake. See, *e. g., Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975); *Roe* v. *Wade,* 410 U. S. 113, 123–125 (1973). Since the litigant faces some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.

When, however, there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim. *E. g., Franks* v. *Bowman Transportation Co.,* 424 U. S., at 752–757. See *Kremens* v. *Bartley,* 431 U. S. 119, 129–130 (1977). Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. The Court considered this possibility in *Gerstein* v. *Pugh,* 420 U. S., at 110, n. 11. *Gerstein* was an action challenging pretrial detention conditions. The Court assumed that the named plaintiffs were no longer in custody awaiting trial at the time the trial court certified a class of pretrial detainees. There was no indication that the particular named plaintiffs might again be subject to pretrial detention. Nonetheless, the case was held not to be moot because:

> "The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Ibid.*

See also *Sosna* v. *Iowa,* 419 U. S., at 402, n. 11.

In two different contexts the Court has stated that the proposed class representative who proceeds to a judgment on the merits may appeal *denial* of class certification. First, this assumption was "an important ingredient," *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. — (slip op., at 10), in the rejection of interlocutory appeals, "as of right," of class certification denials. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978). The Court reasoned that denial of class status will not necessarily be the "death knell" of a small claimant action, since there still remains "the prospect of prevailing on the merits and reversing an order denying class certification." *Ibid.*

Second, in *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393-395 (1977), the Court held that a putative class member may intervene, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims have been satisfied and judgment entered in their favor. Underlying that decision was the view that "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs." *Id.*, at 393. And today, the Court holds that named plaintiffs whose claims are satisfied through entry of judgment over their objections may appeal the denial of a class certification ruling. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. —.

Gerstein, *McDonald*, and *Roper* are all examples of cases found not to be moot, despite the loss of a "personal stake" in the merits of the litigation by the proposed class representative. The interest of the named plaintiffs in *Gerstein* was precisely the same as that of Geraghty here. Similarly, after judgment had been entered in their favor, the named plaintiffs in *McDonald* had no continuing narrow personal stake in the outcome of the class claims. And in *Roper* the Court points out that an individual controversy is rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment. *Ante*, p. — (slip op., at 6).

These cases demonstrate the flexible character of the Art. III mootness doctrine.[7] As has been noted in the past, Art. III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). "[T]he justiciability doctrine [is] one of uncertain and shifting contours." *Flast* v. *Cohen*, 392 U. S., at 97.

IV

Perhaps somewhat anticipating today's decision in *Roper*, petitioners argue that the situation presented is entirely different when mootness of the individual claim is caused by "expiration" of the claim, rather than by a judgment on the claim. They assert that a proposed class representative who individually prevails on the merits still has a "personal stake" in the outcome of the litigation, while the named plaintiff whose claim is truly moot does not. In the latter situation, where no class has been certified, there is no party before the

[7] Three of the Court's cases might be described as adopting a less flexible approach. In *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975), and in *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), dismissal of putative class suits, as moot, was ordered after the named plaintiffs' claims became moot. And in *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976), it was indicated that the action would have been moot, upon expiration of the named plaintiffs' claims, had not the United States intervened as a party plaintiff. Each of these, however, was a case in which there was an attempt to appeal the merits without first having obtained proper certification of a class. In each case it was the defendant who petitioned this Court for review. As is observed subsequently in the text, appeal from denial of class classification is permitted in some circumstances where appeal on the merits is not. In the situation where the proposed class representative has lost a "personal stake," the merits cannot be reached until a class properly is certified. Although the Court perhaps could have remanded *Jacobs* and *Weinstein* for reconsideration of the class certification issue, as the Court of Appeals did here, the parties in those cases did not suggest "relation back" of class certification. Thus we do not find this line of cases dispositive of the question now before us.

court with a live claim, and it follows, it is said, that we have no jurisdiction to consider whether a class should have been certified. Brief for Petitioners 37–39.

We do not find this distinction persuasive. As has been noted earlier, Geraghty's "personal stake" in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*. Further, the opinion in *Roper* indicates that the approach to take in applying Art. III is issue by issue. "Nor does a confession of judgment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Ante*, p. — (slip op., at 7). See also *United Airlines, Inc.* v. *McDonald*, 432 U. S., at 392; *Powell* v. *McCormack*, 395 U. S., at 497.

Similarly, the fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class. "The denial of class certification stands as an adjudication of one of the issues litigated," *Roper, ante*, p. — (slip op., at 9). We think that in determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits "expires," we must look to the nature of the "personal stake" in the class certification claim. Determining Art. III's "uncertain and shifting contours," see *Flast* v. *Cohen*, 392 U. S., at 97, with respect to nontraditional forms of litigation, such as the class action, requires reference to the purposes of the case or controversy requirement.

Application of the personal stake requirement to a procedural claim, such as the right to represent a class, is not automatic or readily resolved. A "legally cognizable interest," as the Court described it in *Powell* v. *McCormack*, 395 U. S., at 496, in the traditional sense rarely ever exists with respect to the class certification claim.[8] The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims. See, *e. g.*, Advisory Committee Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 427–429; Note, Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1321–1323, 1329–1330 (1976). Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so,[9] these benefits generally are byproducts of the class action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the rules are met. This "right" is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the "personal stake" requirement. See *Roper, ante,* p. — (slip op., at 10–11).

As noted above, the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial

[8] Were the class an indispensable party, the named plaintiff's interests in certification would approach a "legally cognizable interest."

[9] See, *e. g.*, Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F. R. D. 375 (1972).

resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 753–756; *Baker* v. *Carr*, 369 U. S., at 204; *Poe* v. *Ullman*, 367 U. S., at 503 (plurality opinion). We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply presented issue. In *Sosna* v. *Iowa* it was recognized that a named plaintiff whose claim on the merits expires *after* class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.

We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied.[10] The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. See *Roper*, *ante*, p. — (slip op., at 10). If, on appeal, it is determined that

[10] We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification. See *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393–394, and n. 14 (1977).

class certification properly was denied, the claim on the merits must be dismissed as moot.[11]

Our conclusion that the controversy here is not moot does

[11] MR. JUSTICE POWELL, in his dissent, advocates a "rigidly formalistic" approach to Art. III, *post,* at 4, and suggests that our decision today is the Court's first departure from the formalistic view. *Id.,* at 6–11. We agree that the issue at hand is one of first impression and thus, in that narrow sense, is "unprecedented," *id.,* at 11. We do not believe, however, that the decision constitutes a redefinition of Art. III principles or a "significant departure," *id.,* at 1, from "carefully considered" precedents, *id.,* at 9.

The erosion of the strict, formalistic perception of Art. III was begun well before today's decision. For example, the protestations of the dissent are strikingly reminiscent of Mr. Justice Harlan's dissent in *Flast* v. *Cohen,* 392 U. S. 83, 116, in 1968. Mr. Justice Harlan hailed the taxpayer standing rule pronounced in that case as a "new doctrine" resting "on premises that do not withstand analysis." *Id.,* at 117. He felt that the problems presented by taxpayer standing "involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system." *Id.,* at 116. The taxpayers were thought to complain as "private attorneys-general," and "[t]he interests they represent, and the rights they espouse are bereft of any personal or proprietary coloration." *Id.,* at 119. Such taxpayer actions "are and must be . . . 'public actions' brought to vindicate public rights." *Id.,* at 120.

Notwithstanding the taxpayers' lack of a formalistic "personal stake," even Justice Harlan felt that the case should be held nonjusticiable on purely prudential grounds. His interpretation of the cases led him to conclude that "it is . . . clear that [plaintiffs in a public action] as such are not constitutionally excluded from the federal courts." *Ibid.* (emphasis in original).

Is it not somewhat ironic that MR. JUSTICE POWELL, who now seeks to explain *United Airlines, Inc.* v. *McDonald, supra,* as a straightforward application of settled doctrine, *post,* at 7–9, expressed in his dissent in *McDonald,* 432 U. S., at 396, the view that the holding rested on a fundamental misconception about the mootness of an uncertified class action after settlement of the named plaintiffs' claims. He stated:

"Pervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status. But that assumption is supported neither by the text nor by the history of Rule 23.

not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. "[I]t does shift the focus of examination from the elements of justiciabil-

To the contrary, . . . the denial of class status converts the litigation to an ordinary nonclass action." *Id.*, at 399.

The dissent went on to say:

"[Petitioner] argues with great force that, as a result of the settlement of their individual claims, the named plaintiffs 'could no long appeal the denial of class' status that had occurred years earlier. . .'. Although this question has not been decided by this Court, the answer on principle is clear. The settlement of an individual claim typically moots any issues associated with it. . . . This case is sharply distinguishable from cases such as *Sosna* v. *Iowa* . . . and *Franks* v. *Bowman Transp. Co.* . . . where we allowed named plaintiffs whose individual claims were moot to continue to represent their classes. In those cases, the District Courts previously had certified the classes, thus giving them 'a legal status separate from the interest[s] asserted by [the named plaintiffs].' *Sosna* v. *Iowa*, *supra*, at 399. This case presents precisely the opposite situation: The prior denial of class status had extinguished any representative capacity." 432 U. S., at 400 (footnote omitted).

Thus, the assumption thought to be "[p]ervading the Court's opinion" in *McDonald*, and so vigorously attacked by the dissent there, is now relegated to "gratuitous" "dictum," *post*, at 8. MR. JUSTICE POWELL, who finds the situation presented in the case at hand "fundamentally different" from that in *Sosna* and *Franks*, *post*, at 5, also found the facts of *McDonald* "sharply distinguishable" from those previous cases. 432 U. S., at 400.

We do not recite these cases for the purpose of showing that our result is mandated by the precedents. We concede that the prior cases may be said to be somewhat confusing, and that some, perhaps, are irreconcilable with others. Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as "flexible"; it has been developed, not irresponsibly, but "with some care," *post*, at 2, including the present case.

The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction "upon the

Has Ct ever said this before. This would obliterate distinction between prudential

ity to the ability of the named representative to 'fairly and adequately protect the interests of the class.' Rule 23 (a)." *Sosna* v. *Iowa*, 419 U. S., at 403. We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue.[12]

We need not decide here whether Geraghty is a proper representative for the purpose of representing the class on the merits. No class as yet has been certified. Upon remand, the District Court can determine whether Geraghty may continue to press the class claims or whether another representative would be appropriate. We decide only that Geraghty was a

bare existence of a sharply presented issue in a concrete and vigorously argued case," *post*, at 12. Each case must be decided on its own facts. We hasten to note, however, that this case does not even approach the extreme feared by the dissent. This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e. g.*, *Powell* v. *McCormack*, 395 U. S., at 496–500. His injury continued up to and beyond the time the District Court denied class certification. We merely hold that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling "relates back" to the date of the original denial.

What was it?

The judicial process will not become a vehicle for "concerned bystanders," *post*, at 4, even if one in respondent's position can conceivably be characterized as a bystander, because the issue on the merits will not be addressed until a class with an interest in the outcome has been certified. The "relation back" principle, a traditional equitable doctrine applied to class certification claims in *Gerstein* v. *Pugh*, *supra*, serves logically to distinguish this case from the one brought a day after the prisoner is released. See *post*, at 13, n. 15. If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action.

[12] See, *e. g.*, Comment, A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions, 54 Texas L. Rev. 1289, 1331–1332 (1976); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 602–608.

proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined. Thus, it was not improper for the Court of Appeals to consider whether the District Court should have granted class certification.

V

We turn now to the question whether the Court of Appeals' decision on the District Court's class certification ruling was proper. Petitioners assert that the Court of Appeals erred in requiring the District Court to consider the possibility of certifying subclasses *sua sponte*. Petitioners strenuously contend that placing the burden of identifying and constructing subclasses on the trial court creates unmanageable difficulties. Brief for Petitioners 43–51. We feel that the Court of Appeals' decision here does not impose undue burdens on the district courts. Respondent had no real opportunity to request certification of subclasses after the class he proposed was rejected. The District Court denied class certification at the same time it rendered its adverse decision on the merits. Requesting subclass certification at that time would have been a futile act. The District Court was not about to invest effort in deciding the subclass question after it had ruled that no relief on the merits was available. The remand merely gives respondent the opportunity to perform his function in the adversary system. On remand, however, it is not the District Court that is to bear the burden of constructing subclasses. That burden is upon the respondent and it is he who is required to submit proposals to the court. The court has no *sua sponte* obligation so to act. With this modification, the Court of Appeals' remand of the case for consideration of subclasses was a proper disposition.

It would be inappropriate for this Court to reach the merits of this controversy in the present posture of the case. Our holding that the case is not moot extends only to the appeal of the class certification denial. If the District Court again

denies class certification, and that decision is affirmed, the controversy on the merits will be moot. Furthermore, although the Court of Appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of respondent's case until after it is determined affirmatively that a class properly can be certified.

The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Roper citations changed to conform with recirculation and STYLISTIC CHANGES

Ellen - Please reread carefully. We must not assume no changes have been made that require some answer. Some of this draft seems unfamiliar to me, perhaps because I've been away from it for some time.

LFP

2/25/80

I have reviewed, and find no changes of substance. Ellen

[Even the citations to Roper are largely unchanged. The inconsistency has become even more glaring - See proposed INSERT.]

Recirculated: FEB 25 1980

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines, could continue his appeal of a ruling denying class certification even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 442 U. S. 178, 184 (1979). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at 17.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits.

[*Footnote 2 is on p. 2*]

I

In 1973, the United States Parole Board adopted explicit Parole Release Guidelines for adult prisoners.[3] These guidelines establish a "customary range" of confinement for various classes of offenders. The guidelines utilize a matrix, which combines a "parole prognosis" score (based on the prisoner's age at first conviction, employment background, and other personal factors) and an "offense severity" rating, to yield the "customary" time to be served in prison.

Subsequently, in 1976, Congress enacted the Parole Commission and Reorganization Act (PCRA), Pub. L. 94-233, 90 Stat. 219, 18 U. S. C. §§ 4201-4218. This Act provided the

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440 U. S. 945 (1979). These prisoners, or most of them, now also have been released from incarceration. On September 25, 1979, a supplement to the motion to substitute or intervene was filed, proposing six new substitute respondents or intervenors; each of these is a presently incarcerated federal prisoner who, allegedly, has been adversely affected by the guidelines and who is represented by Geraghty's counsel.

Since we hold that respondent may continue to litigate the class certification issue, there is no need for us to consider whether the motion should be granted in order to prevent the case from being moot. We conclude that the District Court initially should rule on the motion.

[2] See, *e. g.*, *Armour* v. *City of Anniston*, 597 F. 2d 46, 48-49 (CA5 1979); *Susman* v. *Lincoln American Corp.*, 587 F. 2d 866 (CA7 1978), cert. pending, No. 78-1169; *Goodman* v. *Schlesinger*, 584 F. 2d 1325, 1332-1333 (CA4 1978); *Camper* v. *Calumet Petrochemicals, Inc.*, 584 F. 2d 70 (CA5 1978); *Roper* v. *Consurve, Inc.*, 578 F. 2d 1106 (CA5 2978), aff'd *sub nom. Deposit Guaranty Nat. Bank v. Roper*, *ante*, p. — (1979); *Satterwhite* v. *City of Greenville*, 578 F. 2d 987 (CA5 1978) (en banc), cert. pending, No. 78-1008; *Vun Cannon* v. *Breed*, 565 F. 2d 1096 (CA9 1977); *Winokur* v. *Bell Federal Savings & Loan Assn.*, 560 F. 2d 271 (CA7 1977), cert. denied, 435 U. S. 932 (1978); *Lasky* v. *Quinlan*, 558 F. 2d 1133 (CA2 1977); *Kuahulu* v. *Employers Ins. of Wausau*, 557 F. 2d 1334 (CA9 1977); *Boyd* v. *Justices of Special Term*, 546 F. 2d 526 (CA2 1976); *Napier* v. *Gertrude*, 542 F. 2d 825 (CA10 1976), cert. denied, 429 U. S. 1049 (1977).

[3] 38 Fed. Reg. 31942-31945 (1973). The guidelines currently in force appear at 28 CFR § 2.20 (1979).

first legislative authorization for parole release guidelines. It required the newly created Parole Commission to "promulgate rules and regulations establishing guidelines for the powe[r] . . . to grant or deny an application or recommendation to parole any eligible prisoner." § 4203. Before releasing a prisoner on parole, the Commission must find, "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner," that release "would not depreciate the seriousness of his offense or promote disrespect for the law" and that it "would not jeopardize the public welfare." § 4206 (a).

Respondent John M. Geraghty was convicted in the United States District Court for the Northern District of Illinois of conspiracy to commit extortion, in violation of 18 U. S. C. § 1951, and of making false material declarations to a grand jury, in violation of 18 U. S. C. § 1623.[4] On January 25, 1974, two months after initial promulgation of the release guidelines, respondent was sentenced to concurrent prison terms of four years on the conspiracy count and one year on the false declarations count. The United States Court of Appeals for the Seventh Circuit affirmed respondent's convictions. *United States* v. *Braasch*, 505 F. 2d 139 (1974), cert. denied *sub nom. Geraghty* v. *United States*, 421 U. S. 910 (1975).

Geraghty later, pursuant to a motion under Fed. Rule Crim. Proc. 35, obtained from the District Court a reduction of his sentence to 30 months. The court granted the motion because, in the court's view, application of the guidelines would frustrate the sentencing judge's intent with respect to the length of time Geraghty would serve in prison. *United States* v. *Braasch*, No. 72 CR 979 (ND Ill., 1975), appeal dism'd and mandamus denied, 542 F. 2d 442 (CA7 1976).

[4] The extortion count was based on respondent's use of his position as a vice squad officer of the Chicago police force to "shakedown" dispensers of alcoholic beverages; the false declarations concerned his involvement in this scheme.

Geraghty then applied for release on parole. His first application was denied in January 1976 with the following explanation:

> "Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26–36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted." App. 5, 24.

If the customary release date applicable to respondent under the guidelines were adhered to, he would not be paroled before serving his entire sentence minus good-time credits. Geraghty applied for parole again in June 1976; that application was denied for the same reasons. He then instituted this civil suit as a class action in the United States District Court for the District of Columbia, challenging the guidelines as inconsistent with the PCRA and the Constitution, and questioning the procedures by which the guidelines were applied to his case.

Respondent sought certification of a class of "all federal prisoners who are or who will become eligible for release on parole." *Id.*, at 17. Without ruling on Geraghty's motion, the court transferred the case to the Middle District of Pennsylvania, where respondent was incarcerated. Geraghty continued to press his motion for class certification, but the court postponed ruling on the motion until it was prepared to render a decision on cross-motions for summary judgment.

The District Court subsequently denied Geraghty's request for class certification and granted summary judgment for petitioners on all the claims Geraghty asserted. 429 F. Supp. 737 (MD Pa. 1977). The court regarded respondent's action

as a petition for a writ of habeas corpus, to which Fed. Rule Civ. Proc. 23 applied only by analogy. It denied class certification as "neither necessary nor appropriate." 429 F. Supp., at 740. A class action was "necessary" only to avoid mootness. The court found such a consideration not comprehended by Rule 23. It found class certification inappropriate because Geraghty raised certain individual issues and, inasmuch as some prisoners might be benefited by the guidelines, because his claims were not typical of the entire proposed class. 429 F. Supp., at 740–741. On the merits, the court ruled that the guidelines are consistent with the PCRA and do not offend the Ex Post Facto Clause, U. S. Const., Art. I, § 9, cl. 3. 429 F. Supp., at 741–744.

Respondent, individually "and on behalf of a class," appealed to the United States Court of Appeals for the Third Circuit. App. 29. Thereafter, another prisoner, Becher, who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, moved to intervene. Becher sought intervention to ensure that the legal issue raised by Geraghty on behalf of the class "will not escape review in the appeal in this case." Pet. to Intervene After Judgment 2. The District Court, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction, denied the petition to intervene. Becher then filed a timely notice of appeal from the denial of intervention. The two appeals were consolidated.

On June 30, 1977, before any brief had been filed in the Court of Appeals, Geraghty was mandatorily released from prison; he had served 22 months of his sentence, and had earned good-time credits for the rest. Petitioners then moved to dismiss the appeals as moot. The appellate court reserved decision of the motion to dismiss until consideration of the merits.

The Court of Appeals, concluding that the litigation was not moot, reversed the judgment of the District Court and re-

manded the case for further proceedings. 579 F. 2d 238 (CA3 1978). If a class had been certified by the District Court, mootness of respondent Geraghty's personal claim would not have rendered the controversy moot. See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393 (1975). The Court of Appeals reasoned that an erroneous *denial* of a class certification should not lead to the opposite result. 579 F. 2d, at 248–252. Rather, certification of a "certifiable" class, that erroneously had been denied, relates back to the original denial and thus preserves jurisdiction. *Ibid.*

On the question whether certification erroneously had been denied, the Court of Appeals held that necessity is not a prerequisite under Rule 23. 579 F. 2d, at 252. The court expressed doubts about the District Court's finding that class certification was "inappropriate." While Geraghty raised some claims not applicable to the entire class of prisoners who are or will become eligible for parole, the District Court could have "certif[ied] certain issues as subject to class adjudication, and . . . limite[d] overbroad classes by the use of sub-classes." *Id.*, at 253. Failure "to consider these options constituted a failure properly to exercise discretion. Indeed, this authority may be exercised *sua sponte*." *Ibid.* The Court of Appeals also held that refusal to certify because of a potential conflict of interest between Geraghty and other members of the putative class was error. The subclass mechanism would have remedied this problem as well. *Id.*, at 252–253. Thus, the Court of Appeals reversed the denial of class certification and remanded the case to the District Court for an initial evaluation of the proper subclasses. *Id.*, at 254. The court also remanded the motion for intervention. *Id.*, at 245, n. 21.[5]

In order to avoid "improvidently dissipat[ing] judicial effort," *id.*, at 254, the Court of Appeals went on to consider whether the trial court had decided the merits of respondent's case properly. The District Court's entry of summary judg-

[5] Apparently Becher, too, has now been released from prison.

ment was found to be error because "if Geraghty's recapitulation of the function and genesis of the guidelines is supported by the evidence," the guidelines "may well be" unauthorized or unconstitutional. *Id.*, at 259, 268. Thus, the dispute on the merits also was remanded for further factual development.

II

Article III of the Constitution limits federal "judicial Power," that is, federal court jurisdiction, to "Cases" and "Controversies." This case or controversy limitation serves "two complementary" purposes. *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Ibid.* Likewise, mootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969).

It is clear that the controversy over the validity of the Parole Release Guidelines is still a "live" one between petitioners and at least some members of the class respondent seeks to represent. This is demonstrated by the fact that prisoners currently affected by the guidelines have moved to be substituted, or to intervene, as "named" respondents in this Court. See n. 1, *supra*. We therefore are concerned here with the second aspect of mootness, that is, the parties' interest in the litigation. The Court has referred to this concept as the "personal stake" requirement. *E. g., Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755 (1976); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

The personal stake requirement relates to the first purpose of the case or controversy doctrine—limiting judicial power

to disputes capable of judicial resolution. The Court in *Flast* v. *Cohen*, 392 U. S., at 100–101, stated:

> "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. . . . Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker* v. *Carr*, [369 U. S.], at 204, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests,' *Aetna Life Insurance Co.* v. *Haworth*, [300 U. S.], at 240–241."

See also *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 216–218 (1974).

The "personal stake" aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973).

III

On several occasions the Court has considered the application of the "personal stake" requirement in the class action context. In *Sosna* v. *Iowa*, 419 U. S. 393 (1975), it held that

mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot. It reasoned that "even though appellees . . . might not again enforce the Iowa durational residency requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified." *Id.,* at 400. The Court stated specifically that an Art. III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.,* at 402.[9]

Although one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation. *E. g., Gerstein* v. *Pugh,* 420 U. S. 103, 110, n. 11 (1975). The "capable of repetition, yet evading review" doctrine, to be sure, was developed outside the class action context. See *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 514–515 (1911). But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal

[9] The claim in *Sosna* also fit the traditional category of actions that are deemed not moot despite the litigant's loss of personal stake, that is, those "capable of repetition, yet evading review." See *Southern Pacific Terminal Co.,* v. *ICC,* 219 U. S. 498, 515 (1911). In *Franks* v. *Bowman Transportation Co.,* 424 U. S., at 753–755, however, the Court held that the class action aspect of mootness doctrine does not depend on the class claim's being so inherently transitory that it meets the "capable of repetition, yet evading review" standard.

stake. See, *e. g., Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975); *Roe* v. *Wade,* 410 U. S. 113, 123–125 (1973). Since the litigant faces some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.

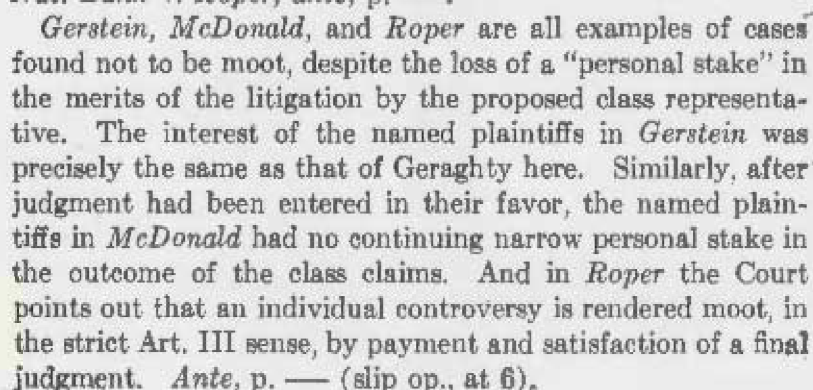
When, however, there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim. *E. g., Franks* v. *Bowman Transportation Co.,* 424 U. S., at 752–757. See *Kremens* v. *Bartley,* 431 U. S. 119, 129–130 (1977). Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. The Court considered this possibility in *Gerstein* v. *Pugh,* 420 U. S., at 110, n. 11. *Gerstein* was an action challenging pretrial detention conditions. The Court assumed that the named plaintiffs were no longer in custody awaiting trial at the time the trial court certified a class of pretrial detainees. There was no indication that the particular named plaintiffs might again be subject to pretrial detention. Nonetheless, the case was held not to be moot because:

> "The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Ibid.*

See also *Sosna* v. *Iowa,* 419 U. S., at 402, n. 11.

In two different contexts the Court has stated that the proposed class representative who proceeds to a judgment on the merits may appeal *denial* of class certification. First, this assumption was "an important ingredient," *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. — (slip op., at 11), in the rejection of interlocutory appeals, "as of right," of class certification denials. *Coopers & Lybrand* v. *Livesay,* 437 U. S. 463, 469, 470, n. 15 (1978). The Court reasoned that denial of class status will not necessarily be the "death knell" of a small claimant action, since there still remains "the prospect of prevailing on the merits and reversing an order denying class certification." *Ibid.*

Second, in *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385, 393-395 (1977), the Court held that a putative class member may intervene, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims have been satisfied and judgment entered in their favor. Underlying that decision was the view that "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs." *Id.,* at 393. And today, the Court holds that named plaintiffs whose claims are satisfied through entry of judgment over their objections may appeal the denial of a class certification ruling. *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. —.



Gerstein, McDonald, and *Roper* are all examples of cases found not to be moot, despite the loss of a "personal stake" in the merits of the litigation by the proposed class representative. The interest of the named plaintiffs in *Gerstein* was precisely the same as that of Geraghty here. Similarly, after judgment had been entered in their favor, the named plaintiffs in *McDonald* had no continuing narrow personal stake in the outcome of the class claims. And in *Roper* the Court points out that an individual controversy is rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment. *Ante,* p. — (slip op., at 6).

These cases demonstrate the flexible character of the Art. III mootness doctrine.[7] As has been noted in the past, Art. III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). "[T]he justiciability doctrine [is] one of uncertain and shifting contours." *Flast* v. *Cohen*, 392 U. S., at 97.

IV

Perhaps somewhat anticipating today's decision in *Roper*, petitioners argue that the situation presented is entirely different when mootness of the individual claim is caused by "expiration" of the claim, rather than by a judgment on the claim. They assert that a proposed class representative who individually prevails on the merits still has a "personal stake" in the outcome of the litigation, while the named plaintiff whose claim is truly moot does not. In the latter situation, where no class has been certified, there is no party before the

[7] Three of the Court's cases might be described as adopting a less flexible approach. In *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975), and in *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), dismissal of putative class suits, as moot, was ordered after the named plaintiffs' claims became moot. And in *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976), it was indicated that the action would have been moot, upon expiration of the named plaintiffs' claims, had not the United States intervened as a party plaintiff. Each of these, however, was a case in which there was an attempt to appeal the merits without first having obtained proper certification of a class. In each case it was the defendant who petitioned this Court for review. As is observed subsequently in the text, appeal from denial of class classification is permitted in some circumstances where appeal on the merits is not. In the situation where the proposed class representative has lost a "personal stake," the merits cannot be reached until a class properly is certified. Although the Court perhaps could have remanded *Jacobs* and *Weinstein* for reconsideration of the class certification issue, as the Court of Appeals did here, the parties in those cases did not suggest "relation back" of class certification. Thus we do not find this line of cases dispositive of the question now before us.

court with a live claim, and it follows, it is said, that we have no jurisdiction to consider whether a class should have been certified. Brief for Petitioners 37–39.

We do not find this distinction persuasive. As has been noted earlier, Geraghty's "personal stake" in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*. Further, the opinion in *Roper* indicates that the approach to take in applying Art. III is issue by issue. "Nor does a confession of judgment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Ante*, p. — (slip op., at 6–7). See also *United Airlines, Inc.* v. *McDonald*, 432 U. S., at 392; *Powell* v. *McCormack*, 395 U. S., at 497.

Similarly, the fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class. "The denial of class certification stands as an adjudication of one of the issues litigated," *Roper*, *ante*, p. — (slip op., at 9–10). We think that in determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits "expires," we must look to the nature of the "personal stake" in the class certification claim. Determining Art. III's "uncertain and shifting contours," see *Flast* v. *Cohen*, 392 U. S., at 97, with respect to nontraditional forms of litigation, such as the class action, requires reference to the purposes of the case or controversy requirement.

Application of the personal stake requirement to a procedural claim, such as the right to represent a class, is not automatic or readily resolved. A "legally cognizable interest," as the Court described it in *Powell* v. *McCormack*, 395 U. S., at 496, in the traditional sense rarely ever exists with respect to the class certification claim.[8] The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims. See, *e. g.*, Advisory Committee Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 427–429; Note, Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1321–1323, 1329–1330 (1976). Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so,[9] these benefits generally are byproducts of the class action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the rules are met. This "right" is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the "personal stake" requirement. See *Roper*, *ante*, p. — (slip op., at 11–12).

As noted above, the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial

[8] Were the class an indispensable party, the named plaintiff's interests in certification would approach a "legally cognizable interest."

[9] See, *e. g.*, Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F. R. D. 375 (1972).

resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 753–756; *Baker* v. *Carr*, 369 U. S., at 204; *Poe* v. *Ullman*, 367 U. S., at 503 (plurality opinion). We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply presented issue. In *Sosna* v. *Iowa* it was recognized that a named plaintiff whose claim on the merits expires *after* class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.

We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied.[10] The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. See *Roper*, *ante*, p. — (slip op., at 10). If, on appeal, it is determined that

[10] We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification. See *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393–394, and n. 14 (1977).

class certification properly was denied, the claim on the merits must be dismissed as moot.[11]

Our conclusion that the controversy here is not moot does

[11] MR. JUSTICE POWELL, in his dissent, advocates a "rigidly formalistic" approach to Art. III, *post*, at 4, and suggests that our decision today is the Court's first departure from the formalistic view. *Id.*, at 6-11. We agree that the issue at hand is one of first impression and thus, in that narrow sense, is "unprecedented," *id.*, at 11. We do not believe, however, that the decision constitutes a redefinition of Art. III principles or a "significant departure," *id.*, at 1, from "carefully considered" precedents, *id.*, at 9.

The erosion of the strict, formalistic perception of Art. III was begun well before today's decision. For example, the protestations of the dissent are strikingly reminiscent of Mr. Justice Harlan's dissent in *Flast* v. *Cohen*, 392 U. S. 83, 116, in 1968. Mr. Justice Harlan hailed the taxpayer standing rule pronounced in that case as a "new doctrine" resting "on premises that do not withstand analysis." *Id.*, at 117. He felt that the problems presented by taxpayer standing "involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system." *Id.*, at 116. The taxpayers were thought to complain as "private attorneys-general," and "[t]he interests they represent, and the rights they espouse are bereft of any personal or proprietary coloration." *Id.*, at 119. Such taxpayer actions "are and must be . . . 'public actions' brought to vindicate public rights." *Id.*, at 120.

Notwithstanding the taxpayers' lack of a formalistic "personal stake," even Justice Harlan felt that the case should be held nonjusticiable on purely prudential grounds. His interpretation of the cases led him to conclude that "it is . . . clear that [plaintiffs in a public action] as such are not *constitutionally* excluded from the federal courts." *Ibid.* (emphasis in original).

Is it not somewhat ironic that MR. JUSTICE POWELL, who now seeks to explain *United Airlines, Inc.* v. *McDonald*, *supra*, as a straightforward application of settled doctrine, *post*, at 7-9, expressed in his dissent in *McDonald*, 432 U. S., at 396, the view that the holding rested on a fundamental misconception about the mootness of an uncertified class action after settlement of the named plaintiffs' claims? He stated:

"Pervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status. But that assumption is supported neither by the text nor by the history of Rule 23.

not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. "[I]t does shift the focus of examination from the elements of justiciabil-

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To the contrary, . . . the denial of class status converts the litigation to an ordinary nonclass action." *Id.*, at 399.

The dissent went on to say:

"[Petitioner] argues with great force that, as a result of the settlement of their individual claims, the named plaintiffs 'could no long appeal the denial of class' status that had occurred years earlier. . . . Although this question has not been decided by this Court, the answer on principle is clear. The settlement of an individual claim typically moots any issues associated with it. . . . This case is sharply distinguishable from cases such as *Sosna* v. *Iowa* . . . and *Franks* v. *Bowman Transp. Co.* . . . where we allowed named plaintiffs whose individual claims were moot to continue to represent their classes. In those cases, the District Courts previously had certified the classes, thus giving them 'a legal status separate from the interest[s] asserted by [the named plaintiffs].' *Sosna* v. *Iowa, supra,* at 399. This case presents precisely the opposite situation: The prior denial of class status had extinguished any representative capacity." 432 U. S., at 400 (footnote omitted).

Thus, the assumption thought to be "[p]ervading the Court's opinion" in *McDonald*, and so vigorously attacked by the dissent there, is now relegated to "gratuitous" "dictum," *post*, at 8. MR. JUSTICE POWELL, who finds the situation presented in the case at hand "fundamentally different" from that in *Sosna* and *Franks*, *post*, at 5, also found the facts of *McDonald* "sharply distinguishable" from those previous cases. 432 U. S., at 400.

We do not recite these cases for the purpose of showing that our result is mandated by the precedents. We concede that the prior cases may be said to be somewhat confusing, and that some, perhaps, are irreconcilable with others. Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as "flexible"; it has been developed, not irresponsibly, but "with some care," *post*, at 2, including the present case.

The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction "upon the

ity to the ability of the named representative to 'fairly and adequately protect the interests of the class.' Rule 23 (a)." *Sosna* v. *Iowa*, 419 U. S., at 403. We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue.[12]

We need not decide here whether Geraghty is a proper representative for the purpose of representing the class on the merits. No class as yet has been certified. Upon remand, the District Court can determine whether Geraghty may continue to press the class claims or whether another representative would be appropriate. We decide only that Geraghty was a

bare existence of a sharply presented issue in a concrete and vigorously argued case," *post*, at 12. Each case must be decided on its own facts. We hasten to note, however, that this case does not even approach the extreme feared by the dissent. This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e. g.*, *Powell* v. *McCormack*, 395 U. S., at 495–500. His injury continued up to and beyond the time the District Court denied class certification. We merely hold that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling "relates back" to the date of the original denial.

The judicial process will not become a vehicle for "concerned bystanders," *post*, at 4, even if one in respondent's position can conceivably be characterized as a bystander, because the issue on the merits will not be addressed until a class with an interest in the outcome has been certified. The "relation back" principle, a traditional equitable doctrine applied to class certification claims in *Gerstein* v. *Pugh*, *supra*, serves logically to distinguish this case from the one brought a day after the prisoner is released. See *post*, at 13, n. 15. If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action.

[12] See, *e. g.*, Comment, A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions, 54 Texas L. Rev. 1289, 1331–1332 (1976); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 602–608.

proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined. Thus, it was not improper for the Court of Appeals to consider whether the District Court should have granted class certification.

V

We turn now to the question whether the Court of Appeals' decision on the District Court's class certification ruling was proper. Petitioners assert that the Court of Appeals erred in requiring the District Court to consider the possibility of certifying subclasses *sua sponte*. Petitioners strenuously contend that placing the burden of identifying and constructing subclasses on the trial court creates unmanageable difficulties. Brief for Petitioners 43–51. We feel that the Court of Appeals' decision here does not impose undue burdens on the district courts. Respondent had no real opportunity to request certification of subclasses after the class he proposed was rejected. The District Court denied class certification at the same time it rendered its adverse decision on the merits. Requesting subclass certification at that time would have been a futile act. The District Court was not about to invest effort in deciding the subclass question after it had ruled that no relief on the merits was available. The remand merely gives respondent the opportunity to perform his function in the adversary system. On remand, however, it is not the District Court that is to bear the burden of constructing subclasses. That burden is upon the respondent and it is he who is required to submit proposals to the court. The court has no *sua sponte* obligation so to act. With this modification, the Court of Appeals' remand of the case for consideration of subclasses was a proper disposition.

It would be inappropriate for this Court to reach the merits of this controversy in the present posture of the case. Our holding that the case is not moot extends only to the appeal of the class certification denial. If the District Court again

denies class certification, and that decision is affirmed, the controversy on the merits will be moot. Furthermore, although the Court of Appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of respondent's case until after it is determined affirmatively that a class properly can be certified.

The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

No. 78-904 United States Parole Commission v. Geraghty

MR. JUSTICE POWELL, dissenting.

The Court holds today that the named plaintiff in an action brought on behalf of a class has a "'personal stake' in obtaining class certification" which, wholly apart from his interest in obtaining relief on the merits for himself or anyone else, is sufficient to satisfy the case or controversy limitation on the jurisdiction of a federal court. Ante, at 15. The analysis proceeds in two steps: First, the Court concludes that mootness is a wholly flexible doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. Second, the Court holds that a right "analogous to the private attorney general concept" supports the jurisdiction of an Art. III court to decide whether an action may be maintained on behalf of a class. Because both steps depart radically from settled law in a manner that cannot rationally be confined to the narrow issue presented in this case, I dissent.

I

As the Court has said, this case involves the personal stake aspect of the mootness doctrine. Ante, at 7-8. There is no doubt that the controversy, if any exists, involves a claim that federal courts may properly resolve without intruding upon the province of the political branches. The only question is whether there is a plaintiff who may raise it - that is, whether there is a controversy between adverse parties which casts the dispute in a form historically viewed as capable of judicial resolution.

Recent decisions of this Court have considered the personal stake requirement at some length, most commonly in the context of arguments that a plaintiff has no standing to bring an action in the first instance. We have repeatedly held that the inquiry has a double aspect: On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies self-imposed restraints on the exercise of judicial power. Singleton v. Wulff, 428 U.S. 106, 112 (1976); Gladstone, Realtors v. Village of Bellwood, 441 U.S.

or controversy" and the Court must dismiss the action as moot. Preiser v. Newkirk, 422 U.S 395, 401-403 (1975); North Carolina v. Rice, 404 U.S. 244, 246 (1971); SEC v. Medical Committee for Human Rights, 404 U.S. 403, 407 (1972); Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969). When mootness is predicated upon this constitutional deficiency, we do not inquire into practical concerns which often militate against a dismissal of the action by the time it reaches this Court. Richardson v. Ramirez 418 U.S. 24, 37 (1974); see Sosna v. Iowa, 419 U.S. 393, 401 n.9 (1975). Instead, we routinely vacate and remand such cases with directions to dismiss. United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). However, Art. III may be satisfied by some continuing impairment of personal interests which is unaffected by the mootness of the original claim to relief. In such cases our constitutional power to hear the case is unabated, and we may base our prudential decision whether to do so in part on the obvious practical differences between an action we are asked to dismiss at its inception and one in which the parties have

revolution of the last decade, which has liberalized the requirements of Art. III to the point where "'an identifiable trifle is enough for standing to fight out a question of principle,'" United States v. SCRAP, 412 U.S. 669, 689 n. 14 (1973), quoting Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (19), we have continued to insist that principle alone is simply not enough. Only last term the Court stated without dissent that "in order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 u.S. 59, 72 (1978); Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252, 260-261 (1977); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. [490], 499 [(1975)]; Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973)." Gladstone, Realtors v. Village of of Bellwood, 441 U.S. 91, 99 (1979). See also Simon v. Eastern Kentucky Welfare

Org., supra, 426 U.S., at 40; see Schlesinger v. Reservists to Stop the War 418 U.S. 208, 227 (1974); O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Sierra Club v. Morton, 405 U.S. 727, 738 (197). We have called this requirement an "indispensable," Shclesinger v. Reservists to Stop the War 418 U.S. 166, 181 (1974), and "irreducible" constitutional minimum, United States v. Richardson, 418 U.S. 166, 181 (POWELL, J., concurring); Simon v. Eastern Kentucky Welfare Rights Org., supra, 426 U.S., at 60, id. at 64 (BRENNAN, J., concurring); to which we have "steadfastly adhered." Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973)(footnotes omitted).

If a plaintiff can demonstrate the concrete personal injury required by Art. III, he may in some circumstances be permitted to argue the rights of third parties or the public interest in support of his claim. Singleton v. Wulff, supra, 428 U.S., at 113; Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connectcut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249 (1953). Prudential considerations militate against this result, Gladstone, Realtors v. Village of Bellwood, 441 U.S., at 100; Arlington Heights v. Metropolitan Housing Corp., 429 U.S., at 263. but congressional authorization sweeps away such concerns. We have therefore construed the Administrative Procedure Act, 5 U.S.C. § 702, to permit suits by "private

attorneys general" representing the public interest - but only where the plaintiff also alleges concrete, individual injury, no matter how small. Sierra Club v. Morton, Supra 405 U.S., at 727-728; cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-167 (1972); Tileston v. Ullman, 318 U.S. 44, 46 (1943). In no event may Congress abrogate the Art. III minimum. Gladstone, Realtors, v. Village of Bellwood, supra, 441 U.S., at 100; O'Shea v. Littleton, 414 U.S. 488, 494, 493-494 n. 2 (1973).[1]

The personal stake requirement may appear formalistic in such cases. But we have insisted upon it because it is a requirement imposed by the Constitution, "founded in concern about the proper - and properly limited - role of the courts in a democratic society." Warth v. Seldin, 422 U.S. 490, 498 (1975); see United States v. Richardson, 418 U.S., at 188-189 (POWELL, J., concurring). This consistent thread in our decisions "prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." United States v. SCRAP, 412 U.S. 669, 687 (1973); see Sierra Club v. Morton, 405 U.S., at 740; Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S., at 60 (BRENNAN, J., concurring in the judgment). Because the interest of a "private attorney general" is by definition that of a concerned bystander, we have never permitted that interest alone

to supply the personal stake necessary to support the jurisdiction of a federal court.

II

Until today our decisions in the class action area had applied these principles in a straightforward fashion. Our only departure from settled law has been to recognize that a class that has been certified in accordance with Rule 23 "acquire[s] a legal status separate from the interest asserted by [the named plaintiff]." Sosna v. Iowa, 419 U.S. 393, 399 (1975). We have therefore held that "given a properly certified class," the live interests of unnamed but identifiable class members may supply the case or controversy required by Art. III after the individual claim of the named plaintiff becomes moot. Franks v. Bowman Transportation Co., 424 U.S. 727, 755-756 (1976); Sosna v. Iowa, supra, at 402.

Neither Sosna nor Franks remotely suggests that Art. III may be satisfied by any means other than the traditional requirement of a personal stake in the outcome. Both cases simply acknowledge the effects of a procedure which gives legal recognition to additional--and unquestionably adverse--parties plaintiff. Cf. Aetna Life Ins. Co. v. Haworth 300 U.S. 227, 240 (1937).[2] The situation is entirely different when the named plaintiff's claim becomes moot at a time when the interests of

absent class members cannot be recognized because the district court has not properly certified the class. In these circumstances, the existence of a case or controversy turns entirely on the individual interest of those who seek to represent the class. Because the named plaintiffs have no personal interest in representing a class and cannot rely for Art. III purposes upon the live interests of absent third parties in securing their representation, we have uniformly held that these actions may be permitted to continue only when the named plaintiff is able to allege some personal stake in addition to his interest in obtaining relief for the class.

Thus, a named plaintiff who alleges no individualized injury at the outset of the action "may not seek relief on behalf of himself or any other member of the class." O'Shea v. Littleton, 414 U.S. 488, 495 (1974). If the named plaintiff states a claim which becomes moot before the district court has ruled on his certification motion, the entire case must be dismissed as moot unless it falls within "that narrow class of cases" involving wrongs which are capable of repetition but "by nature [so] temporary" that they "become[] moot as to [the named plaintiffs] before the district court can reasonably be expected to rule on a certification motion." Gerstein v. Pugh, 420 U.S. 103, 110-111 n. 11 (1975); see Swisher v. Brady, 438 U.S. 204,

213-214 n. 11 (1978); Sosna v. Iowa, supra, 419 U.S., at 402 n. 11. In such cases, depending on "the reality of the claim that the issue would otherwise evade review," we have permitted certification to "relate back" to the filing of the complaint for Art. III purposes. Ibid. This rule embodies in shorthand form a principle first noted in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911) and subsequently established in a long line of decisions bearing no relationship to class actions.[3] Although the Court has never fully explained how the furthest reaches of the Southern Pacific rule may be squared with Art. III, that rule has never been thought to undermine the constitutional requirement of a personal stake in the outcome.[4] In any event, the Court has applied it in the class action context only where an "individual [plaintiff] could . . . suffer repeated deprivations" with no means of redress and thus retains an individualized stake in the outcome of the action on the merits. Gerstein v. Pugh, 420 U.S., at 110 n. 11; see Roe v. Wade, 410 U.S. 113, 125 (1973).

case will be moot if the attempted certification is determined on appeal to have been so faulty as to prevent the class from obtaining separate legal status under Sosna. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975); see Baxter v. Palmigiano 425 U.S. 308, 310 n.1 (1976); Pasadena City Board of Education v. Spangler 427 U.S. 424, 430 (1976).

If certification is denied, the named plaintiff who abandons his claim to represent the class by failing to appeal that ruling cannot continue to litigate the merits after his individual claim becomes moot. Weinstein v. Bradford, 423 U.S. 147 (1975); see Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 8 (1978). We have never squarely addressed a case in which a mooted named plaintiff continued to press the class claims by appealing the denial of certification. But the named plaintiffs in Jacobs, Baxter, and Spangler each vigorously asserted the claims of the class. They did not do so by the procedural route of appealing a denial of certification only because the district court had granted - albeit defectively - class status. Therefore, it was the defendant who raised the question of the named plaintiffs' right to represent a class, a right which the named plaintiffs continued to assert. By failing to remand for correction of the procedural defects in the oral certification order, we recognized that a named plaintiff has

suffered no injury which could be redressed by adequate certification and implicitly held that an individual's interest in representing a class is insufficient to supply the personal stake necessary to satisfy Art. III.

It is true that the Court has twice permitted appeals from the denial of class certification after the named plaintiffs' claims on the merits had been satisfied. *Deposit Guaranty Nat. Bank v. Roper*, ante, at ___; *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). But neither case supports the broad proposition that the claim to represent a class may be asserted by a plaintiff who has no other personal stake in the outcome of the action.

In *McDonald*, putative class members were permitted to intervene to appeal an adverse class certification ruling after the individual claims of the original named plaintiffs had been settled pursuant to a judgment on the question of liability. Id. Provided their individual claims were not time-barred, the intervenors in *McDonald* plainly possessed the personal stake

mean no more than that an action which is promptly pursued by interested parties at all times does not "die" in an Art. III because of an interval in which neither the original nor any substitute party was present before the court. The same conclusion is implicit in those cases in which the Court has permitted the representatives of the estates of deceased criminal defendants to carry on their appeals, Wetzel v. Ohio, 371 U.S. 61 (1962), as well as those class actions in which we have relied upon the interests of timely intervenors without inquiring whether the intervention occurred before the mooting of the original named plaintiff's claim, Baxter v. Palmigiano, 425 U.S., at 310 n. 1.

The Court did state in McDonald that the denial of class certification would be subject to appellate review at the behest of the named plaintiffs, 432 U.S., at 393, a dictum which was repeated in Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 470 n. 15 (1978), and is today adopted as the law. Deposit Guaranty Nat. Bank v. Roper, ante, at ___. As explained in Roper, however, this rule turns entirely upon a "critical distinction between the definitive mootness of a case or controversy . . . and a judgment in favor of a party at an intermediate stage of litigation . . . ." Slip op., at 9. When such a judgment has been entered, the Court holds, Art. III is

only indirectly concerned and the central question is appealability. Id., at 7, 12. Moreover, the Roper Court expressly notes the named plaintiffs' interest in obtaining class certification in order to reduce their costs of litigation - an interest not present here. Id., at 10 n. 8. Although Roper may be criticized on other grounds, ante, at ___, its rationale leaves undisturbed the fundamental understanding which unifies our decisions in this area: without more, a named plaintiff has no personal stake in any "claim" to represent a class.[6]

IV

In my view, the foregoing precedents dispose of this case. We cannot rely on the personal stake of the unnamed members of the putative class, as we did in Franks and Sosna, for they have not been identified in a proper certification order. There has been no suggestion that the issue is one which, like the pretrial confinement in Gerstein, could evade review. On the contrary respondent's lawyer has assured us that if this case is held to be moot he will immediately file another action. Although the Court does not rule on the motion to substitute new parties respondent filed with this Court, that motion was filed well over a year after respondent was released from prison. In the interim respondent had not only obtained a

ruling from the Court of Appeals but also filed his petition for certiorari. In these circumstances the motion can scarcely be deemed timely within the meaning of McDonald. Nor is the question one of appealability as defined in Roper. Accordingly, the case is moot under the rule of Indianapolis School Comm'rs v. Jacobs and Weinstein v. Bradford unless the plaintiff can identify some personal stake, not present in those cases, which could be affected by the outcome of this action.

No such stake has been identified. In the words of his own attorney, respondent "can obtain absolutely no additional personal relief" in this case and is here solely to represent other parties. Transcript of Oral Argument, at 25-26. The Court does not suggest that respondent has a personal stake in obtaining relief on the merits for the members of the putative class. Indeed, it must squarely reject that contention in order to hold that mootness precludes consideration of the claim on the merits until a class is properly certified. Instead, the Court holds that respondent has a personal stake in the "claim" that he is entitled to represent a class, wholly apart from the merits. In reaching this conclusion, the Court makes no attempt to identify any benefits that may accrue to this plaintiff from the use of the class action device. Rather, he is said to have a personal stake in obtaining class

certification because (i) the Federal Rules of Civil Procedure give him a "right," "analogous to the private attorney general concept," to have a class certified in certain circumstances, and (ii) he "continues vigorously to advocate his right to have a class certified" in what the Court finds to be a "concrete factual setting." Ibid.

This novel approach to the personal stake requirement leads to a result which is reconcilable with our past class action decisions in a narrow technical sense: We have never dismissed as moot an appeal from a denial of class certification. But the result reached today will require reconsideration, if not outright overruling, of substantial portions of the settled law governing this area. Moreover, the Court attempts to avoid the conclusion implicit in our decisions - that a named plaintiff has no personal stake in representing a class - by drawing an untenable distinction between the named plaintiff's right to have a class certified and his right to obtain relief for that class on the merits. Finally, the Court relies exclusively on factors that have previously been thought relevant only to the prudential decision applicable to cases which have been shown to be within our jurisdiction as defined by Art. III. If these factors alone suffice to establish the personal stake required by the Constitution, then this case is a

startling departure indeed - for it upsets the settled understanding that a plaintiff who can identify no concrete injury that may be remedied by judicial action has no claim to the resources of an Art. III court.

A

If, as the Court holds today, a named plaintiff's stake in obtaining class certification is sufficient to satisfy the requirements of Art. III whenever concrete adversity is present in fact, then at least three of our precedents must be subject to reconsideration on the ground that their analysis was wholly misguided.

First, Indianapolis School Comm'rs v. Jacobs can survive only if the newly defined personal stake in obtaining class certification may be destroyed when the issue is raised on appeal by the defendant rather than the plaintiff. As the Court intimates today, this irrational distinction must be rejected and Jacobs recast as a case that was moot only because the named plaintiff failed to suggest the proper ground in support of his claim.

Second, it appears that we must jettison that portion of Gerstein v. Pugh which limits the occasions on which a mooted named plaintiff may continue to press his certification motion after his own claim becomes moot to those cases which are

"capable of repetition, yet evading review." It would be difficult to justify such a limitation even on prudential grounds, for the named plaintiff's interest in obtaining certification surely cannot be increased by the district court's denial of his motion in the first instance.

Third, the Court's view cannot logically be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging the parole release system could seek certification of the class, why should a plaintiff who is released the day before filing the suit be treated differently? As an Art. III matter, there can be no difference - both plaintiffs clearly satisfy the minimum the Court has determined to tolerate in this case. Even on prudential grounds, the difference between the posture of this action on remand and the posture of a newly filed action is so subtle as to escape detection. This Court has ruled neither on the merits nor on the propriety of the class action. At the same time, it has vacated the decision of the Court of Appeals, which in turn vacated the decision of the District Court dealing with these questions. Accordingly, there is no law of the case to preserve. Moreover, counsel expressly stated that the mootness aspect of this case was of no practical importance whatever, because the same issues will be raised in a new action

if this one is dismissed as moot. Transcript of Oral Argument, at 25. It is difficult to imagine a case in which the prudential considerations aligned against a finding of mootness are less compelling. If the holding of *O'Shea v. Littleton* survives at all, its scope has been drastically reduced.

B

The Court attempts to avoid yet more drastic incursions into settled law by rejecting respondent's attempt to litigate the merits of the class claims. This result is accomplished by separating respondent's interest in representing the class into two separate "claims": First, that the action may be maintained on behalf of a class; and second, that the class is entitled to relief on the merits. Because Art. III is not easily applied to "procedural claims," respondent is said to have a personal stake in the first claim despite his lack of a stake in the second. This distinction is wholly illusory.

Any attempt to uncover the personal stake underlying a "procedural claim" is bound to end in frustration, because the

determination that the plaintiff is entitled to join additional parties or to present his case to a jury rather than a judge, in that each seeks only to present a substantive claim in a particular context. It is meaningless to discuss anyone's interest in these issues apart from his claim to relief on the merits, for they have value only insofar as they may enhance the possibility of obtaining that relief. The parties are permitted to litigate them, not because they have some independent personal stake in the procedures, but rather because they are part and parcel of their attempt to establish substantive claims.[7] As we held in O'Shea, a plaintiff may not invoke the jurisdiction of a federal court simply to decide whether he may represent a class. I see no reason why the result should change because the plaintiff once had standing to sue on his own behalf.

Because respondent in this case has no interest in obtaining class certification apart from his generalized interest in representing the class on the merits, the result reached today cannot be reconciled with the most basic premises of our class action decisions.

C

Although the Court's departure from our class action precedents is troubling, by far the most radical aspect of the

case is its willingness to accept the "private attorney general's" abstract concern with the interests of third parties - here those of the defendant, absent class members and the court in avoiding the inconveniences occasioned by multiple lawsuits - as a personal stake within the meaning of Art. III. We have steadfastly refused to countenance such plaintiffs in other factual settings which would amply satisfy the Court's twin tests of authorization in law and adversity in fact.[8] See p.___ supra.

This break with tradition is in no sense justified by the need to recognize the novel interests at stake in "nontraditional forms of litigation". Ante, at 13. The class action is scarcely a new idea. Rule 23 merely codified and provided standard procedures for dealing with a form of action that had long been known at equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction should properly attach to the class aspect of such actions as an adjunct to the litigation of an individual claim has never been

Judgment Act)(emphasis supplied), quoting *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933). Unless we are willing to abandon the personal stake requirement entirely, this freedom must end when we are unable to identify a concrete injury that may be remedied in the course of the litigation. The effects of a finding of mootness on the vitality of a device such as the class action,[9] which has significantly advanced the administration of justice, must always be a factor in prudential decisions made under the rubric of mootness. But such policy judgments are powerless to authorize a plain violation of Art. III.

I would hold that the absent members of the class are not presently before the Court, and that the individual respondent no longer has any interest in the injuries that may be redressed if this action is permitted to continue. Because the action lacks a plaintiff having that minimal personal stake which is an absolute constitutional prerequisite to the jurisdiction of an Art. III court, I would vacate the decision

FOOTNOTES

1 These decisions unequivocally reject the suggestion, expressed in some earlier opinions, that Congress might be able to confer jurisdiction where none would otherwise exist under Art. III. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (WHITE, J., concurring); see *Linda R. S. v. Richard D.*, 410 U.S., at 617. Because there is no expression of congressional will in the case before us, however, the issue is not presented here.

2 The order certifying the class represents a judicial finding that injured parties other than the named plaintiff exist and provides a definition by which they may be identified. Certification sharpens the interests of unnamed class members in the outcome, for only thereafter wil they be bound by the result. Moreover, unnamed parties can be certain after certification that the action will not be settled or dismissed without the approval of the court and appropriate notification to class members. Fed. R. Civ. P. 23(e). Vigorous

defaults in this responsibility. The posture of the case is no different in principle from the more traditional representative action in which a single party who cannot be brought before the court because of his incompetence, for example, is permitted to litigate through an appointed fiduciary.

Although some courts have suggested that Rule 23(e) notice must be required even before certification and others have indicated that the named plaintiff's duty to the class begins with filing rather than certification, none has applied either theory after certification has been denied. See Advisory Committee Notes, 39 F.R.D. 69, 104 (1966).

3 American Party v. White 415 U.S. 767, 770 n.1 (1974); Storer v. Brown 415 U.S. 724, 737 n.8 (1969); Roe v. Wade, 410 U.S. 113, 124-125 (1973); Dunn v. Blumstein, 405 U.S. 330, 333 n. 2 (1972); Moore v. Ogilvie, 394 U.S. 814 (1969); Sibron v. New York, 302 U.S. 40 (1968)(alternative holding); United States v. W.T. Grant Co., 345 U.S. 629 (1953); see Weinstein v. Bradford, 423 U.S., at 149; SEC v. Medical

litigants whose stake in the outcome was assured by specific threats to their own future interests, subsequent cases suggest that even those individuals who allege no such threat may continue to litigate if their claim is by nature so inherently trnasitory that it otherwise would evade review at the behest of any single challenger. E.g., Dunn v. Blumstein, 405 U.S., at 333 n. 2; Moore v. Ogilvie, 394 U.S., at 814. Such cases can be explained on the basis of the importance of the issues addressed or on the theory that a constitutional rule absolutely precluding review in whole classes of cases would represent an abdication of judicial responsibility so serious as to erode the role of the courts in our federal system by imposing inappropriate burdens on the political branches. Although either explanation arguably is inconsistent with the rigid rule that Art. III requires a "personal stake in the outcome" in every case, the Court has repeatedly reaffirmed that rule despite the existence of the exception. See p. ___, supra.

5 It is significant that the Court found it

certification issue itself. In fact, members of the putative class whose arguably meritorious claims have "expired" by reason of limitations would stand in a strikingly similar position to the plaintiff before us today.

6 This understanding is further reflected in the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 406 n. 12 (1977); Franks v. Bowman Transportation Co., supra, 424 U.S., at 754 n. 6, 755-756; see Zablocki v. Redhail, 98 S. Ct. 673, 679 n. 6 (1978); Kremens v. Bartley, 431 U.S. 119, 129-130 (1977); Richardson v. Ramirez, 418 U.S. 24, 39 (1974)(jurisdiction in this Court proper only because state courts had treated action as a class). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and - subject to the Gerstein exception - at the time of certification. Kremens v. Bartley, 431 U.S., at 143 n. 6 (BRENNAN, J.

because he feared that intervening mootness would otherwise prevent a final determination of the merits. App. at 17, Brief of Respondent at 23, 33. The same theme infused respondent's argument before this Court, which he attempted to devote entirely to the merits, urging that the mootness question was "not very significant" because if the case were held moot another prisoner would simply file a new case.

8 The Court finds initial authorization for the "private attorney general" concept in the fact that Rule 23 grants named plaintiffs a right to have a class certified in certain circumstances. But we have held that even Congress may not grant us jursidiction when Art. III does not. Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. R. Civ. P. 82. The Court's test must therefore be that whenever a rule of law - common law statute, or rule - confers a right to litigate the only requirement of Art. III is that there be "sharply presented issues in a concrete factual setting and

this case has nothing to do with the procedural protections mentioned by the Court. See n. 7, supra. It is neither surprising nor improper that respondent should be concerned with the legality of the parole system rather than the rights of strangers or the smooth running of the judicial process. But if the degree of "vigor" and "self-interest" with which this respondent approaches the certification question is sufficient to satisfy the Court's Art. III test, then the advocate who presses a deeply held belief as to the public interest must also prevail against a challenge based upon Art. III.

9 In view of the tremendous analytical gap the Court is willing to bridge to save this action, it is appropriate to note how slight are the practical imperatives for hearing this case. I have already noted the unimportance attached to the mootness question by respondent's lawyer. See p. ___, supra. This attitude is likely to be fairly typical of class actions brought under Rule 23 (b)(1) or (2) in which only injunctive or declaratory relief is sought. Such actions are not subject to the danger, illustrated by Deposit Guaranty Nat. Bank v. Roper, ante, at ___, of complete frustration through sequential settlement offers "picking off" each intervening plaintiff. Nor is the loss of a single plaintiff potentially disastrous because others are deterred by the enormous notice costs that often flow

from the certification of a class under Rule 23 (b)(3). Moreover, the question is not whether the parole commission may ever be required to conform its guidelines to the mandates of the law. As we have expressly noted in another context, if the guidelines are invalid there will be other plaintiffs who may properly challenge them. Johnson v. Railway Express Agency, 421 U.S. 454, 467 n. 13 (1975).

Note to Ellen:

Possible Approach to Part II of our opinion:

This case presents a fundamentally different situation. No class has been certified and the only plaintiff no longer has any personal ~~stag~~ stake in the litigation. In my view, the precedents of this Court, and the purpose of Article III, require a dismissal of what remains - essentially a lawyer's case, however conscientious the lawyer may be. But the Court today views the case differently, and constructs new doctrine to justify breathing life into a lawsuit with no parties plaintiff.

It anounces for the first time there are two categories of "the Article III mootness doctrine": "flexible" and "less flexible". Ante, at 12 and n. 7. Not surprisingly, the Court then relies on cases said to "demonstrate" the flexible type of mootness in class action litigation. These cases include Sosna, Gerstein, McDonald, and today's decision in Roper.

(Ellen: Here distinguish each of these cases much as you have done so in your draft.)

The "less flexible" approach to the mootness doctrine is said to be illustrated by Jacobs, Bradford and Spangler. As these are about to be made second class precedents, they are relegated to afa footnote. Ante, p. 12 n. 7. But these cases are quite recent decisions of this Court; no Justice who participated in any of them suggested the distinction made today; and, as the opinions therein make clear, settled principles of Article III jurisprudence - long established by prior cases - were applied. I suppose it would have been awkward to overrule them today. Yet this would have been the straightforward method of dispatching the "less flexible" cases. The Court's abbreviated treatment ignores their relevance - if not controlling force - to the issue presented by the present case.

(Note to Ellen: Here discuss these three cases

them from the "more flexible" cases and emphasizing that they are indistinguishable on principle from the present case).

Then to exercise in flexibility

We thus have a case in which the named plaintiff (the respondent here) no longer has any interest in the injuries asserted in his complaint, and where no member of the putative class is before the Court. The case therefore lacks a plaintiff having that minimal personal stage which is a constitutional prerequisite to the ~~jurisdiction~~ jurisdiction of an Article III court. In any realistic sense, the only party before this Court who appears to have an interest ~~in the~~ is a counsel who no longer has an identifiable client.

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

7-W

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(<u>Note to Ellen</u>: Here discuss these three cases much as you already have in your draft, distinguishing

We thus have a case in which the named plaintiff (the respondent here) no longer has any interest in the injuries asserted in his complaint, and where no member of the putative class is before the Court or even has been identified. The case therefore lacks a plaintiff having that minimal personal stage which is a constitutional prerequisite to the ~~jurisdiction~~ jurisdiction of an Article III court. In any realistic sense, the only party before this Court who appears to have an interest ~~in the~~ is ~~a~~ counsel who no longer has ~~an identifiable~~ a client.*

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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* I imply no criticism of whatever counsel in this case. The precise question ~~presented~~ has not been decided by this Court. Moreover, the Court of Appeals agreed that a live controversy still exists, and the case was brought to this Court by the United States.

lfp/ss 12/31/79 Rider A, p. 7 (Geraghty)

The foregoing decisions, largely ignored by the Court's opinion, establish principles that this Court has applied consistently. To be sure they involve the initial question of standing to bring an action rather than class actions. But there is no exception in Article III for class actions. The constitutional doctrines of standing and mootness focus alike on whether a personal stake is at issue in a live controversy. We have recognized, however, that when a class has been certified in accordance with Rule 23 it "acquires a legal status separate from the interests asserted by [the named plaintiff]" Sosna v. Iowa, 419 U.S. 393, 399 (1975).

This suit was filed by respondent as a class action while he was serving time in a federal prison. The District Court denied classx certification and granted summary judgment for petitioners. Respondent appealed, but before any brief was filed he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot, but the Court of Appeals denied that motion, ~~reversed~~ the ~~judgment~~ order of the District Court denying class certifn., and remanded the case for further proceedings. The court concluded that despite the conceded mootness of respondent's personal claim, the propriety of denial of class certification ~~class action issue~~ remained ax live controversy in which respondent - as class representative - had sufficient interest to prosecute the appeal. This Court today agrees with this holding of the Court of Appeals. (FN) ~~As I believe this decision cuts deeply into the core of Article III's case or controversy requirement, I dissent.~~

, apparently is elevated by the Court's opinion in this case to the status of new doctrine. If this is the intent, there is serious tension with the opinion of Chief Justice Burger for the Court in Roper, also handed down today. In Roper, the Court is careful to explain that allowing the named plaintiff who has prevailed on the merits to continue in the case for the purpose of appealing, within the statutory period, the denial of class certification rests upon the "critical distinction" between mootness deriving from a judgment and mootness deriving from events extrinsic to the litigation. Ante, at ---, slip op., at 9. When a judgment has been entered the Roper Court holds that Article III is relevant only indirectly to a central question of appealability. Id., at 7, 12. Roper also expressly notes that the named plaintiff whose judgment was satisfied retains an economic interest in sharing litigation costs with the class. Thus, it is far from apparent how these two cases can be reconciled. Here, mootness did not derive from a judgment; rather, it resulted solely from an extrinsic event - the unconditional release from prison of the only named plaintiff. Thus, a

distinction viewed as "critical" by the *Roper* Court is ignored by the *Geraghty* Court.

Although *Roper* fairly may be criticized on other grounds, *ante*, at ___, it carefully leaves undisturbed the fundamental rule that a plaintiff who can no longer assert a concrete injury remediable by judicial action has ceased to present a case cognizable in an Article III court.

Ellen - substitute new initials before going to printer

Revised LFP

~~er 1/16/80~~ LFP 1/17/80

No. 78-572 United States Parole Commission v. Geraghty

MR. JUSTICE POWELL, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before ~~he filed any~~ briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, ~~the Court~~ it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. Ante at 8 - 12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney

general concept" to appeal the denial of class certification even when his personal claim for relief is moot. Ante, at 12 - 16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. Ante, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent's present interest in the controversy makes him a proper plaintiff.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies self-imposed restraints on the exercise of judicial power. E.g., Singleton v. Wulff, 428 U.S. 106, 112 (1976); Warth v. Seldin, 422 U.S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. Ante, at 12. But the constitutional minimum has been

given definite content: "[i]n order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).1/ Although non-economic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject - or with the rights of third parties - for "the concrete injury required by Art. III." Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 (1976).2/

As the Court notes today, the same threshold requirement must be satisfied throughout the action. Ante, at 8; see Sosna v. Iowa, 419 U.S. 393, 402 (1975). Prudential considerations not present at the outset may come into play after the parties have invested substantial resources in an action and generated a factual record. But an actual case or controversy in the constitutional sense "must be extant at all stages of review." Steffel v. Thompson, 415 U.S. 452, 459 n. 10 (1974). Cases that no longer "'touc[h] the legal relations of parties having adverse legal interests'" are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971)(per curiam),

quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937). The limitation flows directly from Art. III. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974)(per curiam).3/

Since the question is one of power, practical considerations do not control. Sosna v. Iowa 419 U.S. 393, 401 n.9 (1975); Richardson v. Ramirez, 418 U.S. 24, 36 (1974); United States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See DeFunis v. Odegaard, supra, at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. Sibron v. New York, 392 U.S. 40, 53-58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply some showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." ~~On the contrary,~~ Indeed, the personal stake requirement sometimes appears rigidly formalistic. See Davis, Standing: Taxpayers and Others, 35 U.

Chi. L. Rev. 601, 613-614 (1968). We have insisted upon the requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by our Constitution, "founded in concern about the proper - and properly limited - role of the courts in a democratic society." Warth v. Seldin, 422 U.S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." United States v. SCRAP, 412 U.S. 669, 687 (1973); see Simon v. Eastern Kentucky Welfare Rights Org., supra, at 60 (BRENNAN, J., concurring in the judgment); Sierra Club v. Morton, 405 U.S.727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." O'Shea v. Littleton, 414 U.S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." Sosna v. Iowa, supra at 399

(1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. Franks v. Bowman Transportation Co., 424 U.S. 747, 755-756 (1976); Sosna v. Iowa, supra, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.4/ In the words of his own lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in representing respondent, as opposed to persons presently incarcerated, as named plaintiff. Ibid.5/ In these circumstances, Art. III and the precedents of this Court require dismissal of the remnants of this suit. But the Court views the case differently and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time - and without attempting to reconcile the many cases to the contrary - that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." Ante, at 12 and n.7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation.

These cases include Gerstein v. Pugh, 420 U.S. 103, 110-111 n.11 (1975), United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), and today's decision in Deposit Guaranty Nat. Bank v. Roper, ante, p. ___. Each case is said to show that a class action is not necessarily mooted by the loss of the class representative's personal stake in the merits, even though no class has been certified. Ante, at 11. Sosna itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" Ante, at 15. The Court grievously misreads these precedents, for they show nothing of the kind.

A

In Sosna, the Court simply acknowledged that the certification procedure gives legal recognition to additional adverse parties. Cf. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).6/ And in Gerstein, the Court applied a rule long established by non-class action cases that never have been thought to erode the requirement of a personal stake in the outcome. Gerstein held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The action did not continue because

a personal stake in the outcome on the merits was unnecessary. Rather, the lawsuit fell in "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U.S., at 110 n. 11.7/

McDonald and Roper sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case departs from traditional understandings of the personal stake requirement. In McDonald, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U.S., at 390.8/ Because the Court found that her claim was not time-barred, the intervenor in McDonald possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.9/ At most, McDonald holds only that an action which is kept alive ~~promptly pursued~~ by interested parties within prescribed periods of limitations ~~at all times~~ does not "die" in an Art. III sense. ~~because of a brief interval in which neither the original nor the substitute party was present before the court.~~ ~~10/~~

There is a dictum ~~The Court stated~~ in McDonald that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U.S., at 393. That gratuitous sentence, ~~dictum~~ repeated in Coopers & Lybrand v. Livesay, 437 U.S.

viewed as:

463, 469, 470 n. 15 (1978), apparently is elevated today today is adopted as law. Roper explains, however, that the rule allowing a plaintiff who has prevailed on the merits to appeal the denial of class certification rests upon the "critical distinction" between mootness deriving from a judgment and mootness deriving from events extrinsic to the litigation. Ante, at ___, slip op. at 9. When a judgment has been entered, the Court holds that Art. III is relevant only indirectly to the central question of appealability. Id., at 7, 12. Roper also expressly notes the named plaintiffs' economic interest in sharing litigation costs with the class - an interest not present here. Id., at 10 n. 8. Although Roper may be criticized on other grounds, ante, at ___, it leaves undisturbed the fundamental rule that a plaintiff who can no longer assert a concrete injury remediable by judicial action has ceased to present a case cognizable in an Art. III court.

A →

Ellen: does this read Roper too generously?

B

The ~~"less flexible"~~ cases cited by the Court as "less flexible" - and therefore, less authoritative - apply ~~this fundamental rule~~ established Art. III doctrine (see supra ___) in cases closely analogous to this one. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975)(per curiam); Weinstein v. Bradford, 423 U.S. 147 (1975)(per curiam); Pasadena City Board of Education v. Spangler, 427 U.S. 424, 430 (1976). As they are about to become second class precedents,

, apparently is elevated by the Court's opinion in this case to the status of new doctrine. If this is the intent, there is serious tension with the opinion of [illegible] the Court in Roper also handed down today. In Roper, the Court is careful to explain that allowing the named plaintiff who has prevailed on the merits to continue in the case for the purpose of appealing, within the statutory period, the denial of class certification rests upon the "critical distinction" between mootness deriving from a judgment and mootness deriving from events extrinsic to the litigation. Ante, at ___ (slip op., at 9). When a judgment has been entered, the Roper Court holds that Article III is relevant only indirectly to the central question of appealability. Id., at 7, 12. Roper also expressly notes that the named plaintiff whose judgment was satisfied retains an economic interest in sharing litigation costs with the class. Thus, it is far from apparent how these two cases can be reconciled. Here, mootness did not derive from a judgment; rather, it resulted solely from an extrinsic event — the unconditional release from prison of the only named plaintiff. Thus, a

a "critical distinction" identified in

~~a distinction viewed as "critical" by the Roper Court~~

Roper is absent in this case.

~~is ignored by the Geraghty Court.~~

Although (the distinctions relied on in) ~~Roper fairly may be criticized,~~

that case

~~on other grounds,~~ ante, at ---, ~~it carefully leaves~~

does not purport to

~~un~~disturb~~ed~~ the fundamental rule that a plaintiff

who can no longer assert a concrete injury

remediable by judicial action has ceased to present

a case cognizable in an Article III court.

these cases are relegated to a footnote. Ante, at 12 n.7. But the cases are quite recent decisions of this Court. They applied long established principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In Jacobs, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U.S., at 130. Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in Spangler, an action saved from mootness only by the timely intervention of a third party. 427 U.S., at 430-431. See also Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976). And in Bradford, where the District Court had denied certification outright, the Court held that the

named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U.S., at 149. See also Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8 (1978).

The Court suggests that Jacobs and Spangler may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the district court had granted - albeit defectively - class status. We chose not to remand for correction of the oral certification order in Jacobs because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying Jacobs, and Bradford as well, is the elementary principle that no one has any personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.11/ The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more ~~startling still~~ disturbing. The Court splits the class aspects of this action into two separate "claims": that the action may be maintained by respondent on behalf of ~~a~~ an uncertified class, and that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. Ante, at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question. Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with any concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a

The Court's reliance on some new "right" inherent in Rule 23 is entirely misplaced. We have held that even Congress may not ~~grant us~~ confer federal court jurisdiction when Art. III does not. Gladstone, Realtors v. Village of Bellwood, 441 U.S., at 100; O'Shea v. Littleton, 414 U.S., at 494 & n.2; see Marbury v. Madison, 1 Cranch 137, 175-177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. R. Civ. P. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See Warth v. Seldin, 422 U.S., at 501; Sierra Club v. Morton, 405 U.S., at 737-738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they are an aspect of those "policy rules often invoked by the court 'to avoid passing prematurely on constitutional questions.'" Franks v. Bowman Transportation Co. 424 U.S., at 755-756 & n. 8, quoting Flast v. Cohen, 392 U.S.

83, 97 (1968). Such rules operate only in "'cases confessedly within [the Court's] jurisdiction.'" Ibid. The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.12/ Indeed, each of these characteristics is sure to be present in the typical "private attorney general" action brought by ~~an interested~~ a public spirited citizen.13/ Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.14/

The Court reasons that this ~~dramatic~~ departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." Ante, at 13, 14. But the Court has created a false dilemma. As noted in Roper, class certification issues are "ancillary to the litigation of substantive claims." Ante, at ___ (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often

generally have no value apart from their capacity to increase the likelihood of success on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits. A class representative is permitted to litigate the class certification question because it is inextricably entwined with his attempt to establish substantive claims - not because of any independent interest in serving as class representative and certainly not, as the Court suggests, because Art. III makes an exception for "nontraditional" forms of litigation.

The class action is scarcely a new idea. Rule 23 merely codifies procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different "'means for presenting a case or controversy <u>otherwise cognizable by the federal courts</u>.'" <u>Aetna Life Ins. Co. v. Haworth</u>, 300 U.S., at 240 (1937) (Declaratory Judgment Act), quoting <u>Nashville, C. & St. L. Ry. v. Wallace</u>, 288 U.S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action

~~which has significantly advanced the administration of justice,~~

may ~~affect~~ be relevant to prudential ~~decisions in this area~~ considerations.15/ But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.16

IV

In short, we deal with a case in which the putative class representative - respondent here - no longer has ~~any~~ the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendant and a lawyer who no longer has a client.17/

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

FOOTNOTES

1/ See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978); Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252, 260-261 (1977); Warth v. Seldin, 422 U.S. 490, 499 (1975); Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973).

2/ See, e.g., Schlesinger v. Reservists to Stop the War 418 U.S. 208, 227 (1974); O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-167 (1972); Sierra Club v. Morton, 405 U.S. 727, 736-738 (1972); Tileston v. Ullman, 318 U.S. 44, 46 (1943) (per curiam). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. Ashcroft v. Mattis, 431 U.S. 171, 172-173 (1977) (per curiam).

3/ See, e.g., Preiser v. Newkirk, 422 U.S. 395, 401-402 (1975); SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 407 (1972); Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969); Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964)

4/ The Court agrees that respondent has no personal stake in the ultimate outcome of the case, for it holds that the case must be dismissed as moot if no class is certified on remand. Ante, at 15, 17. And the Court does not suggest that respondent will be affected personally by any ruling on the class certification question that is remanded today. In fact,

the Court apparently concedes that respondent has no personal stake - "in the traditional sense" - in obtaining certification. Id., at 14.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under United Air Lines v. McDonald, 432 U.S. 385 (1977).

5/ Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he will simply "file a new case." Tr. of Oral Arg. 25. Except as necessary to respond to questions, the lawyer thereafter limited his presentation to a discussion of the merits.

6/ The order certifying the class represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification sharpens the interests of unnamed class members in the outcome; only after certification

will they be bound by the outcome. After certification, the action cannot be settled or dismissed without the approval of the court and appropriate notice to class members. Fed. R. Civ. P. 23(e). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot, the court can monitor his performance and decertify the class under Rule 23 if he defaults in this responsibility. After certification, in other words, the case is no different in principle from the more traditional representative action in which a single party who cannot be brought before the court because of, for example, his incompetence is permitted to litigate through an appointed fiduciary.

7/ The Court's analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of Southern Pac. Terminal v. ICC, 219 U.S. 498, 515 (1911). See Roe v. Wade, 410 U.S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" Swisher v. Brady, 438 U.S. 204, 213 n.11

(1978), quoting Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975). These limitations themselves are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

8/ The individual claims of the original named plaintiffs had been settled after a judgment on the question of liability. 432 U.S., at 389, 393 n.14.

9/ ~~The Court's~~ This extensive inquiry in McDonald would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim ~~has~~ long since has "expired", ~~with the passage of time~~, he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

10/ See Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976) (permitting intervenors to continue the litigation despite suggestions of mootness, without inquiring into questions of timing).

10/ ~~This understanding~~ The vitality of the Jacobs result is reflected in the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 406 n. 12 (1977); Franks v. Bowman Transportation Co., supra, 424 U.S., at

10/ In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E.g.*, *Singleton* v. *Wulff*, 428 U.S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U.S. 249, 255-256 (1953). In each case, however, we have been careful to insist that they also identify concrete, individual injury to themselves that will be remedied by the relief sought. Ibid.; see n. 2 *supra*, and accompanying text.

754 n.6, 755-756; see Kremens v. Bartley, 431 U.S. 119, 129-120 (1977); Richardson v. Ramirez, 418 U.S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. Kremens v. Bartley, supra, at 143 n.6 (BRENNAN, J., dissenting); Sosna v. Iowa, 419 U.S., at 402; see Bell v. Wolfish, ___ U.S. ___, ___ n. 5 (1979); Zablocki v. Redhail, 434 U.S. 374, 382 n.9 (1978).

12/ The Court has twice rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. Richardson v. Ramirez, 418 U.S. 24, 35-36 (1974); Hall v. Beals, 396 U.S. 45, 48-49 (1969) (per curiam).

13/ The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." Ante, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Respondent 23, 33. The record does not reveal whether respondent - as distinguished from his lawyer - now wishes to continue with the case. If he does, it is clear that his

interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." Ante, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from that of a "private attorney general" who might bring a "public action" to challenge the workings of the parole system.

14/ The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. This Court has ruled on neither the merits of the case nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn vacated the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the case must begin anew. Respondent's counsel himself finds our resolution of the mootness question of no practical importance. See note 5, supra. It is difficult to imagine a case in which the

prudential considerations aligned against a finding of mootness are less compelling.

15 I do not imply that the result reached today is necessary in any way to the continued vitality of the class action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, supra. And this case may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. Deposit Guaranty Nat. Bank v. Roper, ante, at ___ (slip op., at 11-12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

16/ In ~~its headlong rush~~ perhaps an understandable desire to "save" this action from mootness the Court ~~neglects~~ departs strikingly from the normal role of a reviewing court. It fails to identify how, if at all, the District Court has erred. The Court does not address the District Court's ruling against respondent on the merits or the District Court's refusal to certify the broad class sought by respondent. Nor does the Court suggest that the District Court erred in failing to consider the possibility of subclasses sua sponte. Nevertheless, respondent (actually, his lawyer) is given the opportunity to raise the

subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the court below. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." Ante, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from raising the subclass issue thereafter.

17/ I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

12a. In a footnote, ante at 18 n. 11, the Court states:

> "This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, e.g., Powell v. McCormack, 395 U.S., at 495, 500. His injury continued up to and beyond the time the District Court denied class certification." Ante, at 18, n. 11.

This appears to be a categoric claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages, even if otherwise material, is irrelevant here as respondent sought no damages - only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. Oral Agr. 25. If indeed the Court is claiming concrete injury "up to and beyond the time" class certification was denied, it would indeed be helpful for the Court to identify specifically the injury it perceives and that respondent's counsel, did not

er 2/11/80

RE: No. 78-572 Geraghty

Here are some proposed rsponses to the Court's new footnote 11. I do not think the Court makes any telling points against our dissenting position, however, and if you decide against responding I will not be insulted.

RIDER 1, p. 2 n.1:

Each of these cases rejects explicitly the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. Ante, at 16 n. 11; Flast v. Cohen, 392 U.S. 83, 120 (1968)(Harlan, J., dissenting). Until today, however, that view never had commanded a majority.

RIDER 2, p. 4

4a/ The Court states that "the erosion of the strict formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." Ante, at 16 n. 11. ~~Not surprisingly, The Court~~ It, however, fails to cite a single Court opinion in support of either statement. To the extent that the decision in Flast v. Cohen, 392 U.S. 83 (1968), ~~actually~~ supports the position ascribed to it in the dissent, id., at 117-120, it does not survive the long line of express holdings that began with

Warth v. Seldin, 422 U.S. 490 (1975), and were reaffirmed only last term. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). See nn. 1 & 2, supra.

RIDER 3, p. 8

8a/ In assuming that the class aspects of the action continued after the denial of certification, McDonald departed significantly from the principles established in Sosna v. Iowa and Franks v. Bowman Transportation Co. See pp. 4-5, supra; United Airlines, Inc. v. McDonald, 432 U.S. 385, 399-400 (POWELL, J., dissenting). ~~The Court's~~ In my view, not accepted by the Court, the reading of Rule 23 may have caused some prejudice to the defendant in that case. Ibid. But it created no exception to the Art. III requirement of a personal stake in the outcome, for there can be no doubt that the McDonald intervenors were interested parties plaintiff.

No?

RIDER 4, p. 11.

12a/ The Court notes that respondent may have a personal stake in obtaining damages for his allegedly illegal detention. Ante, at 16 n. 11. The relevance of that observation to the present action for injunctive and declaratory relief is not apparent. If the Court actually believes that respondent retains a stake in this action for the purpose of obtaining damages, its refusal to consider the merits of his claim is incomprehensible.

Ellen - see May substitute

Ellen See my comment

RIDER 5, p. 11

12b/ The Court attempts to limit the sweeping consequences that would flow from a straightforward application of these criteria, see infra, at 12-13 & n. 15, by asserting that "[e]ach case must be decided on its own facts." Ante, at 16 n. 11. But the Court does not expound a limiting principle of any kind. Adverse practical consequences certainly cannot explain today's result, since none would flow from a finding of mootness in this case. See n. 15, infra. Nor does the "relation back principle," ante, at 16 n. 11, further the analysis. Although this legal fiction may provide a useful shorthand label for the Court's conclusion, it hardly supplies an explanation.

lfp/ss 2/11/80 Rider 5, p. 11 ~~(Roper)~~ Geraghty

12b/ The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see infra, at 12-13 and n. 15, by asserting that "[e]ach case must be decided on its own facts", considering the "practicalities and prudential considerations". Ante, at 17 n. 11. The Court long has recognized a difference between prudential and constitutional (Article III) standing. ^ I am not aware that the Court, until today, has ever merged these considerations for the purpose of eliminating the constitutional requirement of a personal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Article III analysis, cannot justify today's holding as none whatever would flow from a decision of mootness. See n. 15, infra. Nor does the Court's reliance upon a "relation back principle", ante, at 18, n. 11, further analysis. Indeed, although this may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

Cite cases Warth?

lfp/ss 2/11/80 Footnote 12a (Geraghty)

The Court states that "respondent suffered actual, concert injury . . . [that] continued up to and beyond the time the District Court denied class certification." Ante, at 18 n. 11. Apparently this statement is based on the assumption that "damages" were - or could have been - souught. We need not consider whether the situation would be different if damages had been sought, had respondent sought only injunctive and declaratory relief. Indeed, counsel for respondent, frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr., Oral Arg. at 25. In view of this categoric concession, I invite the Court to identify the "actual, concrete injury" suffered by respondent after his unconditional release from prison.

er 2/12/80

No. 78-572 Geraghty

I Text at page 4.

It turns out that Professor Davis' views do not lend themselves to ready quotation, as the portion of the article referred to in our opinion was written in a somewhat whimsical tone that could be misunderstood. What he said was that the law was clear that "standing may rest upon a trifle, and it is equally clear that at least a trifling interest of the plaintiff is always required. Since the trifle makes all the difference between standing and lack of standing, the difference between a trifle and zero becomes more than a trifle! One may ask: Why should the law of standing be so nonsensical? My opinion is that drawing the line between a trifle and zero is sensible, logical, and practical, as I shall try to show." 35 U. Chi. L. Rev., at 613-614.

He also said that: "I know of no federal case in which a plaintiff was held to have standing without asserting an interest of his own. . . . I think it entirely clear that the Court has always required 'economic or other personal interests' as the basis for standing, without exception." Id., at 616. "Even though the law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition, without exception: One who has no interest of his own at stake always lacks standing." Id., at 617. Finally, he emphasizes that federal courts have never permitted the "public action." Id., at 614, 629-630.

I am not certain what to quote on page 4. How about:

"Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing "to which the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968).[5] We have insisted upon the personal stake requirement in mootness and standing cases because it is embedded in . . . ."

II

In Rider 1, on p. 2, I believe that the views expressed in Richardson fall in the same category as Justice Harlan's view in Flast: they never commanded a majority, and, as we say in Rider 2, have now been rejected by Warth and its progeny. We could add a "see also" to the citations in Rider 1, citing Richardson (POWELL, J., concurring). Or we could simply ignore Richardson. I tend to think that Richardson is not sufficiently glaring a precedent to require our calling attention to the inconsistency. On the other hand, you are perfectly entitled to say that your past views have been rejected repeatedly by the majority and now ought not to be resurrected. I am on the fence on this one.

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No. 78-572 Geraghty

RIDER 1, p. 2 n.1:

Each of these cases rejects explicitly the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. Ante, at 16 n. 11; Flast v. Cohen, 392 U.S. 83, 120 (1968)(Harlan, J., dissenting). Until today, however, that view never had commanded a majority.

RIDER 2, p. 4

4a/ The Court states that "the erosion of the strict formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." Ante, at 16 n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in Flast v. Cohen, 392 U.S. 83 (1968), supports the position ascribed to it in the dissent, id., at 117-120, it does not survive the long line of express holdings that began with Warth v. Seldin, 422 U.S. 490 (1975), and were reaffirmed only last term. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). See nn. 1 & 2, supra. Even before Warth, a leading commentator observed that this Court had adhered to the personal stake requirement

"without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 616, 617 (1968).

RIDER 4, p. 11.

12a/ The Court states that "respondent suffered actual, concrete injury . . . [that] would satisfy the formalistic personal stake requirement if damages were sought." Ante, at 18 n. 11. We need not consider whether the situation would be different had respondent alleged a claim for damages, as respondent never has asked for anything but injunctive and declaratory relief. App. 3-16. Indeed, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. Oral Arg. 25. In view of this categorical concession, I invite the Court to identify the "actual, concrete injury" that continued after respondent's unconditional release from prison.

RIDER 5, p. 11

12b. The Court attempts to limit the sweeping

prudential and constitutional aspects of the standing and mootness doctrines. See p. 2, supra. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a personal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Article III analysis, cannot justify today's holding as none whatever would flow from a finding of mootness. See n. 15, infra. Nor does the Court's reliance upon a "relation back principle", ante, at 18, n. 11, further analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

2,4,12-13

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

2-13-80

From: Mr. Justice Powell

3rd DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 78-572

12

United States Parole Commission et al., Petitioners, v. John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete

[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260–261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Each of these cases rejects ~~explicitly~~ the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. *Ante*, at 16, n. 11; *Flast* v. *Cohen*, 392 U. S. 83, 120 (1968) (Harlan, J., dissenting); see also United States v. Richardson, 418 U.S. 166, 180 (1974) (POWELL, J., concurring). Until today, however, that view never had commanded a majority.

injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401,

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[2] See, *e. g.*, *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

n. 9 (1975); *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard*, *supra*, at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York*, 392 U. S. 40, 53-58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing "to which the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968).[3] We have insisted upon the personal stake requirement in mootness and standing cases because it is em-

[3] The Court states that "the erosion of the strict formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." *Ante*, at 16, n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in *Flast* v. *Cohen*, 392 U. S. 83 (1968), supports the position ascribed to it in the dissent, *id.*, at 117-120, it does not survive the long line of express holdings that began with *Warth* v. *Seldin*, 422 U. S. 490 (1975), and were reaffirmed only last Term. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979). See nn. 1 & 2, *supra*. Even before *Warth*, a leading commentator observed that the personal stake requirement had no exceptions. Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 616, 617 (1968).

Professor Davis supra, at

bedded in the case or controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa, supra*, at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa, supra*, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[9] In the words of his own

[9] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante*, at 14.

Several prisoners now in federal custody have filed a motion to inter-

lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante*, at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III

vene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. In my view, the Court misreads these precedents.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[8] And in *Gerstein*, the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits

[8] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (c); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify

[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher* v. *Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that a named plaintiff who has prevailed on the merits may appeal the denial of class certification because of a "critical distinction" between mootness deriving from a judgment and mootness resulting from events extrinsic to the litigation. *Ante*, at — (slip op., at 9). When a prevailing party seeks review of a ruling collateral to the judgment, *Roper* concludes, Art. III is relevant only indirectly to the question of appealability. *Id.*, at 7, 12. *Roper* also suggests that a named plaintiff whose judgment is satisfied may retain an economic interest in sharing litigation costs with the class. *Id.*, at 10, n. 8.

It is not apparent how *Roper* supports the decision in this case. There is not even a speculative interest in sharing costs here. Moreover, since respondent's claim was mooted by an extrinsic event—his unconditional release from prison—the distinction identified in *Roper* as "critical" is absent in this case. *Id.*, at 9. One need not accept that distinction as sound to conclude that *Roper* affords only illusory support for the Court's ruling here.

To INSERT

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The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But

the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures.

[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[12] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

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[12] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.;* see n. 2, *supra*, and accompanying text.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question.[14] Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.[15]

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[14] In a footnote, *ante*, at 18, n. 11, the Court states:

"This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e. g., Powell* v. *McCormack*, 395 U. S., at 495–500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages—only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review," see p. 3, *supra*, it would ~~indeed~~ be helpful for it to identify specifically this injury that was not apparent to respondent's counsel.

[15] The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see *infra*, at 12–13, and n. 15, by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations." *Ante*, at 17, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See p. 2, *supra*. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a personal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Art. III analysis, cannot justify

The claim of concrete injury remains empty, as the Court has identified none.

~~One may search the Court's opinion~~

Ellen - what do you think of adding this "stinger"

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is sure to be present in the typical "private attorney general"

today's holding as none whatever would flow from a finding of mootness. See n. 15, *infra*. Nor does the Court's reliance upon a "relation back principle," *ante*, at 18, n. 11, further the analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g., Richardson* v. *Ramirez*, 418 U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

action brought by a public spirited citizen.[17] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[18]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal

[17] The Courts assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[18] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[10]

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[10] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra*. And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, at — (slip op., at 11–12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court thereafter.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

er 2/26/80

Excellent!

No. 78-572 Geraghty; INSERT on p. 9:

In Roper, the Court holds that a named plaintiff whose judgment is satisfied may retain a personal stake in sharing litigation costs with the class. Ante, at ___ (Slip Op. at 7 n. 6, 10). Finding that Art. III is satisfied by this continuing economic interest, Roper reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment. See id., at 7, 9-10. The Court concludes that the denial of class certification falls within this category, as long as the appellants "assert a continuing stake in the outcome of the appeal." Id., at 10.

It is not apparent how Roper supports the decision in this case. Indeed, Roper reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III. Here, there is not even a speculative interest in sharing costs, and respondent positively denies that any of his individual interests will be affected by the appeal. See p. 6, supra. Thus, a fact that was critical to the analysis in Roper is absent in this case. One need not accept that analysis as sound to conclude that it affords no support for the Court's ruling here.

far from — expressly — can be thought to — the opinion by the Chief Justice in

Ellen does HAB claim support? If so, cross cite to it.

Ellen - This is an excellent opinion except for p 12. I think the point made there is marginal + can be omitted. You + Greg take a look & see how it can either be changed or omitted.

LFP

Ellen, see my editing & questions on pps: 2 3 4 5 6 8 11 12 13 15

CHAMBERS DRAFT
1/18/80

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent's present interest in the controversy makes him a proper plaintiff.

Recent decisions of this Court have considered the personal stake requirements with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 12. But the constitutional minimum has been given definite content: "[i]n order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260-261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).

[2] See, *e. g., Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U. S. 166-167 (1972); *Sierra Club* v. *Morton*, 405

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante,* at 8; see *Sosna* v. *Iowa,* 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may come into play after the parties have invested substantial resources in an action and generated a factual record. But an actual case or controversy in the constitutional sense "must be extant at all stages of review." *Steffel* v. *Thompson,* 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard,* 416 U. S. 312, 316 (1974) (*per curiam*).[3]

Since the question is one of power, practical considerations do not control. *Sosna* v. *Iowa,* 419 U. S. 393, 401, n. 9 (1975); *Richardson* v. *Ramirez,* 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard, supra,* at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York,* 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory

U. S. 727, 736–738 (1972); *Tileston* v. *Ullman,* 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis,* 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See, *e. g., Preiser* v. *Newkirk,* 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights,* 404 U. S. 403, 407 (1972); *Powell* v. *McCormack,* 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.,* 375 U. S. 301, n. 3 (1964).

that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply ~~some~~ a non-frivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the personal stake requirement sometimes appears rigidly formalistic. See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613–614 (1968). We nevertheles have insisted upon the requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa*, *supra*, at

399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa, supra,* at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[4] In the words of his own lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[5] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

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[4] The Court agrees that respondent has no personal stake in the ultimate outcome of the case, for it holds that the case must be dismissed as moot if no class is certified on remand. *Ante,* at 15, 17. Nor does the Court suggest that respondent will be affected personally by any ruling on the class certification question that is remanded today. In fact, it apparently is conceded that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Id.,* at 14.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Air Lines* v. *McDonald,* 432 U. S. 385 (1977).

[5] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he will simply "file a new case." Tr. of Oral Arg. 25. Except as necessary to respond to questions, the lawyer thereafter limited his presentation to a discussion of the merits.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. These cases include *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. —. Each case is said to show that a class action is not necessarily mooted by the loss of the class representative's personal stake in the merits, even though no class has been certified. *Ante*, at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. The Court grievously misreads these precedents, for they show nothing of the kind.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[6] And in *Gerstein*, the Court applied a rule long

[6] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only after certification will they be bound by the outcome. After certification, the action cannot be settled or dismissed without the approval of the court and appropriate notice to class members. Fed. Rule Civ. Proc. 23 (e). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot, the court can monitor his performance and decertify the class under Rule 23 if he defaults in this responsibility. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

established by nonclass action cases that never has been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The action did not continue because a personal stake in the outcome on the merits was unnecessary. Rather, the lawsuit fell in "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[7]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case departs from traditional understandings of the personal stake requirement. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[8] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[9] At most,

[7] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher* v. *Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations themselves are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[8] The individual claims of the original named plaintiffs had been settled after a judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[9] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification

McDonald holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court is careful to explain that a named plaintiff who has prevailed on the merits may appeal the denial of class certification because of a "critical distinction" between mootness deriving from a judgment and mootness resulting from events extrinsic to the litigation. *Ante*, at — (slip op., at 9). When a judgment has been entered, *Roper* concludes, Art. III is relevant only indirectly to the question of appealability. *Id.*, at 7, 12. *Roper* also suggests that a named plaintiff whose judgment is satisfied may retain an economic interest in sharing litigation costs with the class. *Id.*, at 10, n. 8.

It is far from apparent how these two cases can be reconciled. The Court does not identify an economic interest in this case. Moreover, since this case was mooted by an extrinsic event—the only plaintiff's unconditional release from prison—a "critical distinction" identified in *Roper* is absent here. That distinction fairly may be criticized. *Ante*, at —. But the fact remains that *Roper* does not purport to disturb the fundamental rule that a plaintiff who can no longer assert a concrete injury remediable by judicial action has ceased to present a case cognizable in an Art. III court.

issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[10] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where

[10] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.*, see n. 2, *supra*, and accompanying text.

the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs and Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[11] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more

[11] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named palintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez,* 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co., supra,* 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley,* 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez,* 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley, supra,* at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa,* 419 U. S., at 402; see *Bell* v. *Wolfish,* — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail,* 434 U. S. 374, 382, n. 9 (1978).

disturbing. The Court splits the class aspects of this action into two separate "claims": that the action may be maintained by respondent on behalf of a class, and that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question. Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with any concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general

concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they are an aspect of those "policy rules often invoked by the court 'to avoid passing prematurely on constitutional questions.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). Such rules operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Ibid.* The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[12] Indeed, each of these characteristics is sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[13] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[14]

[12] The Court has twice rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *Richardson* v. *Ramirez*, 418 U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

[13] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a State. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[14] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action

Ellen - this is only page in op. that seems - to me - to lack force. But with my omission, I think it OK

Ellen - is the force of this statement is not evident to me

Now it is clear.

The Court reasons that this departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been

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challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the case must begin anew—this time without a plaintiff. It is difficult to imagine a case in which the prudential considerations aligned against a finding of mootness are less compelling.

questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[15] But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[16]

[15] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra.* And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper, ante,* at — (slip op., at 11-12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[16] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits, or its refusal to certify the broad class sought by respondent. Nor does the Court suggest that the District Court erred in failing to consider the possibility of subclasses *sua sponte.* Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the court below. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante,* at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order againt him on the merits cannot excuse him from raising the subclass issue thereafter.

IV

In short, ~~we deal with~~ this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendant and a lawyer who no longer has a client.[17]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

[17] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

1-24-80

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

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[1] See, *e. g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260-261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).

[2] See, *e. g.*, *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which after the parties have invested substantial resources in an action and generated a factual record.[3] But an actual case or controversy in the constitutional sense "must be extant at all stages of review." *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401, n. 9 (1975); *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard*, *supra*, at 316. Collateral consequences of the original wrong may supply the individual interest in some circum-

U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

stances. *Sibron* v. *New York*, 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219, U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the personal stake requirement sometimes appears rigidly formalistic. See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613–614 (1968). We nevertheless have insisted upon the requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule

23 can it "acquir[e] a legal status separate from the interests aserted by [the named plaintiff]." *Sosna* v. *Iowa, supra,* at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa, supra,* at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[5] In the words of his own lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[6] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and con-

[5] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante,* at 14.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Air Lines* v. *McDonald,* 432 U. S. 385 (1977).

[6] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out. Tr. of Oral Arg. 25.

structs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are include *Gerstein* v. *Pugh*, 420 U. S. 103, 110-111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome, even though no class has been certified. *Ante*, at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. The Court grievously misreads these precedents, for they show nothing of the kind.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[7] And in *Gerstein*, the Court applied a rule long

[7] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only after certification will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almand Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposi-

established—outside the class action context—by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that action a personal stake in the outcome on the merits was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the lawsuit within "that narrow class of cases" that are "distinctly "capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[8]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds

tion on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c) (1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

[8] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[9] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[10] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that a named plaintiff who has prevailed on the merits may appeal the denial of class certification because of a "critical distinction" between mootness resulting from events extrinsic to the litigation. *Ante*, at — (slip op., at 9). When a prevailing party seeks review of a ruling collateral to the judgment, *Roper* concludes, Art. III is relevant only indirectly to the question of appealability. *Id.*, at 7, 12. *Roper* also suggests that a named plaintiff whose judgment is satisfied may retain an economic interest in sharing litigation costs with the class. *Id.*, at 10, n. 8.

[9] The individual claims of the original named plaintiffs had been settled after a judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[10] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

It is far from apparent how *Roper* can be reconciled with this case. The Court does not identify an economic interest here. Moreover, since respondent's claim was mooted by an extrinsic event—his unconditional release from prison—a "critical distinction" identified in *Roper* is absent in this case. That distinction fairly may be criticized. *Id.*, at — (POWELL, J., dissenting). But the fact remains that *Roper* does not purport to disturb the fundamental rule that a plaintiff who can no longer assert a concrete injury remediable by judicial action has ceased to present a case cognizable in an Art. III court.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class

properly identified by the District Court." 420 U. S., at 130.[11] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as

[11] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[12] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question. Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with any concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.

The Court's reliance on some new "right" inherent in Rule

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[12] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.;* see n. 2, *supra*, and accompanying text.

23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[13] Indeed, each of these characteristics is sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[14] Although we

[13] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g.*, *Richardson* v. *Ramirez*, 418 U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

[14] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a State. The class claims were added

have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[15]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular

to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[15] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, here can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different "'means for presenting a case or controversy *otherwise cognizable by the federal courts.*'" *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[16] But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[17]

[16] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra.* And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper, ante,* at — (slip op., at 11–12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[17] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendant and a lawyer who no longer has a client.[18]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclass a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court issue thereafter.

[18] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

1, 3, 5-7, 9, 11, 15

Mr. Justice: I have a few tiny stylistic changes and one stronger citation I wanted to add. If you approve, shall we make 1-30-80 these changes before recirculating?

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JAN 30 1980

Recirculated: ________

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, [with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join,] dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8–12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12–16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

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[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260-261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).

[2] See, *e. g., Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense "must be extant at all stages of review." *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer "'touc[h] the legal relations of parties having adverse legal interests'" are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Preiser v Newkirk, 422 U.S. 395, 401 (1975), quoting

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401, n. 9 (1975); *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard*, *supra*, at 316. Collateral consequences of the original wrong may supply the individual interest in some circum-

U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

stances. *Sibron* v. *New York*, 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219, U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the personal stake requirement sometimes appears rigidly formalistic. See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613–614 (1968). We nevertheless have insisted upon the requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org., supra,* at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule

23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa*, *supra*, at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa*, *supra*, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[5] In the words of his own lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[6] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and con-

[5] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante*, at 14.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977).

[6] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out. Tr. of Oral Arg. 25.

structs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the ~~action~~ lawsuit, even though no class has been certified. *Ante*, at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. In my view, the Court misreads these precedents.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[7] And in *Gerstein*, the Court applied a rule long

[7] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire

established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the lawsuit within "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[8]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal

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class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

[8] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[9] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[10] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that a named plaintiff who has prevailed on the merits may appeal the denial of class certification because of a "critical distinction" between mootness deriving from a judgment and mootness resulting from events extrinsic to the litigation. *Ante*, at — (slip op., at 9). When a prevailing party seeks review of a ruling collateral to the judgment, *Roper* concludes, Art. III is relevant only indirectly to the question of appealability. *Id.*, at 7, 12. *Roper* also suggests that a named plaintiff whose judgment is satisfied may retain an economic interest in sharing litigation costs with the class. *Id.*, at 10, n. 8.

[9] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[10] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

The Court in *Roper* creates novel Art. III doctrine with which I disagree. Yet it is not apparent how *Roper* supports the decision in this case. There is not even a speculative interest in sharing costs here. Moreover, since respondent's claim was mooted by an extrinsic event—his unconditional release from prison—the distinction identified in *Roper* as "critical" is absent in this case. *Id.*, at 9. One need not accept that distinction as sound to conclude that *Roper* affords only illusory support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[11]

[11] The vitality of the *Jacobs* result is underscored by the repeated

Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal

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dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[12] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question. Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with any concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.

The Court's reliance on some new "right" inherent in Rule

[12] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.*; see n. 2, *supra*, and accompanying text.

23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[13] Indeed, each of these characteristics is sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[14] Although we

[13] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g.*, *Richardson* v. *Ramirez*, 418 U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

[14] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added

have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[15]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular

to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[15] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, here can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[16] But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[17]

[16] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra*. And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, at — (slip op., at 11–12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[17] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendant and a lawyer who no longer has a client.[18]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court thereafter.

[18] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

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One printer's error at page 7. Recirculate?

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401, n. 9 (1975); *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard*, *supra*, at 316. Collateral consequences of the original wrong may supply the individual interest in some circum-

(*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

stances. *Sibron* v. *New York*, 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219, U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible."[4] Indeed, the personal stake requirement sometimes appears rigidly formalistic. See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613–614 (1968). We nevertheless have insisted upon the requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule

23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa*, *supra*, at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa*, *supra*, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[5] In the words of his own lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[6] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and con-

[5] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante*, at 14.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977).

[6] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

structs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante,* at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh,* 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante,* at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante,* at 15. In my view, the Court misreads these precedents.

A

In *Sosna,* the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240 (1937).[7] And in *Gerstein,* the Court applied a rule long

[7] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire

established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "the narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal

class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher* v. *Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

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There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that a named plaintiff who has prevailed on the merits may appeal the denial of class certification because of a "critical distinction" between mootness deriving from a judgment and mootness resulting from events extrinsic to the litigation. *Ante*, at — (slip op., at 9). When a prevailing party seeks review of a ruling collateral to the judgment, *Roper* concludes, Art. III is relevant only indirectly to the question of appealability. *Id.*, at 7, 12. *Roper* also suggests that a named plaintiff whose judgment is satisfied may retain an economic interest in sharing litigation costs with the class. *Id.*, at 10, n. 8.

[9] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[10] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

It is not apparent how *Roper* supports the decision in this case. There is not even a speculative interest in sharing costs here. Moreover, since respondent's claim was mooted by an extrinsic event—his unconditional release from prison—the distinction identified in *Roper* as "critical" is absent in this case. *Id.*, at 9. One need not accept that distinction as sound to conclude that *Roper* affords only illusory support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[11]

[11] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight*

Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mecha-

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v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

nism of class certification or otherwise.[12] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question. Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not

[12] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.*; see n. 2, *supra*, and accompanying text.

confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[13] Indeed, each of these characteristics is sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[14] Although we

[13] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g.*, *Richardson* v. *Ramirez*, 418 U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

[14] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might

have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[15]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value

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terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[15] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, here can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[16] But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[17]

[16] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra*. And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, at — (slip op., at 11–12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[17] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[18]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court thereafter.

[18] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1,3,5,7,9,11,15 LFP

From: Mr. Justice Powell

2-7-80

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SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante,* at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff,* 428 U. S. 106, 112 (1976); *Warth* v. *Seldin,* 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante,* at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U. S. 26, 40 (1976).[2]

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[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260–261 (1977); *Warth* v. *Seldin,* 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617 (1973). — RIDER 1

[2] See, *e. g., Schlesinger* v. *Reservists to Stop the War,* 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton,* 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman,* 318 U. S. 44, 46 (1943).

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante,* at 8; see *Sosna* v. *Iowa,* 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk,* 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson,* 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard,* 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa,* 419 U. S. 393, 401, n. 9 (1975); *Richardson* v. *Ramirez,* 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard, supra,* at 316. Collateral consequences of the original wrong may supply the individual interest in some circum-

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(*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis,* 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g., Preiser* v. *Newkirk,* 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights,* 404 U. S. 403, 407 (1972); *Powell* v. *McCormack,* 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.,* 375 U. S. 301, 306, n. 3 (1964).

stances. *Sibron* v. *New York*, 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219, U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the personal stake requirement sometimes appears rigidly formalistic. See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613–614 (1968). We nevertheless have insisted upon the requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule

23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa, supra,* at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa, supra,* at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[5] In the words of his own lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[6] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and con-

[5] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante,* at 14.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977).

[6] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

structs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante*, at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. In my view, the Court misreads these precedents.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[7] And in *Gerstein*, the Court applied a rule long

[7] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire

established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "the narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[8]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal

class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589-590, 602-603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

[8] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[9] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[10] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that a named plaintiff who has prevailed on the merits may appeal the denial of class certification because of a "critical distinction" between mootness deriving from a judgment and mootness resulting from events extrinsic to the litigation. *Ante*, at — (slip op., at 9). When a prevailing party seeks review of a ruling collateral to the judgment, *Roper* concludes, Art. III is relevant only indirectly to the question of appealability. *Id.*, at 7, 12. *Roper* also suggests that a named plaintiff whose judgment is satisfied may retain an economic interest in sharing litigation costs with the class. *Id.*, at 10, n. 8.

[9] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[10] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

It is not apparent how *Roper* supports the decision in this case. There is not even a speculative interest in sharing costs here. Moreover, since respondent's claim was mooted by an extrinsic event—his unconditional release from prison—the distinction identified in *Roper* as "critical" is absent in this case. *Id.*, at 9. One need not accept that distinction as sound to conclude that *Roper* affords only illusory support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[11]

[11] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight*

Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mecha-

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v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co., supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

nism of class certification or otherwise.[12] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question. Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.

12a/ Rider 4

12b/ Rider 5

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not

[12] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.;* see n. 2, *supra*, and accompanying text.

confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[13] Indeed, each of these characteristics is sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[14] Although we

[13] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g.*, *Richardson* v. *Ramirez*, 418 U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

[14] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might

have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[16]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value

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terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[16] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, here can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[16] But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[17]

[16] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra*. And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, at — (slip op., at 11–12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[17] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[18]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court thereafter.

[18] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: ________

Recirculated: FEB 8 1980

3d DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

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[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260-261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). INSERT 1-NO 9

[2] See, *e. g., Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943).

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No. 78-572 Geraghty

INSERT 1, p. 2 n.1:

Each of these cases rejects explicitly the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. Ante, at 16, n. 11; Flast v. Cohen, 392 U.S. 83, 120 (1968)(Harlan, J., dissenting). Until today, however, that view never had commanded a majority.

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401, n. 9 (1975); *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard*, *supra*, at 316. Collateral consequences of the original wrong may supply the individual interest in some circum-

(*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

stances. *Sibron* v. *New York*, 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219, U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the personal stake requirement sometimes appears rigidly formalistic. See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613–614 (1968). We nevertheless have insisted upon the requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

INSERT 2 (No 9)

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule

5/ INSERT 3

INSERT 2, p. 4:

Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing "to which the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968).5/ We have insisted upon the personal stake requirement

INSERT 3, p. 4

5/ The Court states that "the erosion of the strict formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." Ante, at 16, n. 11. It fails, however, to cite a single Court opinion in support of either

statement. To the extent that the decision in Flast v. Cohen, 392 U.S. 83 (1968), supports the position ascribed to it in the dissent, id., at 117-120, it does not survive the long line of express holdings that began with Warth v. Seldin, 422 U.S. 490

23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa, supra,* at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa, supra,* at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[6] In the words of his own lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and con-

[6] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante,* at 14.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

structs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante*, at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. In my view, the Court misreads these precedents.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[8] And in *Gerstein*, the Court applied a rule long

[8] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire

established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "the narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal

class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

9 The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher* v. *Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that a named plaintiff who has prevailed on the merits may appeal the denial of class certification because of a "critical distinction" between mootness deriving from a judgment and mootness resulting from events extrinsic to the litigation. *Ante*, at — (slip op., at 9). When a prevailing party seeks review of a ruling collateral to the judgment, *Roper* concludes, Art. III is relevant only indirectly to the question of appealability. *Id.*, at 7, 12. *Roper* also suggests that a named plaintiff whose judgment is satisfied may retain an economic interest in sharing litigation costs with the class. *Id.*, at 10, n. 8.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

It is not apparent how *Roper* supports the decision in this case. There is not even a speculative interest in sharing costs here. Moreover, since respondent's claim was mooted by an extrinsic event—his unconditional release from prison—the distinction identified in *Roper* as "critical" is absent in this case. *Id.*, at 9. One need not accept that distinction as sound to conclude that *Roper* affords only illusory support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford,* 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante,* at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs,* six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12]

[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight*

Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430-431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mecha-

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v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co., supra*, 424 U. S., at 754, n. 6, 755-756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129-120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

13/

nism of class certification or otherwise.[*] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

14/

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question. Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.

15/

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not

13/ [*] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Burrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.*; see n. 2, *supra*, and accompanying text.

14/ INSERT 4

15/ INSERT 5

INSERT 4, p. 11.

14/ In a footnote, *ante*, at 18, n. 11, the Court states:

> "This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e.g.*, *Powell v. McCormack*, 395 U.S., at 495-500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages - only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review,"

see p. 3, supra, it would indeed be helpful for it to identify specifically this injury that was not apparent to respondent's counsel.

RIDER 5, p. 11

15/ The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see infra, at 12-13, and n. 15, by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations". Ante, at 17, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See p. 2, supra. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a personal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Article III analysis, cannot justify today's holding as none

confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[17] Although we

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g.*, *Richardson* v. *Ramirez*, 418 U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

[17] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might

have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice. 18/

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value

terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

18 The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[19] But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

[19] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra*. And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, at — (slip op., at 11–12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court thereafter.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

Richey 2317[3]

2, 4, 12-13

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

3-4-80
~~2-13-80~~

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4th ~~3rd~~ DRAFT

Recirculated: FEB 13 1980

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete

[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260–261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Each of these cases rejects ~~explicitly~~ the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. *Ante*, at 16, n. 11; *Flast* v. *Cohen*, 392 U. S. 83, 120 (1968) (Harlan, J., dissenting). Until today, however, that view never had commanded a majority.

; see also United States v. Richardson, 418 U.S. 166, 180 (1974) (POWELL, J., concurring).

injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401,

[2] See, *e. g.*, *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

n. 9 (1975); *Richardson* v. *Ramirez,* 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard, supra,* at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York,* 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing "to which the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968).[5] We have insisted upon the personal stake requirement in mootness and standing cases because it is em-

[5] The Court states that "the erosion of the strict formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." *Ante,* at 16, n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in *Flast* v. *Cohen,* 392 U. S. 83 (1968), supports the position ascribed to it in the dissent, *id.,* at 117–120, it does not survive the long line of express holdings that began with *Warth* v. *Seldin,* 422 U. S. 490 (1975), and were reaffirmed only last Term. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99 (1979). See nn. 1 & 2, *supra.* Even before *Warth,* a leading commentator observed that the personal stake requirement had no exceptions. Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 616, 617 (1968).

bedded in the case or controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa, supra*, at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa, supra*, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[6] In the words of his own

[6] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante*, at 14.

Several prisoners now in federal custody have filed a motion to inter-

lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante,* at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh,* 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante,* at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III

vene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. In my view, the Court misreads these precedents.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[8] And in *Gerstein*, the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits

[8] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify

[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that a named plaintiff who has prevailed on the merits may appeal the denial of class certification because of a "critical distinction" between mootness deriving from a judgment and mootness resulting from events extrinsic to the litigation. *Ante*, at — (slip op., at 9). When a prevailing party seeks review of a ruling collateral to the judgment, *Roper* concludes, Art. III is relevant only indirectly to the question of appealability. *Id.*, at 7, 12. *Roper* also suggests that a named plaintiff whose judgment is satisfied may retain an economic interest in sharing litigation costs with the class. *Id.*, at 10, n. 8.

It is not apparent how *Roper* supports the decision in this case. There is not even a speculative interest in sharing costs here. Moreover, since respondent's claim was mooted by an extrinsic event—his unconditional release from prison—the distinction identified in *Roper* as "critical" is absent in this case. *Id.*, at 9. One need not accept that distinction as sound to conclude that *Roper* affords only illusory support for the Court's ruling here.

To INSERT (No 9)

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But

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No. 78-572 Geraghty; INSERT on p. 9:

In Roper, the Court holds that a named plaintiff whose judgment is satisfied may retain a personal stake in sharing litigation costs with the class. Ante, at ___ (slip op., at 7, n. 6, 10). Finding that Art. III is satisfied by this continuing economic interest, Roper reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment. See id., at 7, 9-10. The Court concludes that the denial of class certification falls within this category, as long as the appellants "assert a continuing stake in the outcome of the appeal." Id., at 10.

It is far from apparent how Roper can be thought to support the decision in this case. Indeed, the opinion by the CHIEF JUSTICE in Roper reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III. Here, there is not even a speculative interest in sharing costs, and respondent positively denies that any of his individual interests will be affected by the appeal. See p. 6, supra. Thus, a fact that was critical to the analysis in Roper is absent in this case. One need not accept that analysis as sound to conclude that it affords no support for the Court's ruling here.

the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures.

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[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs,* and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[13] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante,* at 15, 17. But respondent is said to have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

[13] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson,* 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.;* see n. 2, *supra,* and accompanying text.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question.[14] Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.[15]

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[14] In a footnote, *ante*, at 18, n. 11, the Court states:

"This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e. g.*, *Powell* v. *McCormack*, 395 U. S., at 495-500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages—only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review," see p. 3, *supra*, it would indeed be helpful for it to identify specifically this injury that was not apparent to respondent's counsel.

Absent such identification, the claim of injury is indeed an empty one.

[15] The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see *infra*, at 12–13, and n. 15, by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations." *Ante*, at 17, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See p. 2, *supra*. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a personal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Art. III analysis, cannot justify

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is sure to be present in the typical "private attorney general"

today's holding as none whatever would flow from a finding of mootness. See n. 15, *infra*. Nor does the Court's reliance upon a "relation back principle," *ante*, at 18, n. 11, further the analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g.*, *Richardson* v. *Ramirez*, 418 U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

action brought by a public spirited citizen.[17] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[18]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal

[17] The Courts assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[18] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different "'means for presenting a case or controversy *otherwise cognizable by the federal courts.*'" *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[19]

[19] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra.* And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper, ante,* at — (slip op., at 11–12). Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court thereafter.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: ______

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

The C.J. joined later

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante,* at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff,* 428 U. S. 106, 112 (1976); *Warth* v. *Seldin,* 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante,* at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete

[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260-261 (1977); *Warth* v. *Seldin,* 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617 (1973). Each of these cases rejects the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. *Ante,* at 16, n. 11; *Flast* v. *Cohen,* 392 U. S. 83, 120 (1968) (Harlan, J., dissenting); see also *United States* v. *Richardson,* 418 U. S. 166, 180 (1974) (POWELL, J., concurring). Until today, however, that view never had commanded a majority.

injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240-241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401,

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[2] See, *e. g.*, *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166-167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736-738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172-173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376-377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401-402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

n. 9 (1975); *Richardson* v. *Ramirez,* 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard, supra,* at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York,* 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing "to which the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968).[5] We have insisted upon the personal stake requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the

[5] The Court states that "the erosion of the strict formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." *Ante,* at 16, n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in *Flast* v. *Cohen,* 392 U. S. 83 (1968), supports the position ascribed to it in the dissent, *id.,* at 117–120, it does not survive the long line of express holdings that began with *Warth* v. *Seldin,* 422 U. S. 490 (1975), and were reaffirmed only last Term. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99 (1979). See nn. 1 & 2, *supra.* Even before *Warth,* Professor Davis observed that the personal stake requirement had no exceptions. Davis, *supra,* at 616, 617 (1968).

Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin,* 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP,* 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org., supra,* at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton,* 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa, supra,* at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 755-756 (1976); *Sosna* v. *Iowa, supra,* at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[6] In the words of his own

[6] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante,* at 14.

Several prisoners now in federal custody have filed a motion to inter-

lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper, ante*, p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante*, at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III

vene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante,* at 15. In my view, the Court misreads these precedents.

A

In *Sosna,* the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240 (1937).[8] And in *Gerstein,* the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits

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[8] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra,* § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify

[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that named plaintiffs whose claims have been paid may retain a personal stake in sharing anticipated litigation costs with the class. *Ante*, at — (slip op., at 7 n. 6, 10). Finding that Art. III is satisfied by this alleged economic interest, *Roper* reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment. See *id.*, at 7, 9–10. The Court concludes that the denial of class certification falls within this category, as long as the named plaintiffs "assert a continuing stake in the outcome of the appeal." *Id.*, at 10.

It is far from apparent how *Roper* can be thought to support the decision in this case. Indeed, the opinion by THE CHIEF JUSTICE in *Roper* reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III. *Ibid.* Here, there is not even a speculative interest in sharing costs, and respondent affirmatively denies that he retains any stake or personal interest in the outcome of this appeal. See p. 6, *supra*. Thus, a fact that was critical to the analysis in *Roper* is absent in this case. One need not accept that analysis as sound to conclude that it affords no support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasa-*

dena City Board of Education v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court

[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co., supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs,* and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[13] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante,* at 15, 17. But respondent is said to have a

[13] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson,* 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.;* see n. 2, *supra,* and accompanying text.

personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question.[14] Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.[15]

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[14] In a footnote, *ante*, at 18, n. 11, the Court states:

"This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e. g., Powell* v. *McCormack*, 395 U. S., at 495–500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages—only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review," see p. 3, *supra*, it would be helpful for it to identify specifically this injury that was not apparent to respondent's counsel. Absent such identification, the claim of injury is indeed an empty one.

[15] The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see *infra*, at 12–13, and n. 15, by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations." *Ante*, at 17, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See p. 2, *supra*. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a per-

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S., at 100; *O'Shea* v. *Littleton,* 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison,* 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin,* 422 U. S., at 501; *Sierra Club* v. *Morton,* 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.,* 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen,* 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is

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sonal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Art. III analysis, cannot justify today's holding as none whatever would flow from a finding of mootness. See n. 15, *infra.* Nor does the Court's reliance upon a "relation back principle," *ante,* at 18, n. 11, further the analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g., Richardson* v. *Ramirez,* 418

sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[17] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[18]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante,* at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues

U. S. 24, 35-36 (1974); *Hall* v. *Beals,* 396 U. S. 45, 48-49 (1969) (*per curiam*).

[17] The Courts assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante,* at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante,* at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[18] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

are "ancillary to the litigation of substantive claims." *Ante,* at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[19]

[19] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra.* And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper, ante,* at — (slip op., at 11–12). Nor will substitute

But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court thereafter.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

3-12-80

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SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante,* at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff,* 428 U. S. 106, 112 (1976); *Warth* v. *Seldin,* 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante,* at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete

[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260-261 (1977); *Warth* v. *Seldin,* 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617 (1973). Each of these cases rejects the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. *Ante,* at 16, n. 11; *Flast* v. *Cohen,* 392 U. S. 83, 120 (1968) (Harlan, J., dissenting); see also *United States* v. *Richardson,* 418 U. S. 166, 180 (1974) (POWELL, J., concurring). Until today, however, that view never had commanded a majority.

injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401,

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[2] See, *e. g.*, *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

n. 9 (1975); *Richardson* v. *Ramirez,* 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard, supra,* at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York,* 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing "to which the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968).[5] We have insisted upon the personal stake requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the

[5] The Court states that "the erosion of the strict formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." *Ante,* at 16, n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in *Flast* v. *Cohen,* 392 U. S. 83 (1968), supports the position ascribed to it in the dissent, *id.,* at 117–120, it does not survive the long line of express holdings that began with *Warth* v. *Seldin,* 422 U. S. 490 (1975), and were reaffirmed only last Term. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99 (1979). See nn. 1 & 2, *supra.* Even before *Warth,* Professor Davis observed that the personal stake requirement had no exceptions. Davis, *supra,* at 616, 617 (1968).

Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin,* 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP,* 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org., supra,* at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton,* 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa, supra,* at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa, supra,* at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[6] In the words of his own

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[6] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante,* at 14.

Several prisoners now in federal custody have filed a motion to inter-

lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante,* at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh,* 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante,* at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III

vene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is held moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. In my view, the Court misreads these precedents.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[8] And in *Gerstein*, the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits

[8] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald,* a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify

[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade,* 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady,* 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa,* 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that named plaintiffs whose claims have been paid may retain a personal stake in sharing anticipated litigation costs with the class. *Ante*, at — (slip op., at 7 n. 6, 10). Finding that Art. III is satisfied by this alleged economic interest, *Roper* reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment. See *id.*, at 7, 9–10. The Court concludes that the denial of class certification falls within this category, as long as the named plaintiffs "assert a continuing stake in the outcome of the appeal." *Id.*, at 10.

It is far from apparent how *Roper* can be thought to support the decision in this case. Indeed, the opinion by THE CHIEF JUSTICE in *Roper* reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III. *Ibid.* Here, there is not even a speculative interest in sharing costs, and respondent affirmatively denies that he retains any stake or personal interest in the outcome of this appeal. See p. 6, *supra*. Thus, a fact that was critical to the analysis in *Roper* is absent in this case. One need not accept that analysis as sound to conclude that it affords no support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasa-*

dena City Board of Education v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court

[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[13] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15, 17. But respondent is said to have a

[13] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g.*, *Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.*; see n. 2, *supra*, and accompanying text.

personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question.[14] Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante,* at 14–15.[15]

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[14] In a footnote, *ante*, at 18, n. 11, the Court states:

"This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e. g., Powell* v. *McCormack*, 395 U. S., at 495–500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages—only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review," see p. 3, *supra,* it would be helpful for it to identify specifically this injury that was not apparent to respondent's counsel. Absent such identification, the claim of injury is indeed an empty one.

[15] The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see *infra,* at 12–13, and n. 15, by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations." *Ante,* at 17, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See p. 2, *supra.* I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a per-

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S., at 100; *O'Shea* v. *Littleton,* 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison,* 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin,* 422 U. S., at 501; *Sierra Club* v. *Morton,* 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in " 'cases confessedly within [the Court's] jurisdiction.' " *Franks* v. *Bowman Transportation Co.,* 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen,* 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is

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sonal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Art. III analysis, cannot justify today's holding as none whatever would flow from a finding of mootness. See n. 15, *infra.* Nor does the Court's reliance upon a "relation back principle," *ante,* at 18, n. 11, further the analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g., Richardson* v. *Ramirez,* 418

sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[17] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[18]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues

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U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

[17] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[18] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly upon release. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[19]

[19] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra*. And this may well be typical of class actions brought under Rule 23 (b) (1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, at — (slip op., at 11–12). Nor will substitute

But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits cannot excuse him from presenting his subclass proposal to the District Court thereafter.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

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(18) X23 073

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

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6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February 7, 1980]

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MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete

[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260-261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Each of these cases rejects the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. *Ante*, at 16, n. 11; *Flast* v. *Cohen*, 392 U. S. 83, 120 (1968) (Harlan, J., dissenting); see also *United States* v. *Richardson*, 418 U. S. 166, 180 (1974) (POWELL, J., concurring). Until today, however, that view never had commanded a majority.

injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401,

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[2] See, *e. g.*, *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

n. 9 (1975); *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard*, *supra*, at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York*, 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing "to which the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968).[5] We have insisted upon the personal stake requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the

[5] The Court states that "the erosion of the strict formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." *Ante*, at 16 n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in *Flast* v. *Cohen*, 392 U. S. 83 (1968), supports the position ascribed to it in the dissent, *id.*, at 117–126, it does not survive the long line of express holdings that began with *Warth* v. *Seldin*, 422 U. S. 490 (1975), and were reaffirmed only last Term, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979). See nn. 1 & 2, *supra*. Even before *Warth*, Professor Davis observed that the personal stake requirement had no exceptions. Davis, *supra*, at 616, 617 (1968).

Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa, supra*, at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa, supra*, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[6] In the words of his own

[6] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante*, at 14.

Several prisoners now in federal custody have filed a motion to inter-

lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante,* at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh,* 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante,* at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III

vene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is ~~held~~ [dismissed as] moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. [at] 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. In my view, the Court misreads these precedents.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[5] And in *Gerstein*, the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits

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[5] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (e); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 308 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c) (1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify

[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper*, the Court holds that the named plaintiffs, who have refused to accept proffered individual settlements, retain a personal stake in sharing anticipated litigation costs with the class. *Ante*, at — (slip op., at 7 n. 6, 10). Finding that Art. III is satisfied by this alleged economic interest, *Roper* reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment. See *id.*, at 7, 9–10. The Court concludes that the denial of class certification falls within this category, as long as the named plaintiffs "assert a continuing stake in the outcome of the appeal." *Id.*, at 10.

It is far from apparent how *Roper* can be thought to support the decision in this case. Indeed, the opinion by THE CHIEF JUSTICE in *Roper* reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III. *Ibid.* Here, there is not even a speculative interest in sharing costs, and respondent affirmatively denies that he retains any stake or personal interest in the outcome of this appeal. See p. 6, *supra*. Thus, a fact that was critical to the analysis in *Roper* is absent in this case. One that analysis can disagree with yet conclude that *Roper* affords no support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Wein-*

stein v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court

[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[13] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15–17. But respondent is said to have a

[13] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g.*, *Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.*; see n. 2, *supra*, and accompanying text.

personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question.[14] Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.[15]

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[14] In a footnote, *ante*, at 18, n. 11, the Court states:

"This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e. g., Powell* v. *McCormack*, 395 U. S., at 495–500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages—only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review," see p. 3, *supra*, it would be helpful for it to identify specifically this injury that was not apparent to respondent's counsel. Absent such identification, the claim of injury is indeed an empty one.

[15] The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see *infra*, at 12–13, and n. [illegible], by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations." *Ante*, at 17, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See p. 2, *supra*. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a per-

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is

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sonal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Art. III analysis, cannot justify today's holding as none whatever would flow from a finding of mootness. See n. 16, *infra*. Nor does the Court's reliance upon a "relation back principle," *ante*, at 18, n. 11, further the analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g.*, *Richardson* v. *Ramirez*, 418

sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[17] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[18]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a false dilemma. As noted in *Roper*, class certification issues

U. S. 24, 35–36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48–49 (1969) (*per curiam*).

[17] The Courts assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[18] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly ~~upon release~~ after the named plaintiff's release from prison. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

are "ancillary to the litigation of substantive claims." *Ante,* at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different "'means for presenting a case or controversy *otherwise cognizable by the federal courts.*'" *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[19]

[19] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of finding mootness in this case would be slight indeed. See note 13, *supra.* And this may well be typical of class actions brought under Rule 23 (b) (1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "pick off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper, ante,* at — (slip op., at 11-12). Nor will substitute

But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 17. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits ~~cannot excuse him from presenting his~~ subclass proposal to the District Court, ~~thereafter~~.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[March 19, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8-12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12-16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 7. There is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 12. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete

[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260–261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Each of these cases rejects the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. *Ante*, at 16, n. 11; *Flast* v. *Cohen*, 392 U. S. 83, 120 (1968) (Harlan, J., dissenting); see also *United States* v. *Richardson*, 418 U. S. 166, 180 (1974) (POWELL, J., concurring). Until today, however, that view never had commanded a majority.

injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 8; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, 419 U. S. 393, 401,

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[2] See, *e. g.*, *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533, at 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

n. 9 (1975); *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. See *DeFunis* v. *Odegaard, supra*, at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York*, 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974); *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing "to which the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968).[5] We have insisted upon the personal stake requirement in mootness and standing cases because it is embedded in the case or controversy limitation imposed by the

[5] The Court states that "the erosion of the strict, formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." *Ante*, at 16–17, n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in *Flast* v. *Cohen*, 392 U. S. 83 (1968), supports the position ascribed to it in the dissent, *id.*, at 117–120, it does not survive the long line of express holdings that began with *Warth* v. *Seldin*, 422 U. S. 490 (1975), and were reaffirmed only last Term. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979). See nn. 1 & 2, *supra*. Even before *Warth*, Professor Davis observed that the personal stake requirement had no exceptions. Davis, *supra*, at 616, 617 (1968).

Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). In this way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 60 (BRENNAN, J., concurring in the judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1974).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interests asserted by [the named plaintiff]." *Sosna* v. *Iowa*, *supra*, at 399 (1975). "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa*, *supra*, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[3] In the words of his own

[3] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante*, at 14.

Several prisoners now in federal custody have filed a motion to inter-

lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg., at 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without atempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante,* at 12, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh,* 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. —. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante,* at 11. *Sosna* itself is cited for the proposition that the requirements of Art. III

vene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is dismissed as moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg., at 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 15. In my view, the Court misreads these precedents.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).[8] And in *Gerstein*, the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits

[8] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (c); 3 H. Newberg Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification State: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the Court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 H. Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify

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[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pac. Terminal* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper* the Court holds that the named plaintiffs, who have refused to accept proffered individual settlements, retain a personal stake in sharing anticipated litigation costs with the class. *Ante*, at — (slip op., at 7 n. 6, 10). Finding that Art. III is satisfied by this alleged economic interest, *Roper* reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment. See *id.*, at 7, 9–10. The Court concludes that the denial of class certification falls within this category, as long as the named plaintiffs "assert a continuing stake in the outcome of the appeal." *Id.*, at 10.

It is far from apparent how *Roper* can be thought to support the decision in this case. Indeed, the opinion by THE CHIEF JUSTICE in *Roper* reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III. *Ibid.* Here, there is not even a speculative interest in sharing costs, and respondent affirmatively denies that he retains any stake or personal interest in the outcome of his appeal. See p. 6, *supra*. Thus, a fact that was critical to the analysis in *Roper* is absent in this case. One can disagree with that analysis yet conclude that *Roper* affords no support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Wein-*

stein v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 12, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court

[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S., at 754, n. 6, 755–756; see *Kremens* v. *Bartley*, 431 U. S. 119, 129–120 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, 419 U. S., at 402, 403; see *Bell* v. *Wolfish*, — U. S. —, —, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

held that the named plaintiff's release from prison required the dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[13] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 15–16, 19–20. But respondent is said to

[13] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.*; see n. 2, *supra*, and accompanying text.

have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question.[14] Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 14–15.[15]

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[14] In a footnote, *ante*, at 18, n. 11, the Court states:

"This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. See, *e. g., Powell* v. *McCormack*, 395 U. S., at 495–500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages—only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review," see p. 3, *supra*, it would be helpful for it to identify specifically this injury that was not apparent to respondent's counsel. Absent such identification, the claim of injury is indeed an empty one.

[15] The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see *infra*, at 13–14, and n. 18, by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations." *Ante*, at 17–18, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See p. 2, *supra*. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a per-

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *O'Shea* v. *Littleton*, 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison*, 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin*, 422 U. S., at 501; *Sierra Club* v. *Morton*, 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in "'cases confessedly within [the Court's] jurisdiction.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is

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sonal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Art. III analysis, cannot justify today's holding as none whatever would flow from a finding of mootness. See n. 18, *infra*. Nor does the Court's reliance upon a "'relation back' principle," *ante*, at 18, n. 11, further the analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g.*, *Richardson* v. *Ramirez*, 418

sure to be present in the typical "private attorney general" action brought by a public spirited citizen.[17] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[18]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 13, 14. But the Court has created a

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U. S. 24, 35-36 (1974); *Hall* v. *Beals*, 396 U. S. 45, 48-49 (1969) (*per curiam*).

[17] The Courts assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 15. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App., at 17; Brief for Repondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 14. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[18] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly after the named plaintiff's release from prison. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*, at — (slip op., at 6). Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different "'means for presenting a case or controversy *otherwise cognizable by the federal courts.*'" *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240 (1937) (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[19]

[19] I do not imply that the result reached today is necessary in any way to the continued vitality of the class-action device. On the contrary, the practical impact of mootness in this case would be slight indeed. See note 18, *supra*. And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "buy off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, *at* — (slip op., at 12–13). Nor will substitute

But it cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 19. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits provides no excuse for his subsequent failure to present a subclass proposal to the District Court.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.