Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts

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INTRODUCTION

Volumes have been written about standing to sue, very little about standing to appeal. There is no dearth of interesting issues concerning standing to appeal and its converse, the right to defend a judicial order or judgment, however. In this Article, I will explore and illuminate many aspects of the law governing these matters in the federal courts, uncover the issues, and analyze the weaknesses in the law.

Part I will put the matters under investigation into context. It will identify conceptual similarities and differences between standing to sue and standing to appeal, and between the "right" to defend in the trial court and the right to defend a judicial order or judgment that has been appealed. It will consider the purposes of the doctrines governing these matters, and will address how Rule 19 parties and intervenors fit into our system. Part I will bring into focus the uncertainties in the source of the constraints on standing to appeal and to defend appeals: which constraints are constitutionally grounded, and which are prudential or practice-based? It also will distinguish between, compare, and explore the relationships among standing to appeal and the right to defend against an appeal, on the one hand, and related doctrines such as capacity to sue and be sued, mootness, appealability and reviewability, other procedural prerequisites to appeal, and acquiescence in a judgment, on the other.

Part II will delve into the nature and degree of injury that warrants recognition of standing to appeal from an order or judgment in a civil suit, the requisite relation between that injury and the order or judgment sought to be appealed, and the relevance of the appellate court's ability to redress the claimed injury. Among the primary focuses of this section will be the bases for appeal available to a person who has substantially prevailed in the trial court. The Article finds little appellate parallel to the vagaries of injury characterization that have made standing to sue doctrine vulnerable to charges of manipulability, and concludes that concerns about manipulation of the system to obtain an early appeal can be handled in determinations of appealability. Part II will show, however, that courts sometimes have been confused about the
standing to appeal of litigants who have prevailed in some respects but failed in others, and that courts have had difficulty in determining the sufficiency-for-appeal of grievances that substantially prevailing litigants have claimed. It will argue for abandonment of the collateral estoppel exception to the general rule that prevailing parties may not appeal, and for the re-thinking of other exceptions to that rule.

Part II also will consider the doctrines that determine who may be an appellee. The Article will not examine standing to appeal, or a right to defend an order or judgment, that is granted by a particular statute and that is not generally applicable and available. For the most part, the Article also will not consider doctrines that govern in criminal prosecutions and related proceedings such as those initiated by petitions for writs of habeas corpus.

A sequel to this Article¹ will explore who, other than full-fledged parties, has standing to appeal or defend an appeal in the federal judicial system. Looking to both constitutional and common law, the second Article will revisit the significance of the capacity in which persons sued or were sued to their right to appeal or to defend a judgment on appeal, comment upon the appeal rights (or the lack thereof) of co-parties and co-"consolidatees" (parties in litigation consolidated with that in which an appealable decision was rendered) and consider the appeal rights of various persons other than full-fledged formal parties to the suit in which an appealable decision was rendered. In particular, it will focus upon would-be and successful intervenors, absent members of classes certified or sought to be certified under Rule 23 of the Federal Rules of Civil Procedure, shareholders in derivative suits, "de facto" and "quasi" parties, and non-parties. The Article will consider both the scope of the right of each of those categories of persons to appeal, and their right to defend an order or judgment on appeal in the federal judicial system.

The second of the pair of Articles also will examine whether current doctrine governing "irregulars'" standing to appeal and to defend judgements makes good policy sense and is internally

consistent with the doctrine governing full-fledged parties, as elaborated in this Article.

I. COMPARING STANDING TO APPEAL AND THE RIGHT TO DEFEND APPEALS WITH STANDING TO SUE AND DEFEND IN THE TRIAL COURT, AND DISTINGUISHING STANDING TO APPEAL FROM RELATED APPELLATE CONCEPTS

A. CONSTITUTIONAL AND PRUDENTIAL STANDING TO SUE

1. Basic Doctrine. Standing to sue is "one of the most confused [and incoherent] areas of the law." The ferment in standing doctrine and the seeming irreconcilability of many decisions concerning standing to sue are rooted, in part, in the importance of standing doctrine in defining the role of the federal courts in American society. Since standing to sue is not the primary focus of this Article, but rather a foil for comparing and contrasting standing to appeal, I summarize the doctrine here in rather broad strokes.

When a court determines a person's or entity's standing to sue, it is deciding whether that person or entity is a proper party to bring a particular claim to court for adjudication. The Court has said that "[i]n essence the question . . . is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Despite this phraseology, the unit to which standing to sue most often attaches is a claim, although courts may scrutinize a person's standing to raise the more ambiguous categories of disputes and issues.

As elaborated by the Supreme Court, standing to sue in federal court has constitutional, sometimes statutory, and prudential aspects. The Constitution does not explicitly mention standing (or

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3 Id. at 57.
5 See, e.g., Allen v. Wright, 468 U.S. 737, 750 (1984) (analyzing standing of persons alleging that IRS grant of tax exemptions to racially discriminatory schools violated Fifth and Fourteenth Amendments to Constitution and several federal statutes); Warth, 422 U.S. at 503-26 (deciding whether plaintiffs and would-be plaintiff-intervenors had standing to assert claims that town ordinance violated their statutory and constitutional rights by excluding them or causing them economic injury).
other components of “justiciability”), but the Court has inferred a standing requirement from Article III’s limitation of federal judicial power to particular “cases” and “controversies,” and it has imposed additional standing requirements in the interest of prudent judicial administration. The three constitutionally-mandated standing requirements that the Court has identified are injury, causation, and redressability. First, “the plaintiff must allege that he or she [personally] has suffered or imminently will suffer an injury. Second, the plaintiff must allege that the injury is fairly traceable to the defendant’s conduct. Third, the plaintiff must allege that a favorable court decision is likely to redress the injury.” The Court has said that, by injury in fact, it means “an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical.” Much case law interprets and applies each of the three requirements.

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6 The other aspects of justiciability are ripeness, mootness, the prohibition against issuance of advisory opinions, and the doctrine that the courts should avoid deciding “political questions.” See generally Richard H. Fallon, Jr. et al., Hart & Wechsler’s The Federal Courts and the Federal System 65-267 (5th Ed. 2003) (discussing aspects of justiciability).
7 U.S. CONST. art. III, § 2.
8 Chemerinsky, supra note 2, at 60.
9 Id. These requirements bring to mind the requirements for stating a claim upon which relief can be granted. If one has standing, one can state such a claim. Whether one has done so will depend on whether one has pleaded with sufficient particularity, and the like. Standing to assert a claim implies that a claim on which relief can be granted exists and that the plaintiff is entitled to assert that claim, assuming that it is otherwise justiciable. (Perhaps it is possible to state a claim on which relief can be granted in the sense that the claim would survive a motion to dismiss brought under Rule 12(b)(6), although a court properly could say that the claim is not ripe, that it is moot, or that it poses a political question beyond the federal courts’ jurisdiction.) By contrast, if one does not have constitutional or prudential standing, one cannot state the claim one seeks to state, although other persons might be able to do so. Lack of standing does not imply that a claim does not exist, but merely that the particular plaintiff is not among those entitled to assert it.
"Statutory standing" (although it sometimes is viewed as a subcategory of prudential standing considerations) is even more equivalent to, and may be identical with, the ability to state a claim on which relief can be granted, which is a merits question. See Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94, 101 (1998) (struggling with relationship between merits inquiry and statutory standing in context of determining permissibility of courts’ considering whether cause of action exists under statute before considering plaintiff’s standing to assert such cause, and determining indicated sequence of decision to be permissible despite Court’s disapproval of “hypothetical jurisdiction”); Lerner v. Fleet Bank, N.A., 318 F.3d 113, 126-30 (2d Cir. 2003) (struggling with whether absence of statutory standing is jurisdictional bar to court’s exercise of supplemental jurisdiction, and deciding it is not).
11 Specifically, the courts have interpreted and applied the requirement that the plaintiff
but no clear tests, beyond analogy to case precedents, have emerged to permit accurate prediction of when courts will hold that a plaintiff's alleged injury affords him standing to sue in federal court. Generally, injury to rights recognized at common law, violation of rights created by statute for the benefit of persons such as the plaintiff, and individualized injuries to recognized constitutional rights are sufficient bases for standing if sufficiently concrete and particularized, and if the requirements of causation and

show that he personally suffered an injury, or, in the case of a plaintiff seeking declaratory or injunctive relief, a substantial likelihood of future harm. See, e.g., County of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991) (holding that plaintiffs who had not received prompt probable cause hearings had alleged personal injury fairly traceable to county's challenged conduct and likely to be redressed by injunction they sought); City of Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983) (holding that plaintiff who allegedly had been subjected to unwarranted chokehold by police lacked standing to seek injunction barring chokeholds absent particular threat by police, because plaintiff failed to establish real and immediate threat to himself).

The requirements of causation and redressability are closely linked, particularly when declaratory or injunctive relief is sought, because judicial action taken against the defendant is likely to stop continued infliction of the injury only if the defendant's activity is the cause of the plaintiff's injury. See CHEMERINSKY, supra note 2, at 74-75. The requirement that the plaintiff allege a sufficient causal link between his injury and defendant's conduct is closely related to the requirement that judicial action will redress plaintiff's injury. See, e.g., Lujan, 504 U.S. at 560 (holding that plaintiff environmental organizations had failed to demonstrate injury or redressability in suit that challenged regulation limiting geographic scope of endangered species protections and sought to require consultation); County of Riverside, 500 U.S. at 51 (holding plaintiff's injury fairly traceable to defendant's conduct and likely to be redressed by requested injunction); Allen v. Wright, 468 U.S. 737, 755 (1984) (holding that parents of black public school children lacked standing to challenge IRS grant of tax exemptions to racially discriminatory schools, both because they failed to allege cognizable injury and because contention that their children suffered lessened opportunity to attend racially integrated schools was not fairly traceable to challenged governmental conduct); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74-78 (1978) (in upholding standing to sue, affirming and relying upon finding of substantial likelihood that nuclear power plants would not be completed or operated absent challenged statute); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42-46 (1976) (holding that plaintiffs lacked standing to challenge IRS policy of extending favorable tax treatment to hospitals that did not serve indigents as much as they could, and focusing upon speculativeness of causal link between IRS rulings and hospital decisions and on failure to establish that relief sought would remedy harms plaintiffs suffered); Warth v. Seldin, 422 U.S. 490, 502-04 (1975) (holding that plaintiffs failed to allege sufficient causal relation between town's zoning practices and plaintiff's alleged exclusion from town or alleged economic injury); 21st Century Telesis Joint Venture v. FCC, 318 F.3d 192, 198 (D.C. Cir. 2003) (holding that, although licensee suffered injury when FCC cancelled its licenses, licensee's decision not to seek reinstatement of licenses rendered moot its claim of financial injury by eliminating possibility that court could redress injury).

CHEMERINSKY, supra note 2, at 68.
redressability also are met. When it comes to rights that do not fit into any of the above three categories, commentators have discerned no principle that satisfactorily explains or reconciles the case results as to what is and is not a sufficient injury.

Commentators have criticized the standing requirements read into the Constitution for their manipulability, difficulty, and uncertainty, among other things. Court decisions have made manifest that the characterization of a plaintiff's injury is manipulable; on some characterizations an injury is redressable, while on other, equally legitimate, characterizations, it is not. Making proper determinations of causation and redressability on the basis of the pleadings (which is the basis on which at least initial standing determinations are made), and without the benefit of discovery, is difficult. And uncertainty inevitably arises from the fact that

[c]ausation and redressability are assessments of probability; [they are assessments of] how likely [it is] that the defendant is the cause of the plaintiff's injury and how likely [it is] that a favorable court decision will remedy the harm . . . . But it is unclear [and hence manipulable] where[,] on the probability spectrum[,] it

\begin{footnotesize}
\begin{enumerate}
\item Id. at 68-69. Professor Chemerinsky notes that, in general, a person who claims discrimination or a violation of an individual liberty . . . will be accorded standing. But someone who seeks to prevent a violation of a constitutional provision dealing with the structure of government is unlikely to be accorded standing unless the person has suffered a particular harm distinct from the rest of the population.
\item Id. at 69.
\item Id. at 72-74. Professor Chemerinsky contrasts the Court's findings that injuries to aesthetic, economic, environmental, and procedural interests were sufficient for standing to sue on certain occasions, with its holding that injuries to interests in avoiding stigma and in enjoying marital happiness were insufficient for standing.
\item Chemerinsky offers as an example the contrast between Orr v. Orr, 440 U.S. 268 (1979), which found a cognizable injury in the form of a denial of equal protection in the case of a man who challenged a state law permitting courts to award alimony to women only (despite the fact that a holding of unconstitutionality would not have ensured that the plaintiff would recover any money) and Linda R.S. v. Richard D., 410 U.S. 614 (1973), which dismissed an unwed mother's suit challenging a state policy not to prosecute the fathers of illegitimate children for failure to pay child support, where the Court characterized the plaintiff's injury as lack of child support and concluded that the claim was not redressable because prosecution would not ensure plaintiff's receipt of child support.
\end{enumerate}
\end{footnotesize}
is sufficiently certain that a court should grant standing.\textsuperscript{16}

Of the standing principles that the Court has announced and denominated "prudential," the one most important for purposes of this Article (because the issue also can arise in connection with an appeal) is that "a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court."\textsuperscript{17} A variety of policies has been invoked in support of this restriction. Among them, the restriction avoids unnecessary and premature constitutional adjudications; it avoids adjudication that the persons most directly affected do not desire; it leaves to other governmental institutions questions that they may be more competent to address; and it is presumed to improve the quality of adjudication, on the theory that anyone other than a right holder typically will be an inferior proponent of his rights.\textsuperscript{18}

Despite the general preference for parties to assert only their own rights, the Court has recognized three situations in which a party in civil litigation may assert the rights of others, when the suing party also has standing to assert, and is asserting, its own rights. One of these exceptional circumstances exists when substantial legal or practical obstacles interfere with an absentee’s assertion of his or her own rights and "there is reason to believe that the advocate will effectively represent the interests” of the absentee.\textsuperscript{19} A second, less

\textsuperscript{16} CHEMERINSKY, supra note 2, at 80. These criticisms are marshaled by Chemerinsky, id. at 78-80. See also Gene R. Nichol, Jr., Standing for Privilege: The Failure of Injury Analysis, 82 B.U. L. REV. 301, 305 (2002) (arguing that standing doctrine is unstable, inconsistent, and harmfully favors powerful over powerless).

\textsuperscript{17} CHEMERINSKY, supra note 2, at 60. See, e.g., United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 557 (1996) (stating that general prohibition on one litigant raising another's rights is prudential, not constitutional mandate); Warth v. Seldin, 422 U.S. 490, 499 (1975) (stating same and noting that prudential limitations typically should cause courts to refrain from hearing cases in which harm alleged is "'generalized grievance' shared in substantially equal measure by all or a large class of citizens").


\textsuperscript{19} Powers v. Ohio, 499 U.S. 400, 413-16 (1991) (holding that criminal defendant has
well-defined, exception exists for situations in which there is a pre-existing relationship between the litigant and the absentee and that relationship is of central relevance to the issues and subject-matter of the suit. This exception may be invoked in a case where the civil litigant is the provider of a good or service, or party to a prospective transaction, regulation of which allegedly impairs the rights of both the good- or service-provider and the intended recipient, or both the parties desiring to enter into the transaction.\textsuperscript{20} "The third exception to the prohibition against third-party standing is... the 'overbreadth doctrine,'" pursuant to which a "person [may] challenge a statute on the ground that it violates the First Amendment rights of third parties,... even though the law is constitutional as applied to"\textsuperscript{21} the present litigant, and without regard to the ability of non-parties to assert their own claims or rights.\textsuperscript{22} The overbreadth doctrine is grounded in the Court's concern that a "statute's very existence may

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standing to raise equal protection claims of prospective jurors excluded by prosecution because of their race, in part because defendant can be counted on to be motivated and effective advocate of this argument and dismissed juror would have less incentive, and face more barriers, to vindicate his rights); \textit{Joseph H. Munson Co.}, 467 U.S. at 956 (discussing, in dicta, doctrine that prudential limitations on third-party standing can be overcome when "the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal" and obstacles prevent a person from asserting his own rights, in case where fundraiser plaintiff did not claim that its own First Amendment rights had been or would be infringed by statute prohibiting charities from paying fundraising expenses of more than set percentage of monies raised); \textit{Eisenstadt v. Baird}, 405 U.S. 438, 443-46 (1972) (holding that plaintiff, an advocate of right to obtain contraceptives and of those desirous of doing so, had standing to challenge statute limiting distribution of contraceptives, on behalf of persons denied access to them, where enforcement of statute would materially impair people's ability to obtain contraceptives and would-be acquirers, because not subject to prosecution, lacked forum to assert their rights); \textit{Barrows v. Jackson}, 346 U.S. 249, 259 (1953) (holding that owner of real estate subject to racially restrictive covenant had standing to challenge it); \textit{Chemerinsky, supra} note 2, at 84 (citing these cases).

\textsuperscript{20} See, e.g., \textit{Craig v. Boren}, 429 U.S. 190, 195-97 (1976) (upholding standing of licensed beer vendor to challenge, on equal protection grounds, statute differentially limiting sale of beer to young men and women, since vendor suffered injury in fact and was entitled to assert correlative rights of third-party would-be purchasers); \textit{Singleton}, 428 U.S. at 117-18 (four Justices concluding that physicians who challenged constitutionality of statute excluding from Medicaid coverage abortions that were not medically necessary had standing to assert rights of impudicious women patients who faced both privacy-based and mootness-based obstacles to their own such challenges).

\textsuperscript{21} \textit{Chemerinsky, supra} note 2, at 87.

\textsuperscript{22} See \textit{Joseph H. Munson Co.}, 467 U.S. at 957 (discussing overbreadth doctrine).
cause others not before the court to refrain from constitutionally protected speech or expression.\textsuperscript{23}

A standing principle that lower courts and commentators had viewed as prudential but that the Court more recently described as constitutional\textsuperscript{24} denies standing when the harm asserted is not peculiar to the plaintiff but is "a generalized grievance shared in a substantially equal measure by all or a large class of citizens"\textsuperscript{25} in their capacity as such or as taxpayers. As applied, this principle denies standing only when "the plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal government expenditures."\textsuperscript{26}

When a suit is brought by organizations, governmental entities, or legislators, additional requirements apply. In brief, when organizations or governmental entities sue, it is essential to determine whether they are asserting their own interests or are suing as representatives of others. When an organization sues on its own behalf, asserting an injury to the organization as an entity, the usual standing doctrine applies. When an organization or government sues on behalf of its members or citizens, however, special standing requirements apply to guarantee both the existence of a genuine controversy and adequate representation of the absentees who purportedly are being represented.\textsuperscript{27} Early cases made relevant notions redolent of those that enter into third-party standing analysis generally. Thus, the Court considered whether


\textsuperscript{24} See Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992) (discussing insufficiency of "generally available grievance").

\textsuperscript{25} Warth v. Seldin, 422 U.S. 490, 499 (1975).

\textsuperscript{26} CHEMERINSKY, supra note 2, at 89-90. Another prudential standing principle requires a plaintiff suing to enforce statutory rights or duties to raise a claim within the zone of interests protected by the statute in question. See id. at 97-103. I will not elaborate upon this here because I intend not to examine the details of standing to appeal under particular statutory schemes.

\textsuperscript{27} See CHEMERINSKY, supra note 2, at 102 (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 144 (2d ed. 1988)). One recent example of an organization held to have standing to sue to assert its own rights is U.S. Postal Serv. v. Nat’l Assoc. of Letter Carriers, 330 F.3d 747, 750-51 (6th Cir. 2003) (upholding union’s standing to challenge arbitration award requiring demotion of supervisory employee where union claimed award would force it to violate federal statute).
reasons existed for members not to sue on their own behalves. More recently, the Court reduced the requirements for an organization to sue on behalf of its members to three: that the members have standing to sue in their own right, that the interests that the organization seeks to protect in the litigation are germane to the organization’s purposes, and that neither the claim asserted nor the relief requested requires the participation of the members. The first of these requirements guarantees the existence of a genuine controversy, and the latter two tend to assure adequate representation of the absent organization members. The Court has held that the first prong is required by Article III, has indicated that the second may be so required but has not definitively held that it is, and has held that the third prong is merely prudential, a matter of “administrative convenience and efficiency” that Congress may abrogate.

The doctrine concerning government entities’ standing to sue has some elements in common with third-party standing doctrine and organizational standing doctrine but also has unique features. Courts recognize governmental standing to sue to protect the government’s own interests, as when a government sues to protect sovereign or proprietary interests. Governments also sometimes

28 See, e.g., NAACP v. Alabama, 357 U.S. 449, 458-59 (1958) (noting that members’ wish to remain anonymous would deter them from suing individually, and made it desirable to allow NAACP to assert violation of its members’ rights, threatened by state law requiring disclosure of organization’s membership list).


30 United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 555-57 (1996); see also Or. Advocacy Ctr., 322 F.3d at 1109 (opining that first two requirements are constitutional and third is prudential, based on United Food).

31 See, e.g., Wyoming v. Oklahoma, 502 U.S. 437, 447 (1992) (recognizing Wyoming’s standing to challenge Oklahoma law alleged to cause injury to Wyoming by reducing tax revenue); Oregon v. Mitchell, 400 U.S. 112, 117 & n.1 (1970) (allowing federal government to sue to enjoin state violations of federal Voting Rights Act, but noting that no question had been raised concerning standing of parties); United States v. San Jacinto Tin Co., 125 U.S. 273, 288 (1888) (allowing suit by federal government to protect its interest in certain lands by seeking to have federal land patents annulled); cf. Diamond v. Charles, 476 U.S. 54, 64-65 (1976) (holding that, because only state has judicially cognizable interest in defending its criminal statutes, private defendant-intervenor lacked standing to appeal, on his own, a decision holding state criminal statute to be unconstitutional).
have standing to sue in a representative capacity, on behalf of their citizens, as *parens patriae*. Most recently, the Court has indicated that a state has *parens patriae* standing when the state asserts a quasi-sovereign interest "in not being discriminatorily denied its rightful status within the federal system" and ensuring that the benefits of the federal system are not denied to its population, and "in [protecting] the health and well-being—both physical and economic—of its residents in general." An indication of whether an injury to citizens suffices is whether the harm that the state seeks to avert is of a type "that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." These requirements strike me as analogous to the restriction of representative organization standing to situations in which the interests that the organization seeks to protect in litigation are germane to the organization's purposes. Thus, the requirement that *parens patriae* standing be reserved for matters that the state would like to regulate helps to ensure that the interests that the state seeks to assert in litigation are germane to the state's sovereign purposes. It may not be true, however, as it is in the case of representative organizational standing, that the harms asserted by the state typically must be harms that citizens would have standing to assert on their own. The Court's decisions have not made clear whether that is required; some suggest the contrary.

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33 Id. at 607.
34 Compare cases suggesting that residents do not need to have standing to sue or that such might cut against *parens patriae* litigation: *e.g.*, Alfred L. Snapp, 458 U.S. at 601-08 (requiring state to have interest apart from interests of private parties—quasi-sovereign interests such as interest in physical and economic health and well-being of its residents—for state to sue *parens patriae*, giving no indication that the residents themselves had standing to sue or private rights of action to assert, arising out of the events giving rise to the Commonwealth's claims); Maryland v. Louisiana, 451 U.S. 725, 769 (1981) (Rehnquist, J., dissenting) (arguing that exercise of Court's original jurisdiction in suit brought *parens patriae*, in part, was inappropriate since issues were being litigated in other fora), and Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (rejecting motion for leave to file suit as *parens patriae* because suit would represent mere collectivity of private suits for taxes withheld), with cases indicating that *parens patriae* litigation can be proper where residents have standing to assert their own claims: *Maryland*, 451 U.S. at 739 (approving states' suit *parens patriae* challenging constitutionality of another state's tax on first use of theretofore untaxed natural gas, noting that, "individual consumers cannot be expected to litigate the validity of the . . . tax given that the amounts paid by each consumer are likely to be relatively small"). *See also* Kansas v. Utilicorp United, Inc., 497 U.S. 199, 219 (1990) (holding that
Because Article III standing to sue is an essential aspect of federal courts' subject-matter jurisdiction, it cannot be waived. It may be challenged for the first time at any time during the pendency of the proceedings and, if none of the parties raises it, the federal courts (both trial and appellate) may, and indeed have a duty to, raise the issue *sua sponte* if there is any doubt about it.\textsuperscript{35} The Supreme Court has not decided whether these propositions are true of the prudential aspects of standing, as well as of the constitutional aspects,\textsuperscript{36} and the federal courts of appeals are split on the

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\textsuperscript{35} In the case of an appellate court, the duty attaches only when standing may have been erroneously recognized below. *See* Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (noting that Court is obliged to examine standing *sua sponte* where standing has been erroneously assumed below, but not to reach issue for which standing was denied below); Boeing Co. v. Van Gemert, 444 U.S. 472, 488 n.4 (1980) (Rehnquist, J., dissenting) (stating that, although respondents had not challenged Boeing's standing, Court was obliged to consider issue *sua sponte*, if necessary); Juidice v. Vail, 430 U.S. 327, 331 (1977) (raising, *sua sponte*, standing of appellees, as plaintiffs, to seek injunctive relief); Conroy v. N.Y. Dept of Corr., 333 F.3d 88, 93 (2d Cir. 2003) (addressing standing arguments that had not been raised in district court); *see also* FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

\textsuperscript{36} The Court has held that Congress may abrogate prudential standing requirements, however. *See* United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 551, 555-58 (1996) (finding prudential standing requirements to be matters of "administrative convenience and efficiency"); Miller v. Rite Aid Corp., 334 F.3d 335, 340 (3d Cir. 2003) (reciting principles concerning Congress's ability to abrogate prudential standing
issue. When constitutional or prudential principles that govern standing prevent pursuit of a suit in the trial court, the question of standing to appeal does not arise, except with respect to appeal of the ruling denying standing to sue. An appellate court does not have jurisdiction to address the merits at the behest of one who lacks standing to sue.

requirements; concluding that ERISA effected no such abrogation, and that abrogability of such requirements might imply their waivability). But see Tileston v. Ullman, 318 U.S. 44, 46 (1943) (dismissing appeal on standing grounds, apparently sua sponte, where physician alleged invasion of constitutional rights of others).

Compare Sanchez-Velasco v. Sec'y of Dep't of Corr., 287 F.3d 1015, 1025 (11th Cir. 2002) (entertaining issue whether attorney erroneously had been permitted "next friend" status to bring federal habeas petition on behalf of death row inmate where appellee was permitted to raise issue as alternative ground in support of dismissal of petition, because court had obligation to consider plaintiff's standing, even if parties did not press it), Cmty. First Bank v. Nat'l Credit Union Admin., 41 F.3d 1050, 1053 (6th Cir. 1994) (rejecting argument that prudential standing requirements may be waived by parties, and considering plaintiffs' standing, despite defendant's failure to cross-appeal on issue), Animal Legal Def. Fund v. Espy, 23 F.3d 496, 499 (D.C. Cir. 1994) (indicating that prudential standing is non-waivable), Thompson v. County of Franklin, 15 F.3d 245, 248 (2d Cir. 1994) (concluding that court's duty to address standing, whether or not raised by parties, extends to prudential standing), and Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 1366 (D.C. Cir. 1990) (considering argument, raised for first time on appeal, that unions did not satisfy prudential standing requirements), with Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co., 219 F.3d 895, 899-900 (9th Cir. 2000) (declaring objections to prudential standing to be waivable and waived if not properly raised before district court; reviewing for abuse of discretion district court ruling excluding non-constitutional standing issues as untimely raised), MacLaughlin v. Prudential Ins. Co., 970 F.2d 357, 359 n.1 (7th Cir. 1992) (concluding that court may not raise prudential standing issues sua sponte), and Lindley v. Sullivan, 889 F.2d 124, 129 (7th Cir. 1989) (stating that court could not consider prudential standing considerations not suggested in district court).

The Court has decided, however, that the prudential aspects of ripeness, another element of justiciability, must, or at least may, be raised sua sponte, see infra note 127 and accompanying text. The two requirements overlap, see infra note 125, so that circumstance may suggest how the Court would decide the issue identified in the text.

Many cases illustrate that one whose suit has been dismissed for lack of standing to sue may appeal that decision. See, e.g., Alfred L. Snapp, 458 U.S. at 607-08; Silveira v. Lockyer, 312 F.3d 1052, 1052 (9th Cir. 2002) (entertaining appeal of residents who had been held to lack standing to challenge constitutionality of state law that strengthened restrictions on possession, use, and transfer of assault weapons); Schmier v. U.S. Court of Appeals for the Ninth Circuit, 279 F.3d 817, 819 (9th Cir. 2002) (entertaining appeal of attorney held not to have standing to challenge circuit rules prohibiting citation to unpublished opinions); Star Scientific, Inc. v. Beales, 278 F.3d 339, 343-48 (4th Cir. 2002) (entertaining appeal of non-participating tobacco company held, inter alia, not to have standing to challenge constitutionality of multi-state Master Settlement Agreement entered into by Virginia and major tobacco companies).

See, e.g., Knight v. Alabama, 14 F.3d 1534, 1555-56 (11th Cir. 1994) (declining to reach merits of cross-appeal by defendant historically black colleges in suit challenging allocation
2. The Purposes of Standing Doctrine. What large ends does standing doctrine purport to serve? The values served by standing doctrine have been crystallized along the following lines:

- "Standing doctrine promotes separation of powers by restricting the availability of judicial review . . . . The notion is that[,] by restricting who may sue in federal court, standing limits what matters the judiciary will address and minimizes judicial review of the actions of other branches of government . . . . Standing thus focuses attention directly on . . . the proper place of the judiciary in the American system of government," and conserves the federal courts' political capital.

- Limits on standing to sue in federal court have federalism implications, as would any limitation upon federal subject-matter jurisdiction. Disputes that cannot be heard in federal court either have to go to another tribunal, which might be a state court, or be left to non-judicial resolution.

- Standing is said to improve judicial decision-making by ensuring that a specific controversy is presented to the court by an advocate with sufficient personal stake to effectively litigate the matter. In the Court's words, standing requires a plaintiff with "such a personal stake in the outcome of the controversy as to

of resources among state's institutions of higher education, holding that defendant colleges lacked standing to appeal court's allocation order since they would not have had standing to assert Fourteenth Amendment claims against the state, and thus were not aggrieved by court's order) (citing 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS 2d § 3902, at 61 (1992 & Supp. 2003) ("[A] plaintiff who lacks standing to bring suit cannot require an appellate court to decide on the merits.").

CHEREMINSKY, supra note 2, at 57-58; see, e.g., Raines v. Byrd, 521 U.S. 811, 819-20 (1997) (commenting that particularly rigorous standing analysis should be brought to bear when constitutionality of action taken by another branch of government is challenged); Allen v. Wright, 468 U.S. 737, 752 (1984) (emphasizing separation of powers concerns at root of standing doctrine); Warth v. Seldin, 422 U.S. 490, 498 (1975) (speaking of standing as founded in concern about proper role of courts in democratic society).

CHEREMINSKY, supra note 2, at 58. Some have criticized the view of separation of powers issues, and any other policies not based on zealous advocacy, as rooted in Article III concerns. See generally Craig R. Gottlieb, Comment, How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns, 142 U. PA. L. REV. 1063, 1064-67 (1994).
assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

- Standing is seen as preventing intermeddlers from "trying to protect others who do not want the protection," and who may not believe that such litigation will further their interests. In this and other ways, "standing is said to serve judicial efficiency by preventing a flood of lawsuits by those who have only an ideological stake in the outcome."

Some commentators, writing from particular theoretical perspectives, have articulated additional values standing doctrine may serve. For example, Professor Maxwell Stearns, applying social choice theory, argues that standing doctrine improves overall fairness (as that term is understood in social choice theory) by

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43 Baker v. Carr, 369 U.S. 186, 204 (1962); see Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, The Lower Federal Courts, and the Nature of the "Judicial Power", 80 B.U.L. REV. 967, 1003 (2000) (observing that, insofar as standing doctrine ensures that courts exercise their powers in concrete factual contexts, Court "equates[s] the benefits of the standing requirement with the traditionally understood strengths of the common law process").


Writing in 1988, then-Professor William A. Fletcher wrote,

The stated purposes . . . of standing . . . include ensuring that litigants are truly adverse and therefore likely to present the case effectively, ensuring that the people most directly concerned are able to litigate the questions at issue, ensuring that a concrete case informs the court of the consequences of its decisions, and preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches.

presumptively preventing ideological litigants from manipulating the order in which cases are adjudicated, and thereby affecting the substantive evolution of legal doctrine. 48

B. THE RIGHT TO DEFEND IN THE TRIAL COURT: BASIC DOCTRINE AND PURPOSES OF THE RIGHT TO DEFEND

Defending in the trial court ordinarily is regarded as an obligation foisted upon defendants by plaintiffs who have served each of them with a complaint and a summons issued by a court with subject-matter jurisdiction over the dispute, personal jurisdiction over the parties, and that may be a proper venue. 47 The fact that failure to defend may well result in a default judgment provides a powerful incentive not to ignore the litigation. 48 Defending may be thought of as a "right" less often that it is perceived as an onerous necessity; but, of course, it is a right. Without a right to defend, persons from whom plaintiffs seek compensation or against whom plaintiffs seek other court-ordered relief could find themselves subject to such judicial impositions without having been afforded the

48 See Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 CAL. L. REV. 1309, 1315 (1995) (asserting that "the modern standing doctrine substantially ameliorates . . . the ability of litigants to control the substantive evolution of legal doctrine by controlling the critically important path of legal decisions"); Maxwell L. Stearns, Standing and Social Choice: Historical Evidence, 144 U. PA. L. REV. 309, 327-30, 337-38 (1995) (arguing that, without standing doctrine, interest groups would retain substantial control over path of cases to Supreme Court, by forcing splits among circuits or highest state courts, and thereby asserting pressure on Court to resolve those splits; that standing doctrine renders such manipulation substantially more difficult, by presumptively grounding path of case presentations in fortuitous historic events beyond control of litigants, rather than in litigants' desire to make law, to "control the substantive evolution of legal doctrine by manipulating the path of case decisions"; and that "because standing furthers an important majoritarian norm . . . standing is well-grounded in fair constitutional process").

47 If the venue is improper, or personal jurisdiction is lacking over one or more defendants, as an alternative to dismissal without prejudice, a federal court may transfer a case to a federal court where the action could have been brought, and whose assertion of personal jurisdiction and venue are unobjectionable. 28 U.S.C. § 1406; see Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962) (allowing transfer if the court in which action was brought lacks personal jurisdiction over defendant, as well as when that court is improper venue).

48 See FED. R. CIV. P. 55 (authorizing court, and in some circumstances court clerk, to enter judgment by default against party against whom affirmative relief has been sought when that party has failed to plead or otherwise defend within time afforded by Rules).
opportunity to argue, or offer evidence showing, that the plaintiff is not entitled to relief.

Thirty years ago, Professor Michelman identified several values that are served by allowing persons to litigate, to defend, as well as to prosecute. These values include dignitary values, participation values, and effectuation values. Thus, we afford a right to defend so that people will not feel demeaned, humiliated, and infuriated by being unable to articulate their side of a dispute; so that people may exert influence upon a process that will lead to a decision that they very much care about; and to promote the protection of interests that the law purports to protect. In the case of defendants, the right to litigate helps enable litigants to retain what is rightfully theirs. Affording a right to defend "is a means by which correct decisions (… those made according to the substantive norms of law) are rendered more probable." In that sense, the right to defend, while it is of most immediate importance to the defendant, also is important to the society generally in a legal system, such as ours, in which judicial decisions (at least those of appellate courts) have precedential value, and consequent effects on others. The rights to notice and the opportunity to be heard in one's own defense are at the core of our concept of due process, without which, the Fifth and Fourteenth Amendments to the U.S. Constitution promise us, we will not be deprived of life, liberty, or property. Due process, and the right to defend in particular, are "central to the rule of law and to [this] society's sense of justice and fundamental values." They are rights that flow in part from our collective judgment that "truth is more likely to emerge from bilateral investigation and presenta-

49 Frank I. Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I, 1973 DUKE L.J. 1153, 1172-77. The fourth value Michelman identified was deterrence, recognizing litigation "as a mechanism for influencing or constraining individual behavior in ways thought socially desirable." Id. at 1173. Although this value could be enjoyed by defendants, particularly in its more generalized form as a "social welfare" value intended to "stand for all interpretations of litigation as a means for maximizing value across society," id. at 1173 n.73, in its deterrence aspect this value seems to be a value for claimants far more than for defendants.

50 Id. at 1172-73.


tion, motivated by the strong pull of self-interest, than from judicial investigation motivated only by official duty,\textsuperscript{53} but, as the earlier discussion indicates, the roots of the rights to notice and the opportunity to be heard are wider, if not deeper, than this value.

To whom does the federal judicial system afford a right to defend? It affords that right to anyone alleged to be liable for money, to anyone whom a plaintiff (or other claimant)\textsuperscript{54} seeks to have court-ordered to do or refrain from doing any acts, to anyone whose rights, obligations, or other legal relations the plaintiff seeks to have judicially declared, and to anyone whom the court is considering holding in contempt.\textsuperscript{55} The exceptions to this "rule" are few, and have to be justified by exceptional circumstances.\textsuperscript{56} Even a temporary restraining order, which can last only a matter of days, may be obtained by a plaintiff "ex parte," that is, without notice to or argument from the adverse party, only when and because such an order is sought in an emergency.\textsuperscript{57}

One does not have to be a "proper" party defendant to have a right to defend. That is, even a defendant who deserves to be dismissed by virtue of inability of the court to exercise subject-matter jurisdiction over the case, inability of the court to assert personal jurisdiction over the defendant, plaintiff's failure to state a claim on which relief can be granted, misjoinder, or on any other ground, has the right to proffer defenses. The propriety of a

\textsuperscript{53} FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 1.2, at 5 (5th ed. 2001).

\textsuperscript{54} For convenience, I will refer to all claimants as plaintiffs unless there is reason to distinguish between them.

\textsuperscript{55} See Int'l Union, UMW v. Bagwell, 512 U.S. 821, 827 n.2, 832 (1994) (observing that civil sanctions for contempt occurring out of court may be imposed in ordinary civil proceeding upon notice and opportunity to be heard, but not summarily (although no jury trial is required), whereas petty "direct contempts that occur in the court's presence may be adjudged and sanctioned summarily" to maintain order in court in face of obstruction of justice. "If a court delays punishing a direct contempt until the completion of trial, however[,] ... due process requires that the contemnor's rights to notice and a hearing be respected.").

\textsuperscript{56} See, e.g., United States v. James Daniel Good Real Prop., 510 U.S. 43, 53, 55, 62 (1993) (holding that, absent exigent circumstances, due process requires government to afford notice and meaningful opportunity to be heard before seizing real property subject to civil forfeiture; noting that pre-deprivation notice and hearing are required absent extraordinary circumstances justifying postponement of hearing, and that ex parte seizure would create unacceptable risk of error).

\textsuperscript{57} Today many jurisdictions insist that the restrained party be given notice and an opportunity to be heard unless the court finds it impractical to do so. JAMES ET AL., supra note 53, § 5.16, at 339.
defendant's joinder may not be critical in quite the same ways as a plaintiff's standing to sue is critical, but at least one properly joined defendant is essential to the existence of an Article III case or controversy.

C. WHERE RULE 19 PARTIES AND INTERVENORS FIT IN

1. Rule 19 and Intervenor-Plaintiffs. Since this Article is surveying standing to sue and to defend in the trial court as a prelude to comparing standing to appeal and the right to defend appeals, it must include a reference to Rule 19 parties and intervenors. In addition to parties who take the initiative to sue and "claim" standing to do so, the Federal Rules of Civil Procedure make it possible for the parties or the trial court to join as a plaintiff a person who

claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.58

Rule 19 notes that "[i]f the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff."59 Similarly, under Rule 24, upon timely application, persons have a right to intervene in an action when a federal statute confers an unconditional right to do so, or

when the applicant claims an interest relating to the property or transaction which is the subject of the action

58 FED. R. CIV. P. 19(a). This Rule also permits the joinder, as a party, of a person in whose absence "complete relief cannot be accorded among those already parties." Id. A person joined for this reason would become someone against whom relief is sought, and therefore would fall within categories of persons with a right to defend.
59 Id.
and the applicant is so situated that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless her interest is adequately represented by existing parties.\textsuperscript{60}

Such persons may intervene as plaintiffs. In addition, upon timely application, a court may permit someone to intervene when a federal statute confers a conditional right to do so, or "when an applicant's claim . . . and the main action have a question of law or fact in common."\textsuperscript{61}

It should be noted that persons who intervene and are aligned as plaintiffs typically seek to protect themselves from impending court action; it is the prospective disposition of the action and its potential to impair their ability to protect their interests that provokes their intervention. They resemble "regular" plaintiffs in their concern with how the court will resolve the case, but they may differ from "regular" plaintiffs in that "regular" plaintiffs are in court to redress past out-of-court harms or to avoid imminent out-of-court harms, whereas, at least on one view of Rule 24, intervenors on the plaintiffs' side need not have any such grievances to redress or avoid.\textsuperscript{62}

Persons joined under Rule 19 and aligned as plaintiffs also are sometimes joined because the prospective disposition of the action has the potential to impair their ability to protect their interests, and they too are concerned with how the court will resolve the case.

2. Rule 19- and Intervenor-Defendants. A person who fits the descriptions provided in Rule 19(a)(1) and (2)(i) (that is, a person in whose absence complete relief cannot be accorded among those already parties, or who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the

\textsuperscript{60} \textit{Fed. R. Civ. P.} 24(a). For example, 28 U.S.C. § 1369(d) (2000) provides that, in any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

\textsuperscript{61} \textit{Fed. R. Civ. P.} 24(b).

\textsuperscript{62} See Steinman, \textit{supra} note 1.
person’s ability to protect that interest,”)\textsuperscript{63} may be joined as a defendant. A person joined pursuant to Rule 19(a)(2)(i) and aligned as a defendant may or may not be someone against whom the plaintiff seeks relief of a monetary or injunctive sort, however.\textsuperscript{64}

Similarly, under Rule 24, upon timely application, persons who seek to intervene as of right\textsuperscript{65} may intervene as defendants or on defendants’ side of the “v.” In addition, upon timely application, a court may permit someone to intervene when a federal statute confers a conditional right to do so, or “when an applicant’s . . . defense and the main action have a question of law or fact in common.”\textsuperscript{66} As with Rule 19 defendants, a defendant-intervenor, whether an intervenor of right or a permissive intervenor, may or may not be someone against whom the plaintiff seeks relief of a monetary or injunctive sort.\textsuperscript{67} Particularly in the case of a permissive intervenor who has a “defense” that merely shares a question of law in common with the pre-existing lawsuit, no plaintiff presently in the litigation may have standing to assert even a claim for declaratory relief against that intervening “defendant.”\textsuperscript{68} Nonetheless, anyone who comes into a suit as a Rule 19 defendant, or who intervenes as a defendant or in support of a defendant, is provided some opportunity to protect his interests, that is, a right to defend.\textsuperscript{69}

\textsuperscript{63} FED. R. CIV. P. 19(a).

\textsuperscript{64} See Steinman, supra note 1.

\textsuperscript{65} FED. R. CIV. P. 24(a). As indicated supra note 60 and accompanying text, a person has a right to intervene in an action when a federal statute confers an unconditional right to do so, or when the applicant claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposition of the action may, as a practical matter, impair or impede her ability to protect that interest—unless her interest is adequately represented by existing parties.

\textsuperscript{66} FED. R. CIV. P. 24(b).

\textsuperscript{67} See Steinman, supra note 1.

\textsuperscript{68} For examples of such cases, see David L. Shapiro, Some Thoughts on Intervention Before Courts, Agencies and Arbitrators, 81 HARV. L. REV. 721, 737-38 (1968).

\textsuperscript{69} Although federal courts may impose conditions and restrictions on intervenors, reviewable for abuse of discretion, those conditions and restrictions are limited. See FED. R. CIV. P. 24 advisory committee’s note (1966) (“An intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.”); see also Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) (concluding that district court-ordered restrictions on discovery and on right to assert claims and request relief additional to that sought by plaintiffs, imposed on permissive intervenors, did not effectively deny them all right to participate, so as to make
Like persons who intervene on the plaintiffs' side, persons who intervene and are aligned on the defense side typically seek to protect themselves from impending court action; it is the prospective disposition of the action and its potential to impair their ability to protect their interests that provokes their intervention. They also resemble plaintiff-joined defendants in their concern with how the court will resolve the case.

There currently is a split in the circuits as to whether a person properly may be permitted to intervene if he himself is not "party to" an Article III case or controversy with an adversary in the litigation. In the sequel to this Article, I will venture into this terrain. It is a part of the background of who can sue and be sued, and who can participate in significant ways in litigation, that will be a prelude to my discussion of the rights of would-be and successful intervenors to appeal and to defend decisions on appeal. More importantly, the standing issue bears rather directly on the rights of intervenors to appeal and to defend decisions on appeal. In whatever manner the courts resolve the question whether such orders immediately appealable, and noting that the "district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference"; id. at 382 & n.1 (Brennan, J., concurring) (opining that, "[e]ven highly restrictive conditions may be appropriately placed on a permissive intervenor, because such a party has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could not adequately protect in another proceeding" and that "a district court has less discretion to limit the participation of an intervenor of right," although restrictions on participation also may be placed on intervenors of right and original parties); Columbus-America Discovery Group v. Atl. Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992) (holding denial of discovery to intervenors unreasonable); see generally 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1922 (2d ed. 1986 & Supp. 2003).


Steinman, supra note 1.
intervenors (or Rule 19 parties) need standing to sue or be sued, the question whether an intervenor is a "party to" an Article III case or controversy recurs and has particular importance in the context of an appeal if no other party seeks to appeal or to defend the judgment below. 72 Thus, the question whether one may prosecute or defend an appeal without independently being party to the case or controversy is raised most acutely in circuits that do not require such independent standing as a prerequisite to intervention or to Rule 19 joinder in the trial court. This issue, which the Supreme Court has answered in part, is addressed in the sequel to this Article. 73

D. CONSTITUTIONAL AND PRUDENTIAL STANDING TO APPEAL

1. Basic Doctrine and Issues. What are the parallels between plaintiffs and appellants, and between standing to sue and standing to appeal, and where do they diverge or break down?

There are many parallels. Appellants resemble plaintiffs in that both perceive themselves to have suffered a wrong for which courts can provide a remedy. Plaintiffs, however, typically contend that they have been wronged (or are imminently about to be wronged) extrajudicially by the persons whom they have named as defendants, whereas appellants complain that they were wronged by the errors of a subordinate tribunal. Each contends that the wrongdoer caused them harm and seeks redress from the court to which they bring their complaint. Plaintiff-appellants claim to have been twice-wronged, first by the defendants and then by the errors of the trial court, and seek remedies for both of these misfortunes.

When a court determines a person's or entity's standing to appeal, it is deciding whether the person or entity is a proper party to bring a particular issue to an appellate court for review. In

72 See Steinman, supra note 1.

73 A student commentator has argued that to allow parties who lack standing to sue to intervene has the effect of "permit[ting] intervening parties into an action without an opportunity to appeal the decision to which they are bound according to the dictates of res judicata unless the original party... pursue[s] appeals related to his own interest," and that this is one of the strongest arguments for requiring intervenors to have standing. White, supra note 70, at 543-44. However, as discussed infra note 232 and accompanying text, a decision that cannot be appealed may be denied res judicata effect.
essence, the question is whether that person is entitled to have an appeals court decide the merits of the dispute, or at least particular issues that the appellant contends were erroneously decided in the trial court. Unlike standing to sue, which typically attaches to claims, standing to appeal attaches to discrete rulings and issues. A litigant may have standing to appeal particular trial court legal rulings and findings of fact in a litigated case but lack standing to appeal other rulings and other findings of fact that relate to the very same claim.\(^7\) When a federal court has appellate jurisdiction to review decisions of the highest court of a state or territory,\(^7\) a defendant even may have standing to appeal in a case that the plaintiffs would not have had standing to commence in a federal district court.\(^7\)

The Supreme Court has said that, like standing to sue, standing to appeal in the federal court has constitutional, sometimes statutory, and prudential aspects,\(^7\) although the Court has

\(^7\) This statement holds true whether one defines a claim for jurisdictional purposes, for pleading purposes, for purposes of Rule 54(b) of the Federal Rules of Civil Procedure, for res judicata purposes, or for other purposes. See John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 *Tex. L. Rev.* 1829, 1858 (1998) (distinguishing transactional concept of claim, that has jurisdictional significance, with conception rooted in legal authority invoked as basis for right to relief).


\(^7\) See ASARCO Inc. v. Kadish, 490 U.S. 605, 623-25 (1989) (upholding state court defendant's standing to appeal to U.S. Supreme Court, stating that,

> When a state court has issued a judgment . . . where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment . . . causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.);

Gutierrez v. Pangemanan, 276 F.3d 539, 545 (9th Cir. 2002) (holding that Governor of Guam had standing to petition Ninth Circuit for writ of certiorari from decision of Supreme Court of Guam that bill was not duly enacted and had been pocket vetoed, regardless of whether plaintiffs would have had taxpayer standing to sue under doctrines governing such standing in federal court; Governor alleged sufficient injury from ruling to confer standing to appeal); see also Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2560-62 (2003) (Breyer, J., dissenting) (disagreeing with Court's dismissal of writ of certiorari as improvidently granted, indicating that, although plaintiff asserting false statements and material omissions of fact concerning working conditions under which Nike products are manufactured likely would have lacked standing to sue in federal court, Nike had standing to complain of state supreme court's ruling that suit could proceed in state court).

\(^7\) See Quinn v. Millsap, 491 U.S. 95, 102-03 (1989) (upholding standing to appeal of
equivocated about which requirements are constitutional and which are merely prudential. The Court has inferred a standing to appeal requirement from Article III's limitation of federal judicial power to particular "cases" and "controversies." The standing to appeal requirements closely parallel those the Court has identified for standing to sue (injury, causation and redressability). Thus, an appellant must allege that he personally is "agrieved" by the rulings or judgment that he is appealing—in other words, that he has suffered, or imminently will suffer, an injury by reason of those decisions or that judgment. Just as a plaintiff claims to have suffered at the hands of the defendants, an appellant—who may have been a plaintiff or a defendant "below"—claims to have suffered wrongs at the hands of the trial judge. In alleging his grievance, appellant must link the injury to the appealed rulings or judgment, as a plaintiff must allege causation, linking his injury to the defendant's out-of-court conduct. Moreover, an appellant must

persons who unsuccessfully challenged state constitutional provision that privileged owners of real property, commenting that, "we have no doubt that the appeal 'retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy,' and therefore qualifies as a 'Case[s]' for the purposes of Article III, § 2") (citations omitted); Perry v. Thomas, 482 U.S. 483, 484 (1987) (rejecting contention that resolving in appellants' favor question whether appellants were entitled to enforce arbitration agreement was prerequisite to appellants' Article III standing to appeal lower court refusal to compel arbitration); see also Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs, 519 U.S. 248, 264 (1997) (rejecting defendant Ingalls' argument that OWCP Director lacked standing to participate as respondent in appeal of Board decision in favor of widow whose former husband had been exposed to asbestos on his job, and commenting that, while question whether Director had statutory authority to appear as respondent before court of appeals or Supreme Court was difficult, "Any impediment to the Director's appearance as a respondent ... is not of constitutional origin ... Article III surely poses no bar to [such participation]"). The Court in Ingalls Shipbuilding also stated that, even as a respondent, the Director was free to argue on behalf of the petitioner. Id. at 270.

Many federal appeals court opinions echo the notion that standing to appeal is constitutionally required, as well as having prudential aspects. See, e.g., Knisley v. Network Assoc., Inc., 312 F.3d 1123, 1126-27 (9th Cir. 2002) (echoing notion in context of holding that shareholder class member lacked standing to appeal attorneys' fee award, on particular facts presented); Rohm & Haas Tex., Inc. v. Ortiz Bros. Insulation, 32 F.3d 205, 208, 210 (5th Cir. 1994) (holding that defendant that disavowed any stake in interpleaded funds lacked constitutional standing to appeal district court's determination of priority of payment to be made from those funds, despite its contentions of remote financial consequences); Sierra Club v. Babbitt, 995 F.2d 571, 574-75 (5th Cir. 1993) (dismissing appeal for lack of jurisdiction, holding that defendant intervenors could not continue appeal after governmental defendant dismissed its appeal, because judgment imposed no injury upon them, and no case or controversy remained).
allege that a favorable appellate court decision is likely to redress the injury.\textsuperscript{78} Discussion later in this Article will illuminate the kinds of injuries that the Court and the intermediate federal appellate courts have found to be (or not to be) sufficient to justify an appeal.\textsuperscript{79} The later discussion also will advert to the relatively rare occasions when courts have found the causation argument, purporting to trace the claimed harm to the order or judgment from which a litigant seeks to appeal, too attenuated, and when courts have not been persuaded that their hearing of a proposed appeal could redress the appellant's claimed grievance.

The Court also has carried over into the appellate context the characterization as prudential of the standing "requirements" that are prudential for purposes of standing to sue.\textsuperscript{80} Beyond that, some pronouncements in Supreme Court opinions cloud which aspects of standing to appeal are of constitutional magnitude and which have been imposed by the Court in the interest of prudent judicial administration. For example, after noting that ordinarily only a party aggrieved by a district court order or judgment may exercise the statutory right to appeal from it,\textsuperscript{81} and that a party who receives all that he has sought generally is not regarded as aggrieved by a

\textsuperscript{78} See, e.g., Cella v. Togum Constructeur Ensembleier en Industrie Alimentaire, 173 F.3d 909, 912 (3d Cir. 1999) (holding that where cognizable deprivation was caused by district court's order and appellate court could remedy deprivation by reversing dismissal of case, adversely affected defendant had standing to appeal deprivation); Grinnell Mut. Reinsurance Co. v. Reinke, 43 F.3d 1152, 1154 (7th Cir. 1995) ("Litigants . . . who cannot show how the judgment injured them in a way the court of appeals can correct, are not proper appellants."); cf. Spencer v. Casavilla, 44 F.3d 74, 78-79 (2d Cir. 1994) (denying standing to appeal, holding that set aside of verdicts on plaintiffs' federal claims did them no harm where jury had not awarded any damages on those claims and set aside did not disturb awards on their state law claims).

\textsuperscript{79} See infra notes 191-310 and accompanying text.

\textsuperscript{80} See, e.g., Arizonans for Official English v. Arizona, 520 U.S. 43, 65-66 (1997) (expressing grave doubts about standing to appeal of sponsors of ballot initiative that became state constitutional provision challenged by plaintiff, deeming to be dubious their argument that they had quasi-legislative interest in defending measure, and problematic their assertion of representational or associational standing).

\textsuperscript{81} The right to appeal in federal court derives from statutes such as 28 U.S.C. §§ 1291, 1292, 1253, 1254 (2000), and to a lesser extent from Rules, including Fed. R. Civ. P. 23(f) and 54(b). An amendment to Fed. R. App. P. 1(b), effective Dec. 1, 2002, deleted the language that the appellate rules "do not extend or limit the jurisdiction of the courts of appeals." The Court has held that there is no constitutional right to an appeal. See infra note 97 and accompanying text.
judgment, the Court declared in *Deposit Guaranty National Bank v. Roper* that "[t]he rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Article III."^{83}

The Court need not have distanced that appellate standing rule from Article III. In *U.S. Parole Commission v. Geraghty*,^{84} it need only have made clear that the grievance that Article III requires can be found in an adverse ruling collateral to the merits, in which the appellant retains a stake, despite success on his substantive law claims.^{85} Thus, the Court injected perhaps needless uncertainty by casting aside the Article III anchor. On the other hand, unbundling standing to appeal from Article III would be defensible and would have some advantages. It could be defended on the ground that whether such a case or controversy exists should be decided once and for all time, when a case is commenced in or removed to federal court. That approach would allow the federal appellate courts,

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83 *Id.* at 333-34, cited in *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001). The Court followed the language quoted in the text at this footnote with the proposition that, "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as the party retains a stake in the appeal satisfying the requirements of Art. III." *Id.* at 334. By contrast, in a later case, *Bender v. Williamsport Area School District*, 475 U.S. 534, 548 (1986), the Court reacted hostilely when the dissent made "an unprecedented (and unexplained) suggestion that the principle governing determination of subject-matter jurisdiction should be relaxed on appeal," in arguing in support of the standing to appeal of a person who, in a different capacity than he claimed on appeal, was a proper party to the district court proceedings. *Bender*, 475 U.S. at 548 (responding to dissenting opinion of Justice Burger). While the Court could react hostilely to an argument for relaxation of appellate standing requirements that are statutorily grounded or prudential, rather than rooted in the Constitution, one might expect such vehement opposition to be reserved for arguments to undermine constitutional requirements. If the Court regarded the capacity requirement, see infra notes 118-24 and accompanying text, as constitutionally rooted, it is not at all clear why it would not similarly regard the requirement of aggrievedness.
85 It may be that the Court thought this distancing from Article III useful in the context of the case that gave rise to it, because the Court there felt obliged to defend its reliance upon policy considerations peculiar to class actions by asserting that courts "have a certain latitude," *Roper*, 445 U.S. at 340, in determining whether an adverse ruling on class certification should be subject to appeal at the behest of named plaintiffs whose substantive claims arguably were mooted by defendants' tender of the maximum those plaintiffs could have recovered.
including the Supreme Court, to resolve important issues raised by a decision in every case that was an Article III case or controversy when the Article III determination was made, based upon the case's posture in the trial court. The question whether the appellant has standing to appeal still would be posed, but it would be exclusively a statutory and prudential, rather than partially a constitutional, question. Such a step would raise many questions. It also would be difficult to reconcile with other Article III jurisprudence, especially with mootness doctrine, demanding that a case or controversy remain live and that the litigants retain a personal stake in the outcome, throughout the pendency of the proceedings. As discussed below, however, the constitutional credentials of that doctrine also are questionable.

Turning to what the Court has treated as prudential aspects of standing, it clearly is true that, at the appellate level, as in the trial courts, the Court has insisted that litigants generally may assert only their own rights, and may not raise the contentions of others.

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66 See infra text following note 95 and at note 96.
67 See infra notes 125-61 and accompanying text.
68 See Powers v. Ohio, 499 U.S. 400, 410, 415 (1991) (stating that "[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties," but ruling that, as he had done in lower proceedings, criminal defendant could represent interests of prospective jurors subjected to race-based exclusions through peremptory challenges in violation of their Fourteenth Amendment equal protection rights, even though criminal defendant was not of same race as excluded jurors); Sec'y of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 955, 958-59 (1984) (stating that plaintiff generally must assert his own legal rights and interests and cannot rest his claim to relief on legal rights or interests of third parties, but allowing professional fundraiser to assert First Amendment rights of charitable organizations on appeal from Maryland state court decision upholding state statute imposing 25% limit on charitable fund-raising expenses, where fundraiser had represented rights of those charities in state trial and appellate courts); Craig v. Boren, 429 U.S. 190, 193-94 (1976) (permitting bartender to appeal from state court decision refusing to enjoin enforcement of Oklahoma statutes prohibiting sale of 3.2% beer to males under twenty-one and females under eighteen, and to challenge law on behalf of bartender's male customers, where bartender had asserted rights of customers in lower court; although Court usually limits litigants' assertion of jus tertii, to minimize involvement in speculative and ill-defined constitutional questions, such prudential objectives did not apply); see also Dixon v. Wallowa County, 336 F.3d 1013, 1017 (9th Cir. 2003) (holding that tenant who brought § 1983 action lacked standing to appeal denial of one of defendants' motions for summary judgment on grounds of qualified immunity); Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 89-90 (2d Cir. 2002) (illustrating lack of standing to assert another's rights on appeal, but also subtlety of distinguishing one's own rights from others: holding that defendant CU, which remained potentially liable to plaintiff, had standing to appeal grant of summary judgment to another
Of course, when the courts have permitted a litigant to assert the rights of others in the trial court, the courts also have permitted that litigant to appeal from trial court decisions that are adverse to those whom the litigant was permitted to represent. This is true in \textit{jus tertii} situations generally, and also in situations of organizational and governmental litigants, suing as representatives of their constituencies.

Finally, at least in its constitutional and statutory aspect, because standing to appeal is regarded as an aspect of federal court subject-matter jurisdiction, it cannot be waived; it may be challenged for the first time at any time during the pendency of the proceedings; and, if none of the parties raise it, the federal appellate courts may, and indeed have a duty to, raise the issue \textit{sua sponte}, if

insurer on plaintiff's claim against latter insurer, and grant of summary judgment against CU on its cross-claim, because CU's right of action for potential contribution against second insurer gave it significant financial stake in whether second insurer could be forced to cover any of plaintiff's loss which made it appropriate to grant CU right to appeal to protect its interests, as opposed to those of plaintiff, even though "CU's claim [was] effectively derivative of [plaintiff's] claim" under policy; Natural Res. Def. Council v. Pena, 147 F.3d 1012, 1019 (D.C. Cir. 1998) (holding that defendant National Academy of Sciences Committee did not have standing to appeal permanent injunction prohibiting Department of Energy from using Academy committee's work product because injunction did not run against Academy, but only against its co-defendant, and did not infringe Academy's First Amendment rights, if any).

\footnote{See supra note 88 (citing Supreme Court cases).}

\footnote{Int'l Union, UAW v. Brock, 477 U.S. 274, 277-81, 290 (1986) (entertaining and adjudicating petition of union that had been permitted to sue in U.S. District Court on behalf of its members to challenge Department of Labor policy affecting trade readjustment allowance benefits; court of appeals had held, on appeal of Labor Department, that union did not have standing to sue, with consequence that it could not defend lower court decision). The Supreme Court's ruling that the union did have standing to sue recognized its right to appeal from the adverse court of appeals decision, and in effect recognized its standing to defend on appeal the trial court decision that favored those whom the union had been permitted to represent. \textit{Id.} at 290. \textit{See} Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 609 (1982) (affirming court of appeals decision that Commonwealth of Puerto Rico had \textit{pares patriae} standing to assert rights of its residents in action seeking declaration that practices of east coast apple growers violated federal law that favored domestic laborers over foreign temporary laborers, reversing trial court decision against Commonwealth); see also Rainbow/Push Coalition v. F.C.C., 330 F.3d 539, 543 n.* (D.C. Cir. 2003) (deciding whether association had demonstrated standing to challenge grant of television broadcasting licenses by F.C.C., discussing case in which D.C. Circuit had assumed that same standards determine standing before the Commission and standing to appeal Commission order, and assuming that D.C. Circuit's views on standing applied to constitutional, as well as to statutory, standing); EEOC v. Louisiana Office of Cmty. Servs., 47 F.3d 1438, 1442-43 (5th Cir. 1995) (allowing EEOC to appeal District Court's grant of summary judgment for employer, where EEOC had brought action on behalf of employee, alleging that defendant employer violated ADEA by failing to promote employee).}
there is any doubt about it. There appear to be few judicial
pronouncements as to whether the prudential aspects of standing to
appeal are waivable, or whether the courts have a duty to raise sua
sponte issues of prudential standing to appeal. In at least one case,
the Supreme Court did raise such an issue.\footnote{See Tileston v. Ullman, 318 U.S. 44, 46 (1943) (dismissing appeal on standing grounds, apparently sua sponte, where physician alleged invasion of constitutional rights of others); see also Dir., Office of Worker's Comp. Programs v. Newport News Shipbuilding & Dry Dock, Co., 514 U.S. 122, 124-25 (1995) (affirming holding of lack of statutory standing to appeal, noting that, acting sua sponte, court of appeals raised issue of standing of Director of Office of Workers' Compensation Programs to appeal denial of disability compensation benefits, and had decided that Director lacked such standing).}

2. The Purposes of Standing to Appeal Doctrine. What ends does
standing to appeal doctrine serve? To what degree does this
document serve the important purposes that standing to sue doctrine
purports to serve, and to what extent does it serve different
purposes?

Doctrines limiting standing to appeal from lower court decisions
do not keep cases out of the judicial bailiwick, leaving them in the
exclusive domain of the political branches. By definition, cases that
have been adjudicated in the lower federal courts have gone to the
judiciary. Thus, when it comes to appeals from lower courts to
intermediate appellate courts or to the Supreme Court, separation
of powers concerns are not part of the equation. This distinguishes
in an important way the policies underlying standing to appeal from
those underlying standing to sue.\footnote{By contrast, arguably, separation of powers concerns are reflected in law that limits standing to appeal to the courts from decisions of administrative agencies and other Article I tribunals. Those limits are statutory, however, and beyond the scope of this piece.}
courts or state agencies, prevent that from happening. Moreover, while the restrictiveness of federal standing-to-sue law may lead to cases being filed in state court, with effects on the allocation of cases between the court systems, neither restrictiveness nor liberality of federal appellate standing doctrine shifts cases between the appellate systems. In part because federal appellate standing doctrine is not particularly restrictive, it is implausible that restrictiveness of federal appellate standing doctrine causes cases to be filed in state court to begin with.

The absence of significant separation of powers and federalism ramifications of standing to appeal doctrine could support an argument for de-constitutionalizing that doctrine, to the extent it is constitutional. Restrictions on standing to appeal, however, serve other important purposes. Like restrictions on standing to sue, restrictions on standing to appeal presumably improve judicial decision-making by ensuring that an advocate with sufficient personal stake to litigate effectively is presenting issues to the

93 28 U.S.C. § 1291 (2000) provides: "The [federal] courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts ... , except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292 grants the federal courts of appeals jurisdiction to hear interlocutory appeals in specified circumstances. In addition, certain Federal Rules provide for appeals in the discretion of the district or appellate court. See FED. R. CIV. P. 23(f) (confering on courts of appeals discretion to permit appeal from order granting or denying class action certification); FED. R. CIV. P. 54(b) (authorizing district courts to direct entry of final judgment as to one or more but fewer than all claims or parties in civil action). Thus, federal "court of appeals jurisdiction extends to nearly every action that might be taken by a district court." 15A WRIGHT, MILLER & COOPER, supra note 39, § 3901, at 13.

State constitutional provisions and statutes similarly restrict appeals to higher courts within the state's judicial hierarchy. See, e.g., 705 ILL. COMP. STAT. ANN. 25/8.1 (West 1999) (providing for most appeals from circuit court final judgments to go to appellate court in district in which circuit court is located); N.Y.C.P.L.R. § 5501 (McKinney 2003) (providing for appellate division to review questions on appeal from judgment or order of court of original instance or from supreme court, county court or appellate term); N.Y.C.P.L.R. § 5601 (McKinney 2003) (providing for appeals to be taken to court of appeals in action originating in supreme court, county court, surrogate's court, family court, court of claims or administrative agency, from order of appellate division which finally determines the action, where there is either dissent by at least two justices on question of law in favor of party taking such appeal, or there is directly involved construction of the constitution of the state or of the United States, and in other specified circumstances); WIS. STAT. ANN. § 808.03 (West 2003) (providing for appeals from circuit courts to court of appeals).
court. In cases raising standing to appeal issues, the Court has cited language from standing to sue cases emphasizing that "the requirement of actual injury redressable by the court . . . tends to assure that the legal questions presented . . . will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." While the concrete factual context of a case could continue to ground a dispute presented to a federal appeals court even if someone other than aggrieved parties were permitted to prosecute the appeal, we would have to come up with something other than personal stake to promote the high-quality advocacy important to high-quality judicial decision-making. Moreover, we would have to determine the impact of appellate decisions, made at the behest of non-aggrieved persons, on the non-appealing aggrieveds. Under current law, restrictions on standing to appeal protect those whose interests are most directly affected by the lower court decision from the unwanted "assistance" of intermeddlers. These restrictions, of course, help to control the appellate caseload as well. That, in turn, gives the appellate courts more time, energy, and resources to devote to other cases. If we did away with standing to appeal restrictions of the kind that now operate, appellate courts would have to expend resources deciding the circumstances under which they could and should entertain appeals by non-aggrieved persons (and by which such persons) and myriad other issues that are avoided by our existing doctrines. Such a regime also would require a mighty stretch of the Article III notions of "case or controversy," if the existence of such a case or

Traditionally, we leave it to the parties, a choice that is far from value-neutral inasmuch as party initiative and control is one of the pillars of the ideational structure underlying adjudication in this country. Party initiative not only resonates with radical individualism and distrust of the state . . . ; it also is an attempt to power the judicial engine with the fuel of individual self-interest. Party initiative is, furthermore, commonly viewed as a means of allocating scarce judicial resources on the basis of intensity of felt need as expressed by willingness to pay to play.
(citations omitted).
controversy is not determined once and for all time based on the posture of the case in the trial court.

Finally, insofar as standing doctrine improves overall fairness (as that term is understood in social choice theory) by presumptively preventing ideological litigants from manipulating the order in which cases are adjudicated, and thereby affecting the substantive evolution of legal doctrine,\(^{96}\) a similar argument might be made by analogy in the context of standing to appeal: absent standing to appeal requirements, anyone, including and perhaps most likely the merely ideologically motivated, could manipulate the order in which cases brought to final decision in the trial courts would go up on appeal. By selecting which cases to appeal and which to forego appealing, those same persons could influence which court of appeals would first (or next) decide an issue, thus affecting the substantive evolution of legal doctrine, and by potentially manipulating the creation of circuit splits, also influence the probability and timing of Supreme Court involvement.

In considering standing to appeal doctrine, one should be cognizant not only of who is denied standing, but also of who is recognized to have it and why. Although the Supreme Court has held the right to appeal not to be guaranteed as a matter of due process,\(^ {97}\) it is a vital statutory right. Congress, having created intermediate federal appeals courts and conferred wide-ranging jurisdiction upon them,\(^ {98}\) as well as having left the U.S. Supreme Court with all-encompassing jurisdiction over appeals from the intermediate federal appeals courts and over direct appeals from three-judge district courts\(^ {99}\) and significant jurisdiction over appeals

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\(^{96}\) See supra note 46 and accompanying text.

\(^{97}\) See, e.g., Goeke v. Branch, 514 U.S. 115, 120 (1995) (per curiam) (indicating that one convicted of crime has no constitutional right to appeal); Jones v. Barnes, 463 U.S. 745, 751 (1983) (observing in felony case that there is no "constitutional right to appeal"); Abney v. United States, 431 U.S. 651, 656 (1977) (stating that it is well established that there is no constitutional right to appeal conviction); Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam) (upholding filing fee payable in the state appellate system, stating "This Court has long recognized that... due process does not require a State to provide an appellate system"); Hill v. Hawes, 320 U.S. 520, 525 (1944) (Stone, C.J., dissenting) (noting that in federal courts there is no right to appeal save as it is granted by Congress or by rule of court authorized by Congress).

\(^{98}\) See supra notes 81, 93.

from the highest court of a state to rule upon designated federal law matters, has demonstrated its belief in the importance of appeals. Furthermore, the American people have come to take the right to appeal for granted.

Appeals serve several very important purposes. They serve the dignitary, participation, effectuation, and behavior-influencing, values for litigants that Professor Michelman identified decades ago. They provide a safeguard against arbitrary action by individual judges that heightens the likelihood that losing litigants will accept the results and that the public will have confidence in the legitimacy of decisions; a mechanism for supervision of trial courts, for error-correction and, one hopes, the doing of justice; a prompter of self-correction by trial courts; a vehicle for elucidation, development, and harmonization of the law by judges who can work collaboratively, with more time and greater resources at their disposal (law clerks, staff attorneys, libraries) than trial judges typically have to devote to these endeavors; and a face-saving fallback for losing litigants. There is, moreover, good reason to

over direct appeals from decisions of three-judge district courts and from cases in federal courts of appeals).

See 28 U.S.C. 1257 (2000) (granting Supreme Court jurisdiction in cases questioning validity of federal law on constitutional grounds, as well as cases asserting federally created rights).

See supra notes 49-50 and accompanying text.

See Dalton, supra note 94, at 66-69 (identifying as justifications for appeal rights: furthering goal of reaching correct decisions; developing legal principles; serving process values of assuring that litigants are, and feel that they have been, treated fairly, and that they have been provided opportunity to participate meaningfully in process that determines their rights or obligations; and tying "geographically dispersed lower courts into a unified, authoritative legal system"); see also DANIEL J. MEADOR ET AL., APPELLATE COURTS—STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 4-10 (1994) (noting that appellate review is essential to consistent and accurate application of law, utilizing excerpts from DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 1-3 (1974), MARTIN M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 49-53 (1981), and John Leubsdorf, Constitutional Civil Procedure, 63 Tex. L. Rev. 579, 628-31 (1984)); FRANK M. COFFIN, THE WAYS OF A JUDGE 16-17 (1980) (noting that "[t]he opportunity to take one's case to a 'higher court' as a matter of right is one of the foundation stones" of our court systems, federal and state, and recognizing importance of higher courts in settling what "the law is and should be"); ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 3 (1941) (noting purposes of helping to prevent, as well as correcting, unfairness and mistakes); cf. Dalton, supra note 94, at 66-69 (calling into question our intuition that appeals right leads to improved case outcomes, and arguing for appeal by leave of court, rather than of right, in some cases); Irving Wilner, Civil Appeals: Are They Useful in the Administration of Justice?, 56 Geo. L.J. 417, 448-50 (1968) (questioning many time-honored justifications for, and
believe that the rights to sue and to defend a suit would lose much of their meaning if losing litigants could not appeal, arguing for correction of the errors that they believe trial courts to have made. So, the breadth afforded to standing to appeal is critical to effective utilization of appellate courts and to effective exercise of their jurisdiction. The important purposes served by appeals should be reflected in the standing to appeal doctrine that we mold and embrace. At the same time, the factors discussed in the preceding paragraphs demonstrate the importance of limiting those entitled or able to appeal, even if appeals by non-agrieved persons could serve some useful purposes. Thus, an appropriate balance needs to be struck. As we review the case law on standing to appeal, we can evaluate how well the federal courts have struck that balance.

While appeals often and increasingly fall short of meeting our ideal conception of them, 103 that is not the focus of this Article. Although it is possible that, at some point, the reality of meaningful appeal might become so illusory that who does and who does not have standing to appeal would be unimportant, I do not believe that appeals in the federal courts now come close to that condition.

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103 See Dalton, supra note 94, at 63 (observing, in 1985, on a trend that has since worsened, that “the right to appeal has in practice begun to shrink . . . in many jurisdictions as appellate judges severely restrict oral argument, deliberate alone, write skeletal opinions, write unpublished opinions, affirm without opinion, and in some cases rule from the bench”).

encomiums of appeals); Charles Alan Wright, The Doubtful Omnisiscence of Appellate Courts, 41 MINN. L. REV. 751, 778-82 (1967) (recognizing appellate functions of discovering and making law, correcting error, ensuring uniformity in rules applied by inferior tribunals, and ensuring that justice is done, but identifying costs, including “impair[ing] the confidence of litigants and the public in the decisions of the trial courts, and . . . multiply[ing] the number of appeals,” and questioning whether justice is improved by enhancing power of appellate courts).

There are many writings on the role of appellate courts in making law. See, e.g., PAUL J. MISHKIN & CLARENCE MORRIS, ON LAW IN COURTS, 79-81, 85 (1965) (considering particular questions whether courts should have power to overrule their own precedents, and if so, under what circumstances they ought to do so); James D. Hopkins, The Role of an Intermediate Appellate Court, 41 BROOK. L. REV. 459, 466-77 (1975) (discussing role of intermediate appellate courts in reforming law and in assisting highest court of system by offering suggestions for change); Benjamin Kaplan, Do Intermediate Appellate Courts Have a Lawmaking Function?, 70 MASS. L. REV. 10 (1985) (discussing powers and duties of appellate courts, judicial power, judge-made law, and Legal Realism); Roger J. Traynor, Transatlantic Reflections on Leeways and Limits of Appellate Courts, 1980 UTAH L. REV. 255, 258 (discussing judicial lawmaking and considerations that should guide appellate courts).
E. THE RIGHT TO DEFEND ORDERS AND JUDGMENTS THAT HAVE BEEN APPEALED

1. Basic Doctrine and Issues. Are there parallels between defendants and appellees, and between the right to defend a suit in the trial court and the right to defend orders and judgments that have been appealed, and where do the analogies diverge or break down?

There are parallels. A defendant typically is alleged to have breached a duty to the plaintiff and, as a result, is vulnerable to being judicially ordered to pay money to the plaintiff or required to change her behavior in a manner directed, more or less specifically, by the court. An appellee need not be alleged to have done any wrong in the trial court, but the appellee (who may have been a plaintiff or a defendant “below”), like a defendant, is alleged to be “ahead of the game”—that is, in some sense in a better position than she deserves to be—at the commencement of the appellate proceedings. And, like a defendant, an appellee is trying to preserve her position. Just as a defendant is vulnerable to both preventative remedies for prospective wrongs, and to compensatory (and sometimes punitive) remedies for its past wrongs, an appellee is vulnerable to being disadvantaged (in the sense of losing undeserved gains) by the appellate court’s rectification of the trial court’s errors—which the appellee may or may not have helped to induce. An appellee typically is a beneficiary of a trial court’s errors.

When a court determines a person’s or entity’s right to defend an appeal, it is deciding whether the person or entity is a proper party to defend the decisions of the trial judge or jury that the appellant

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104 If one regarded it as a “wrong” to have offered evidence that appellant argues the trial court erroneously admitted, or made an objection that appellant argues the trial court erroneously granted, or the like, then my statement in the text is “wrong,” that is, erroneous. However, these are not equivalent or analogous to the kind of wrongs that can render one liable.

105 If the appellant was the plaintiff, he now feels doubly wronged, first by the defendant and then by the trial court. If the appellant was the defendant, she “takes her turn” as an alleged victim of wrongdoing, perhaps having lost a case she should not have lost, or having lost “bigger” than she should have lost.

If the appellee was the defendant, he has preserved his position, transaction costs aside. If the appellee was the plaintiff, to the extent of his win he has gotten redress for the wrong the defendant committed against him.
has challenged, with the appellee typically acting in the service of its own interests. To be recognized as a proper appellee confers upon the winner of something below the right to defend challenged orders or judgments, and thereby to protect her trial court victory. Being an appellee carries burdens as well, of course, but ordinarily they are, in a sense, welcomed. While a trial court victor ordinarily would prefer that there be no appeal (unless she welcomes the making of appellate court precedent), if there is to be an appeal, the victor below typically would prefer to be able to defend his win than to have to passively sit by while the appellant expounds, unchallenged, on the trial court's alleged errors. While a silent appellee cannot lose a case by "default" as a defendant in the trial court can under Rule 55 of the Federal Rules of Civil Procedure, he would be disadvantaged if barred from arguing to the court of appeals a version of the facts and the law that differs from what the appellant is arguing.

Although relatively few cases address the issue, logic dictates that if standing to appeal has constitutional and prudential aspects, "standing" (i.e., the right) to defend an appeal in the federal courts has equivalent status. The Supreme Court has said that, "Standing to sue or defend is an aspect of the case-or-controversy requirement," and that "[s]tanding to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'" In each of the quoted cases, the Court was addressing the standing of persons who had been defendants in the trial court, but who sought to be appellants, not appellees. Nonetheless, both the Court's language and its logic suggest that the Court infers, from Article III's case-or-controversy requirement, limitations upon those eligible to defend trial court judgments on appeal, and that it has imposed or would impose additional requirements or limitations in the interest of prudent judicial administration.

107 Id. (quoting Diamond v. Charles, 476 U.S. 54, 56 (1986)); see also Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs, 519 U.S. 248, 264 (1997) (described supra note 77). Statutory aspects of the issue are beyond the scope of this Article.
108 See, e.g., Barrows v. Jackson, 346 U.S. 249, 257 (1953) (in context of holding enforcement of racially restrictive convenant barred by Fourth Amendment, holding that
Analogizing from standing to appeal doctrine, any constitutionally mandated requirements of "standing" to defend an appeal presumably would include the notion that the appellee has been benefitted by the lower court decision in such a way that the appeal puts her to a risk of loss or detriment that she would suffer if the appeals court were to afford the redress that the appellant seeks.

With respect to prudential aspects, in the realm of the right to defend orders entered and judgments rendered below, the Court has insisted that litigants generally may assert only their own rights, and may not raise the contentions of others at the appellate level, just as it does in the trial courts. Of course, when the courts have permitted a litigant to assert the rights of others in the trial court, the courts also have permitted that litigant to defend an appeal of trial court decisions that favor those whom the litigant was permitted to represent. This is true in jus tertii situations generally, and also in situations of organizational and governmental litigants suing as representatives of their constituencies.

Finally, at least as to constitutional and statutory aspects, because "standing" to defend an appeal is an aspect of federal court

covenantor, sued for breach of covenant, had standing as appellee, as he had as defendant, to raise constitutional rights of non-Caucasian would be users of the restricted land, and noting that limitation on third party standing was "only a rule of practice" outweighed by need to protect fundamental rights of those third parties).


See, e.g., Int'l Union, UAW v. Brock, 477 U.S. 274, 281-93 (1986) (holding that union had standing to sue and to appeal intermediate appellate court's denial of standing to union and other adverse decisions that reversed plaintiffs' success in trial court); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 592, 609 (1982) (affirming intermediate appellate court's reversal of district court holding that Puerto Rico lacked standing to sue pares patris); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 335-41, 344-45 (1977) (permitting Commission to defend appeal of district court decision in favor of Washington state apple growers and dealers and holding that Commission's status as state agency, rather than traditional voluntary membership organization, did not preclude it from asserting claims of Washington apple growers and dealers in representational capacity); Eisenstadt, 406 U.S. at 443-46 (permitting physician convicted of distributing contraceptive foam to unmarried individuals in violation of Massachusetts statute to raise rights of third parties denied access to contraception and to defend on appeal decision vacating dismissal of his petition for habeas corpus predicated on unconstitutionality of statute that physician was convicted of violating); Barrows, 346 U.S. at 258-60 (allowing assertion of third-party rights).

See, e.g., Int'l Union, UAW, 477 U.S. at 277-81, 290; Hunt, 432 U.S. at 335-41, 344-45.
subject-matter jurisdiction,\textsuperscript{112} it cannot be waived, it may be challenged for the first time at any time during the pendency of the proceedings and, if none of the parties raises it, the federal appellate courts have a duty to raise the issue \textit{sua sponte}, if there is any doubt about it.\textsuperscript{113} The question whether the prudential aspects of “standing” to defend an appeal are waivable or must be raised \textit{sua sponte} is seldom addressed, but the law should be the same as that applicable to the prudential facets of standing to appeal.\textsuperscript{114}

2. \textit{The Purposes of the Right to Defend on Appeal}. Does standing to defend on appeal serve the same important purposes that standing to defend in the trial court serves? What ends are served by doctrines limiting the right to defend appeals, and do they warrant constitutionalizing the right?

Restrictions on standing to defend on appeal have neither separation of powers nor federalism implications. But, as with standing to appeal, important purposes are served by restricting standing to defend on appeal.

Standing to defend a ruling or judgment that has been appealed serves purposes very similar to those served by recognition of a right to defend in the trial court. As previously discussed, although the Supreme Court never has recognized a due process right to appeal or to defend on appeal,\textsuperscript{115} there is every reason to believe that the right to defend, on appeal, rulings and judgments made in one’s favor, is highly valued by both the public at large and members of the legal profession. Statistics concerning appeals evidence the value litigants place on the right to appeal,\textsuperscript{116} and the rarity of “lay-

\textsuperscript{112} FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (noting that standing is perhaps most important of “the jurisdictional doctrines”).

\textsuperscript{113} See United States v. Hays, 515 U.S. 737, 742 (1995) (“The question of standing is not subject to waiver, [and federal courts] ‘are required to address the issue even if the lower courts have passed on it, and even if the parties fail to raise [it].’”) (quoting FW/PBS, Inc., 493 U.S. at 230-31).

\textsuperscript{114} See supra note 91 and accompanying text.

\textsuperscript{115} See supra note 97 and accompanying text.

\textsuperscript{116} For the year ending September 30, 2002, the federal courts of appeals brought 27,758 cases to termination on the merits, with 80.5% of the cases handled by an unpublished disposition. Analytical Servs. Office, Judicial Facts and Figures, tbl. 1.6 (2003), available at http://www.uscourts.gov/judicialfacts/figures/contents.html (last visited Feb. 15, 2004). In the same time frame, 57,556 appeals were filed in courts of appeals other than the Federal Circuit, 35,499 of which were civil appeals from district court decisions. Id. tbl. 1.1. Another
downs” by appellees are analogous evidence of the importance they place on the right to defend trial court successes. The due process-based right to defend at trial would lose much of its meaning if winning litigants could not defend those successes on appeal, arguing in support of the decisions that trial courts made.

Moreover, from a systemic perspective, restrictions on standing to defend an appeal (like restrictions on standing to appeal) presumptively improve judicial decision-making by ensuring that an advocate with sufficient personal stake to litigate effectively is presenting the other sides of issues to the court. While the concrete factual context of a case could continue to ground a dispute presented to a federal appeals court even if someone other than parties benefitted and bound by the decision below (and threatened by the appeal) were permitted to defend against the appeal, we would have to come up with something other than personal stake to promote the high-quality advocacy important to high-quality judicial decision-making. Moreover, we would have to figure out the impact on the winners below of appellate decisions made without the input of those parties. Under current law, restrictions on standing to defend an appeal protect those whose interests are most directly affected by the lower court decision from the unwanted “assistance” of intermeddlers. These restrictions help to control the appellate caseload, as well, and thereby conserve appellate time, energy, and resources for other cases. If we did away with restrictions of the kind that now operate to limit who may defend against an appeal, appellate courts would have to expend resources deciding the circumstances under which they could and should entertain appeals that would be defended by persons not directly threatened by the appellate decision (and by which such persons) and myriad other issues that are avoided by our existing doctrines. And, much like its effect on standing to appeal, such a regime would require a consider-

1,748 appeals were filed in the Court of Appeals for the Federal Circuit. Id. tbl. 1.4. Based on data from 1988 through 2002, the Administrative Office of the U.S. Courts reports that, with the exception of a 1994 drop due to a reduction in drug appeals, “total appeals have increased nearly every year and are up 50% since 1988,” although that increase is attributable primarily to an increase in prisoner and criminal appeals. Id. tbl. 1.1 n.1. Looking ahead to appeals in late 2002 and 2003, in fiscal year 2002 U.S. District Courts terminated 320,528 cases, id. tbl. 4.1, of which 259,537 were civil cases. Id. tbl. 2.11.
able stretch of the Article III notions of "case or controversy," if the existence of such a case or controversy is not determined once and for all time based on the posture of the case in the trial court. We seem far better off retaining, and if necessary tinkering with, the current restrictions.

Finally, we should be cognizant not only of who is denied standing to defend a decision on appeal, but also of who is recognized to have it, and why. Equally important to the development of the standing-to-defend-on-appeal legal landscape is the need for an appropriate balance. As we review the relevant case law, we can evaluate how well the federal courts have struck that balance.

F. DISTINGUISHING OTHER REQUIREMENTS FOR APPEAL OR APPEAL DEFENSE

For precision of thought, and sometimes for more practical purposes, it is useful to be able to distinguish standing to appeal or to defend a decision on appeal from (a) a litigant's capacity to appeal or to defend a decision on appeal, (b) a case's (or claim's or issue's) ripeness, liveness (as opposed to mootness), appealability, and reviewability, (c) other procedural prerequisites to appeal and appeal-defense, and, in particular (d) the non-acquiescence in a judgment that is a prerequisite to appeal.\(^\text{117}\) As the judicial decisions discussed below illustrate, the courts have not always scrupulously distinguished among the concepts, nor could they easily do so given the overlap particularly among the justiciability doctrines. Their failure to do so has not had particularly untoward consequences, but it is confusing. More consistent usage would, \textit{inter alia}, usefully indicate the relationships among these concepts.

1. Capacity. Capacity to sue or be sued, including the capacity to continue as a party for the duration of the litigation, refers to a quality of a litigant and is independent of the nature of the action. Incapacity typically is based on traits of an individual or attaches as

\(^{117}\) I suppose one could say that, conversely, acquiescence in a judgment is a prerequisite to defense of an appeal, although it may be an acquiescence "in the alternative," while one cross-appeals some aspect of the judgment or decisions that underlie some aspect of the judgment. Such acquiescence seldom is an issue, since one implicitly acquiesces in whatever one does not appeal.
a legal consequence to certain legal statuses. Thus, categories of persons who commonly lack capacity to sue or be sued are infants, those found to be mentally incompetent, convicts, individuals acting in a representative capacity in jurisdictions other than that of their appointment, and some organizations such as labor unions. Federal Rule of Civil Procedure 17 addresses capacity to sue or be sued in the federal courts, as well as how infants, incompetent persons, and various fiduciaries may sue or be sued. A person’s capacity to sue or be sued, in general, reveals nothing about whether she has standing to appeal or to defend a particular decision on appeal and, conversely, her incapacity is a problem distinct from any issues with respect to standing. Capacity to litigate is necessary, but not sufficient, for standing to appeal or to defend an appeal.

Standing and capacity can, however, “come together.” For example, in applying familiar doctrine that permits parties aggrieved by a trial court decision to appeal it, one has to understand who the parties are. A person who is a litigant by virtue of a particular capacity cannot serve as an appellant or appellee if he ceases to have that capacity or acts in a different capacity. He is a stranger to the litigation in any capacity other than that in which he had standing to sue or be sued because the “[a]cts performed by the same person in two different capacities ‘are generally treated as the transactions of two different legal personages.’” Thus, for

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119 The Federal Rules also mandate that every action be prosecuted in the name of the “real party in interest.” Fed. R. Civ. P. 17(a). The “real party in interest” is one who, under governing substantive law, possesses the right to be vindicated. Consul Gen. of the Republic of Indon. v. Bill’s Rentals, Inc., 330 F.3d 1041, 1045 (8th Cir. 2003). The Rules so require “to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.” Fed. R. Civ. P. 17 advisory committee’s note. In light of its purposes, the requirement that an action be prosecuted by the real party in interest may be waived by the defendant. It is not jurisdictional. Audio-Visual Mktg. Corp. v. Omni Corp., 545 F.2d 715, 719 (10th Cir. 1976).

120 Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543 n.6 (1986) (quoting Fleming James & Geoffrey C. Hazard, Jr., Civil Procedure § 11.6, at 594 (3d ed. 1985)); cf. Mitchell v. Chapman, 343 F.3d 811, 822-23 (6th Cir. 2003) (holding that, under “rule of differing capacities,” prior judgment for individual defendants in their official capacities did not preclude claims against them as individuals).
example, in *Karcher v. May*, the Supreme Court dismissed an appeal for lack of jurisdiction under 28 U.S.C. § 1254(2), where the appellants had ceased to hold the official positions (speaker of a state general assembly and president of the state senate, respectively) that had been the bases for their intervention as defendants into the lawsuit, and where they never had participated, nor even sought to participate, in the proceedings in the new roles (as individual legislators and representatives of the majority of a now-expired legislature) that they could claim. The Court explained that the authority to pursue the lawsuit on appeal had passed to the successor-speaker and -president, who chose not to appeal. Thus, the would-be appellants had no standing to appeal. In short, loss of the capacities in which they had litigated in the trial court caused these appellants to lack standing to appeal.  

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121 484 U.S. 72, 74 (1987).
122 28 U.S.C. § 1254(2) (2000) authorizes the Supreme Court to review cases in the federal courts of appeals by certification by a court of appeals of any question of law as to which it desires instruction.
123 *Karcher*, 484 U.S. at 77-81. *See also Bender*, 475 U.S. at 545 (holding that school board member lacked standing to appeal as individual or as parent when defendant school board had decided to forego appeal). In *Bender*, the Court noted the special importance of confining federal jurisdiction when a constitutional question is raised by the merits of a suit, id. at 541-42, and where the interest of the person seeking to appeal diverges from the interest of the pertinent party to the suit, id. at 548 n.9, both of which were true in *Bender*. The Court raised the issue of the school board member's standing to appeal, *sua sponte*, as going to the federal courts' Article III jurisdiction. *Id.* at 540-42. Because the intermediate court of appeals had been without authority to decide the merits of the case, the Court vacated its judgment and remanded with instructions to dismiss the appeal for want of jurisdiction. *Id.* at 549.

It is worth noting that three Justices dissented, arguing that the school board member had standing to appeal. They emphasized the aspect of the Court's opinion in which it focused upon the absence from the record of facts demonstrating that he was a parent of a student at the school, aggrieved by the conduct of prayer activities on school premises, during school hours, the prohibition of which had sparked the suit. *Id.* at 551-52 (Burger, C.J., dissenting). Although the Court did focus upon this absence of facts, it also went on to conclude that, even had the necessary facts been of record, they would not have conferred standing to appeal when the school board member had not been sued as a parent. The dissenters did not believe that one who was made a defendant, and who sought to appeal, should have imposed upon him the burden of alleging such facts, particularly when no party had challenged his standing to appeal. *Id.* The dissenters' argument that, "At the appellate stage ... the 'complaining party' ... merely identifies himself as a party to the case ... and challenges the validity of [the district court] decision," *id.* at 552, seems to ignore the fact that the "complaining party" was not a party in his individual or his parental capacities.

124 In the effort to keep terminology straight, I note parenthetically that, in concluding further that the judgment below should not be vacated, the Court made clear that this was
2. Ripeness and Liveness. As indicated above, "ripeness" and "liveness" are qualities of a case (or claim or issue), rather than terms describing a litigant.\textsuperscript{125} But ripeness, like standing, is perceived to have both constitutional and prudential aspects.\textsuperscript{126} For some reason, perhaps because the operational differences between not a case that had become moot; rather, the controversy ended when the losing party, the incumbent state legislature, chose not to pursue an appeal. \textit{Karcher}, 489 U.S. at 83.

\textsuperscript{125} The ripeness and standing doctrines nonetheless overlap. \textit{See} Cal. Pro-Life Council, Inc. \textit{v. Getman}, 328 F.3d 1088, 1093, 1094 n.2 (9th Cir. 2003) (noting that whether jurisdictional inquiry was framed as one of standing or of ripeness, analysis would be same since, in many cases, ripeness coincides with injury in fact); \textit{Simmonds v. INS}, 326 F.3d 351, 358 (2d Cir. 2003) (noting that language in U.S. Supreme Court opinions suggests that plaintiff's standing may be enough to render claim ripe, but opining that case's prematurity might render it sufficiently abstract as to cause it to fail Article III requirements in other ways); \textit{McInnis-Misenor v. Me. Med. Ctr.}, 319 F.3d 63, 69 (1st Cir. 2003) (noting that standing and ripeness inquiries overlap, as is most apparent in cases that deny standing because anticipated injury is too remote); \textit{see also} Erwin Chemerinsky, \textit{A Unified Approach to Justiciability}, 22 CONN. L. REV. 677, 683 (1990)

\begin{quote}
[Standing focuses on whether the type of injury is qualitatively sufficient to fulfill the requirements of article III and whether the plaintiff has personally suffered the harm, whereas ripeness centers on whether the injury has occurred yet. But nothing seems to be gained from fragmenting these inquiries."
\end{quote}

\textit{Id.}

\textsuperscript{126} \textit{See} Nat'l Park Hospitality Ass'n \textit{v. Dep't of Interior}, 123 S. Ct. 2028, 2030 (2003) (citing \textit{Reno v. Catholic Soc. Servs., Inc.}, 509 U.S. 43, 57 n.18 (1993)) (noting that ripeness doctrine is drawn from Article III and from prudential reasons to refuse to exercise jurisdiction); \textit{Am. Savings Bank v. UBS Fin. Servs., Inc.}, 347 F.3d 438, 439-40 (2d Cir. 2003) (dismissing appeal and remanding to district court on ground that appeal was not prudentially ripe although it was cognizable within Article III, relying upon issues raised being presently unfit for judicial decision and lack of hardship to parties if decision were withheld, particularly as plaintiff had not exhausted administrative remedies); \textit{Simmonds}, 326 F.3d at 357 (explaining that ripeness requirements, having their source in Article III, and hence going to jurisdiction, prevent courts "from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it," while prudential aspects, which constitute exception to usual rule that federal courts must exercise their jurisdiction, indicate when cases would better be decided later and when delay will not undermine parties' constitutional rights). Judge Calabresi, writing for the Second Circuit continued, "Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." \textit{Id.} As Judge Calabresi further noted, distinguishing the two aspects is important, \textit{inter alia}, "because a court's exercise of jurisdiction in the absence of constitutional ripeness is subject to all those forms of attack that can be made on judgments issued by a court that lacks jurisdiction. A court's error in failing to dismiss on the basis of prudential ripeness is not similarly challengeable." \textit{Id.} at 357 n.6; \textit{see also} \textit{McInnis-Misenor}, 319 F.3d at 70 (acknowledging both aspects). The distinction between constitutional and prudential restraints also is important because Congress can override the latter, but not the former.
the two aspects is unclear, the Court has decided that “even in a case raising only prudential concerns, the question of ripeness may be considered on a court’s own motion.” The ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative . . . from those cases that are appropriate for federal court action. The ripeness inquiry often is said to have two prongs, requiring evaluation of both the fitness of an issue for immediate judicial decision and the hardship the parties would suffer if judicial consideration were withheld. The courts’ interests in avoiding unnecessary litigation and in deciding only issues that are presented in a concrete setting favor postponement of review if a controversy may develop further, or if it may fizzle. A case that is not ripe should be dismissed from the district court for

127 Nat’l Park Hospitality, 123 S. Ct. at 2030 (citing Reno, 509 U.S. at 57 n.18) (noting that even where ripeness question is prudential, Court can raise it on its own motion) and Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974) (noting that, to the extent questions of ripeness involve judicial restraint from unnecessary decision of constitutional issues, Court must determine whether to exercise that restraint); Peachlum v. City of York, 333 F.3d 429, 433 (3d Cir. 2003) (noting that Third Circuit has recognized that ripeness considerations are sufficiently important that court is required to raise issue sua sponte); see supra note 126 and infra note 129 (discussing what goes into which analysis).

128 CHERERINSKY, supra note 2, at 114-15; see, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (noting that one ripeness consideration is need “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements”); Doe v. Bush, 323 F.3d 133, 138 (1st Cir. 2003) (citing Abbott Labs in discussing ripeness doctrine’s “mutually reinforcing constitutional and prudential considerations”).

129 See Nat’l Park Hospitality, 123 S. Ct. at 2030 (speaking of determining whether administrative action is ripe for judicial review); Abbott Labs., 387 U.S. at 149; Natural Res. Def. Council v. FAA, 292 F.3d 875, 881 (D.C. Cir. 2002); Bush, 323 F.3d at 138. Confusingly, the fitness for decision and hardship from delay considerations appear to provide the framework for, or at least to be relevant to, both the constitutional and the prudential facets of ripeness doctrine. See Simmonds, 326 F.3d at 359. But see Chang v. United States, 327 F.3d 911, 921 (9th Cir. 2003) (opining that ripeness’s constitutional consideration lies in whether plaintiffs face realistic danger of sustaining direct injury, and its prudential considerations turn on whether issue is fit for decision and whether parties will suffer hardship if court withholds immediate decision); McInnis-Misenor, 319 F.3d at 70 (opining that both constitutional and prudential concerns operate in fitness inquiry, “with prudential concerns focusing on the policy of judicial restraint from unnecessary decisions,” while hardship prong is entirely prudential).

130 See Bush, 323 F.3d at 138-39 (explaining why suit by active duty military personnel, their parents, and members of U.S. House of Representatives, seeking preliminary injunction to prevent President and Secretary of Defense from initiating war against Iraq, was not ripe, and citing inter alia policies to avoid unnecessary constitutional decisions and to give courts benefit of focus, sharpened by particular facts); see also Natural Res. Def. Council, 292 F.3d at 881 (quoting earlier D.C. Circuit decisions).
that reason, and the only issues concerning standing to appeal or to
defend on appeal that should arise would go to who may appeal (or
defend) such a dismissal. When an *issue* is not ripe for appeal, the
courts also may conclude that appellants have no standing to raise
it. ¹³¹

Assuming that a case is ripe and that the other requirements for
commencing an action in federal court are satisfied, the Court has
declared that an actual controversy under Article III must continue
to exist throughout both the trial and the appellate stages of the
case’s progress. ¹³² Courts frequently say that a case becomes moot
when the issues presented no longer are live or the parties come to
lack a legally cognizable interest in the outcome. ¹³³ Ordinarily, if
the controversy ceases (for example, because the plaintiff ceases to
be subject to the conditions of which she has complained or because
her grievance is rectified), the case has to be dismissed as “moot.”

¹³¹ *See*, e.g., *Keyes v. Sch. Dist. No. 1*, 119 F.3d 1437, 1440 (10th Cir. 1997) (holding that
issue of constitutionality was not ripe and that appellants had no standing to appeal, in case
involving appellants who did not challenge district court’s decision to terminate jurisdiction
in school desegregation case but sought to appeal district court’s dicta in support of federal
constitutionality of state constitutional provision); *see also* *California v. Rooney*, 483 U.S. 307,
312-13 (1987) (indicating that issue whether California courts erred in pronouncing search
of trash unconstitutional was not ripe, but that if various contingencies occurred in future,
state would have opportunity, and standing, to appeal order barring introduction of evidence,
predicated on that conclusion of unconstitutionality). *See generally* Gene R. Nichol, Jr.,
constitutionalization of ripeness doctrine). The Court has indicated that, “[finality, not
ripeness, is the doctrine governing appeals from district court to court of appeals.” United

Despite ripeness doctrine, courts sometimes reach out to decide issues that are not
really ripe when it seems clear that the issue will ripen and judicial efficiency would be served
by giving the issue immediate attention. *See*, e.g., *Pure Country, Inc. v. Sigma Chi
Fraternity*, 312 F.3d 952, 967 (8th Cir. 2002) (reversing denial of motion to amend complaint,
but addressing, in interest of judicial economy, question of standing to enforce consent decree
because issue had been fully briefed and argued, was bound to recur, and presented pure
question of law).

¹³² *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (noting that actual controversy must exist
through all stages of federal judicial proceedings, trial and appellate); *Arizona v. Arizona*, 520 U.S. 43, 67 (1997) (same); *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472,
477 (1990) (same); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (noting that actual controversy must
exist at all stages of appellate and certiorari review).

proposition. *See*, e.g., *Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980); *Los Angeles
County v. Davis*, 440 U.S. 625, 631 (1979); *Gulf of Maine Fisherman’s Alliance v. Daley*, 292
F.3d 84, 87 (1st Cir. 2002).
Similarly, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party, the appeal must be dismissed."\textsuperscript{134} In a well-known passage, Professor Henry Monaghan described mootness as "the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."\textsuperscript{135}

While liveness or mootness describes a case (claim or issue), and standing to appeal or defend an appeal describes rights of litigants, clearly there is, in some cases, a close relationship between the two. If a case (claim or issue) becomes moot after the trial court has entered a judgment on that aspect, the losing litigant will not be permitted to pursue her appeal of the decision that has been mooted.\textsuperscript{136} A characterization of the litigant as "lacking standing to

\textsuperscript{134} Church of Scientology v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)); see also De La Teja v. United States, 321 F.3d 1357, 1362 (11th Cir. 2003) (dismissing appeal as moot insofar as it challenged constitutionality of alien’s detention pursuant to particular statute where alien had come to be detained pursuant to different statute); Daley, 292 F.3d at 88 (noting that “[a] party can have no legally cognizable interest in the outcome of a case if the court is not capable of providing any relief [to] redress the alleged injury,” and dismissing action as moot where challenged regulation had been superceded).


\textsuperscript{136} See, e.g., Arizonans for Official English, 520 U.S. at 71-75 (1997) (discussing and implementing practice of reversing or vacating judgment below and remanding with instructions to dismiss case when civil action becomes moot pending appellate adjudication); De La Teja, 321 F.3d at 1382 (discussing practice of dismissing case as moot when events subsequent to filing deprive court of ability to afford plaintiff meaningful relief); see also Sosna v. Iowa, 419 U.S. 393, 402 (1975) (commenting that “there must be a live controversy at the time [the Supreme] Court reviews the case”).

Parties and courts sometimes use the word "moot" loosely when speaking of issues rather than cases. When an issue has become unimportant in light of the determinations of other issues in a case, parties sometimes argue (and courts sometimes agree) that the issue has become "moot" and that the court should vacate its opinion on that aspect. See, e.g., De La Teja, 321 F.3d at 1384 (vacating portion of trial court’s order addressing constitutionality of statute governing detention of alien where alien had come to be detained pursuant to different statute); Affiliated Ute Citizens v. Ute Indian Tribe, 22 F.3d 254, 255 (10th Cir. 1994) (holding that ruling that defendant tribe waived its sovereign immunity was mooted by ruling that plaintiff lacked standing to sue, and instructing district court to vacate its sovereign immunity ruling); Abbv. v. Sullivan, 963 F.2d 918, 922 (7th Cir. 1992) (referring to plaintiffs’ argument that judge’s ruling, which found that procedures used to investigate alleged scientific misconduct violated APA, mooted issue whether procedures violated plaintiffs’ constitutional due process rights, such that court’s ruling that procedures did not
appeal" seems to me to be entirely derivative of the mootness, at least in a non-class action, but courts sometimes do use the phrase, conflating the two. For example, in *Princeton University v. Schmid*, the University intervened in state supreme court appellate proceedings initiated by a non-student who had been convicted of criminal trespass for distributing political materials on the campus without the permission required by a university regulation. When the state’s highest court reversed, the university filed a notice of appeal, claiming that the judgment deprived it of its constitutional rights. The state joined the appeal, sought U.S. Supreme Court resolution, but declined to take a position on the merits. While the case was pending on appeal, the university violated those rights should be vacated). Such cases actually turn on whether such adverse rulings are appealable at the behest of the prevailing party, however, and use of the term "mootness," which, as a term of art, refers to the loss of a dispute constituting an Article III case or controversy, seems confusing.

The circumstances under which the decisions of a lower court or courts should be vacated once a case has become moot, and those in which they should be permitted to stand, is a question separate from, although influenced by, mootness. See *Arizonaans for Official English*, 520 U.S. at 71-75 (discussing and implementing practice of reversing or vacating judgment below and of remanding with instructions to dismiss case when civil action becomes moot pending appellate adjudication); *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 23-25 (1994) (holding that, even after case has become moot, courts have jurisdiction to determine whether to vacate judgments of lower courts); *Wal-Mart Stores, Inc. v. Rodriguez*, 322 F.3d 747, 749 (1st Cir. 2003) (remanding case mooted by settlement while on appeal, with instructions to vacate preliminary injunction enjoining Puerto Rico Secretary of Justice from pursuing antitrust action, where court concluded that vacatur was equitable under circumstances). In general, if a case became moot before a final judgment was rendered by the district court, that court’s final judgment should be vacated and the case dismissed. If a case became moot while on appeal, lower court judgments may be vacated and the case remanded with instructions to dismiss. See, e.g., *United States v. Munsingwear*, 340 U.S. 36, 39 (1950) (noting that “the established practice of the Court in dealing with a civil case from a court in the federal system which as become moot ... is to reverse or vacate the judgment below and remand with a direction to dismiss”). However, the decision to vacate is equitable. If the mootness is traceable to the actions of the party seeking vacatur, the decisions of lower courts may be allowed to stand, *inter alia*, to preserve their precedential value. The justification of vacatur, which lies in the unfairness of allowing an unfavorable decision to stand when the power to appeal has been lost for reasons beyond the- be appellant and vacatur-seeker’s control, is not applicable. See *U.S. Bancorp*, 513 U.S. at 22-27; see also *Mellen v. Bunting*, 327 F.3d 355, 364-65 (4th Cir. 2003) (vacating district court judgment insofar as it awarded declaratory and injunctive relief because plaintiffs’ claims for that relief had become moot through plaintiffs’ graduation from institution whose supper prayer they had challenged).

Given the state’s indifference to the merits, had it been the sole appellant, the Court would have had to dismiss for lack of a case or controversy. *Id.* at 102.
substantially amended its regulations concerning such conduct as
the defendant had engaged in, superseding the regulation at issue
in the litigation. The validity of the old regulation was thus mooted.
With the university’s alleged standing to appeal resting solely on its
contention that the judgment below prohibited it from enforcing
the superseded regulation,\(^\text{139}\) one might have expected the Court simply
to hold the case moot as to the university. Instead, the Court stated
that the university was “without standing” to invoke the Court’s
jurisdiction.\(^\text{140}\)

Although I find this conflation to be analytically unhelpful, the
close relation between the concepts of standing and of mootness, in
cases that have become moot, makes the equation understandable.
The requirement of a live case or controversy on appeal encom-
passes the presence of persons with standing to prosecute and
defend the appeal, and both requirements “limit[ ] the role of the
judiciary and sav[e] the courts’ institutional capital for cases”\(^\text{141}\) in
which the need for decision is greater.

\(^\text{139}\) The University did not claim standing to challenge the reversal of a criminal
conviction.

\(^\text{140}\) Id. at 103; see also Affiliate Ute Citizens, 22 F.3d at 255-56. Following a favorable
judgment for defendant, in Affiliate Ute Citizens the court dismissed the suit on the ground
that plaintiff lacked standing. Defendant sought to appeal to challenge an interlocutory order
holding that the Tribe had impliedly waived its sovereign immunity from such suits. In
dismissing the appeal for want of a case or controversy, the court concluded that, because the
Tribe failed to take immediate appeal from an adverse sovereign immunity ruling, the
“controversial quality [of that ruling] is mooted by the lack of a plaintiff with standing to sue
and, therefore, incentive to contest.”

Perhaps it is fair to say that the circumstances that render a case moot also deprive
a would-be appellant of standing to appeal. Then both the mootness and the loss of standing
to appeal are an outgrowth of those circumstances, rather than the standing-loss being simply
a function of the mootness. For example, in Goldin v. Barthlow, 166 F.3d 710, 717-18 (5th
Cir. 1999), the Court of Appeals for the Fifth Circuit held that the termination of a trust to
liquidate and distribute assets both mooted claims—claims that the trustee had been
asserting on behalf of the trust and claims asserted against the trust—and denied the trustee
continuing standing to appeal because he ceased to have a personal, substantial interest in
the outcome of the litigation. See also I.C.C. v. Holmes Transp., Inc., 983 F.2d 1122, 1125 (1st
Cir. 1993) (holding that removal of escrow agent terminated his interest as plaintiff seeking
declaration as to who was entitled to certain escrowed funds, and hence his standing to
appeal). The Holmes Transportation, Inc. opinion states that the former escrow agent’s
appeal of a contempt finding based on refusal to disburse refunds pursuant to a consent
decree also was mooted by his removal, but elsewhere states that the district court had
vacated that contempt finding. Id. at 1125 & n.4.

\(^\text{141}\) Chemerinsky, supra note 2, at 126.
Even if (or when) mootness implies lack of standing to appeal, the converse is not true: the fact that a case is not moot does not imply that everyone who had been aligned with the losing side should be regarded as having standing to appeal adverse decisions. The point may be illustrated best by reference to class actions. In the class action context, special doctrines have evolved to determine when cases have and have not become moot. As one example, the Court has held that the mootness of the named representative plaintiff's claim after a class has been certified does not moot the action so long as a controversy continues to exist between a named defendant and a member of the plaintiff class. The Court has declared that, when the representative's claim has been mooted after class certification, whether the representative plaintiff may appeal a decision on the merits that is adverse to the class should be analyzed by reference to the ability of that person to fairly and adequately protect the interests of the class (a Rule 23 standard), rather than by examining justiciability. The Sosna Court did not explain why the conclusion that the case was not moot shifted the focus away from justiciability to a "mere" Rule 23 inquiry and the Court's conclusion may be questioned. To the extent that standing

142 See, e.g., Sosna v. Iowa, 419 U.S. 393, 402 (1975). When class certification has been denied, the named plaintiff who sued on behalf of the proposed class can appeal the denial of class certification after his or her individual claim has expired or been satisfied, if the named plaintiff has a continuing personal stake in the outcome. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332-40 (1980) (so holding, and concluding that entry of judgment over named plaintiffs' objection, by virtue of tender of amount of their claims that plaintiffs had refused, did not moot their case where plaintiffs retained economic interest in class certification, in spreading costs of litigation among class members); see also United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-07 (1980) (permitting purported class representative whose claim had expired to appeal denial of class certification where Court found him to present issues in concrete factual setting and vigorously advocate right to have class certified). A court may find, however, that the named plaintiff has no continuing personal stake. E.g., Potter v. Norwest Mortgage, Inc., 329 F.3d 608, 614 (8th Cir. 2003) (barring mortgagor who brought putative class action from appealing denial of class certification and holding appeal moot where purported representative voluntarily settled her claim and record on appeal was not clear on extent to which representative had reserved right to recover attorneys' fees, leaving representative without continuing personal stake in litigation).

143 Sosna, 419 U.S. at 401.

144 FED. R. CIV. P. 23(a) requires, as a prerequisite to certification of a class, that the representative parties will fairly and adequately protect the interests of the class.

145 Sosna, 419 U.S. at 403 (deciding merits of constitutional challenge to state residency requirement for filing divorce petition, at behest of class representative whose individual claim had become moot after class certification).
to appeal is grounded in Article III, Article III's requirements are not exhausted by the conclusion that the case is "alive," and the decision to regard the case as not moot does not answer who should have standing to appeal. At least in some circumstances, one reasonably could conclude that the representative, whose claim on the merits is moot, no longer has Article III standing to appeal a decision on the merits that is adverse to the class. She may have no continuing interest that was adversely affected by the trial court's decision, and have no injury that an appellate court can redress, whereas members of the class whose claims are live have been adversely affected and their injury is redressable. The "fact" that the case is not moot would not imply that the representative, who earlier in the litigation had interests aligned with the losing side, has standing to appeal decisions adverse to the class. Indeed, standing doctrine generally might suggest that she does not.

Despite this analysis, the Sosna Court's decision has many virtues. Class members may not learn of an adverse, appealable, decision until after the time to appeal has run, or until so close to that time that they do not have a realistic opportunity to retain counsel who can file a timely appeal. Indeed, it remains unclear in what circumstances absent members are entitled to file an appeal.146 In addition, with class actions designed to permit and indeed encourage class members to be passive and to rely upon the representation being afforded to them by the named representative parties, even class members who knew of the litigation could reasonably believe that the named representative would take any necessary appeal. In many class actions, notice of the litigation is not given to class members and, even where it has been given, notice typically is not given of the mootness of a representative's claim. In addition, notice of the entry of an appealable decision often is not given unless the decision is the product of a court-approved

146 The Supreme Court held in 2002 that unnamed class members who, at the fairness hearing, have timely objected to approval of a class action settlement may appeal approval of the settlement without first formally intervening, even if they had moved to intervene and their motion had been denied as untimely. Devlin v. Scardeletti, 536 U.S. 1, 10-14 (2002). Questions remain, however, as to the scope of this opinion. Some of these questions will be discussed in the separately published sequel to this Article. See Steinman, supra note 1.
dismission or settlement.\textsuperscript{147} Thus, affording the mooted-representative standing to appeal decisions adverse to the class, so long as there is reason to believe that she will fairly and adequately protect the interests of the class, makes good policy sense.\textsuperscript{148} Good policy

\textsuperscript{147} FED. R. CIV. P. 23 requires notice only when the court has decided that a class action may be maintained pursuant to Rule 23(b)(3), and when it is proposed that a class action be dismissed or compromised pursuant to Rule 23(e). Effective December 1, 2003, Rule 23(e) was amended to provide that, "The court must direct notice . . . to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Any other notices to the class are in the discretion of the court. If an adjudication went in favor of a plaintiff class and individualized relief had to be afforded, one would expect the court to give notice and inform class members what information they needed to submit, when and where, in order to recover based on the judgment in favor of the class. If individualized relief is not to be awarded, there is no comparable need for notice, just as there typically is no need to notify the class if litigation on its behalf failed or if the named plaintiff's claim became moot.

\textsuperscript{148} Considerations such as these also have induced the Court to stretch to hold a class representative's claims not to be moot. See, e.g., Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332-40 (1980). In \textit{Roper}, plaintiffs brought a proposed class action seeking money damages. The district court denied the motion to certify the class of credit card holders whom plaintiffs sought to represent. Over plaintiffs' objections and despite their rejection of the tender described below, the trial court entered judgment in favor of plaintiffs (but not for the class) based upon defendants' tender of the maximum that each of the individual named plaintiffs could have recovered. Plaintiffs appealed the denial of class certification. The Court held that the refused tender and entry of judgment for plaintiffs, over their objection, did not moot the case even as to the individual plaintiffs and did not terminate their right to appeal the denial of class certification. The Court reasoned, \textit{inter alia}, that, even if the final judgment entered by the district court fully satisfying plaintiffs' substantive claims would preclude their appealing that aspect of the judgment, the denial of class certification (a procedural ruling that became appealable after final judgment) aggrieved the named plaintiffs and they could appeal it so long as they retained a stake satisfying Article III. \textit{Id.} at 332-36. The Court found the requisite stake in the would-be representative plaintiffs' retention of an economic interest in class certification in the form of an interest in shifting part of the cost of the litigation to the class. \textit{Id.} at 334 n.6, 336. The Court also relied on the policy that to deny the right to appeal to proposed representative plaintiffs whom defendants have sought to buy-off would be contrary to sound judicial administration for it would lead to a multiplicity of actions and forum shopping. \textit{Id.} at 339-40.

Somewhat confusingly, the Court commented that "Courts have a certain latitude in formulating the standards that govern the appealability of procedural rulings even though, as in this case, the holding may determine the absolute finality of a judgment, and thus, indirectly, determine whether the controversy has become moot." \textit{Id.} at 340 (emphasis added). The appealability of a denial of class certification, after final judgment, was well-established, see Coopers & Lybrand v. Livesey, 437 U.S. 463, 489 (1978); United Airlines, Inc. v. McDonald, 432 U.S. 385, 396 (1977), although the \textit{standing} of persons in plaintiffs' position to appeal such a ruling was a question of first impression. In light of the trial court's denial of class certification, payment in full to the named plaintiffs could well have mooted the case by fully satisfying plaintiffs' claims. Thus, the reference to mootness was not out of place, but whether the case was moot was made to turn on whether the individual plaintiffs' claims were moot. \textit{See Roper}, 445 U.S. at 332. Once the Court had decided that plaintiffs had a continuing interest in class certification that could be redressed on appeal, so that that aspect
would not suffice, however, if standing to appeal is an Article III requirement that the representative cannot meet. The decision in
Sosna may quietly indicate that it is not an Article III requirement and that, as a prudential matter, the Court was willing to grant the
mooted representative standing to appeal to assert the rights of the class members. From that perspective, the focus on the representa-
tive's ability to fairly and adequately represent the interests of the class was appropriate.

Arguments have been made for allowing appeals to go forward in
cases that have become moot after entry of an ordinarily appealable
decision in the trial court. Professor Chemerinsky has argued that
"When a case is dismissed on appeal, there is a fully developed
record and an opportunity for a definitive resolution of an issue.
Dismissing such a case as moot might cause the same question to be
litigated in many other courts until it is finally resolved by the
Supreme Court."\(^{149}\) In response, one might say that if the case truly
is beyond federal judicial power, it really does not present an
opportunity for definitive resolution of an issue, even within the
Circuit where the case was mooted, and dismissing such a case
would properly leave other courts to face the issue.\(^{150}\) Moreover, for
a court to decide a case that has become moot contradicts a deeply-
entrenched and long-standing doctrine, and seems to run afoul of
the prohibition on the rendering of advisory opinions, separation of
powers concerns, and other policies underlying the requirements for
justiciability.\(^{151}\)

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of the case was not moot, plaintiffs' standing to appeal the denial of class certification was
obvious.

See also U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402-07 (1980) (holding that,
despite denial of class certification, action brought on behalf of class does not become moot
upon expiration of named plaintiff's substantive claim so long as he retains personal stake
in obtaining class certification sufficient to satisfy Article III; further holding that this would-
be class representative could appeal ruling denying class certification). Much of the Geraghty
opinion was devoted to explaining how a person in Geraghty's position could retain a personal
stake in obtaining class certification. Id. at 401-07.

\(^{149}\) CHEMERINSKY, supra note 2, at 127.

\(^{150}\) Dismissing does not "cause" the same question to be litigated in other courts, but it
does leave the legal issue without an authoritative resolution until the Supreme Court comes
upon a case that provides a suitable vehicle for its resolution.

\(^{151}\) For those policies, see supra notes 40-46, 141 and accompanying text; see also
Chemerinsky, supra note 125, at 696-97 (identifying policies that underlie justiciability
doctrines as follows: insuring that plaintiff is entitled to relief under constitutional or
Our system has not been terribly shaken by the various exceptions to mootness doctrine that the Court has shaped, however, and there is some doubt about whether all (or any) mooted cases truly are beyond federal power. Along with Professor Chemerinsky, there are other respected advocates for limitation or abandonment of mootness doctrine. In *Honig v. Doe*, Chief Justice Rehnquist urged an exception to the mootness doctrine for cases that become moot while pending before the Supreme Court. He questioned whether mootness doctrine truly is compelled by Article III, and doubted that Court-made exceptions to the doctrine can be reconciled with Article III. His conclusion, purportedly drawn from cases and “from the historical development of the principle of mootness, [w]hile an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.” As characterized by Justice Scalia, Chief Justice Rehnquist viewed mootness as only a “prudential” doctrine. Chief Justice Rehnquist proposed that the Court decide cases that become moot after the grant of certiorari or noting of

statutory provision she invokes, insuring that federal court decision would be likely to have effect, insuring that litigant is allowed to assert rights of persons not before court only when appropriate, and insuring that constitutional provisions that should not be judicially interpreted and enforced, if any, are not so interpreted and enforced).

152 The exceptions to the mootness doctrine include wrongs that are capable of repetition, yet evade review. See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 541 (1976) (on this ground, allowing challenge to order limiting press reports concerning criminal trial); Roe v. Wade, 410 U.S. 113, 124-25 (1973) (allowing challenge to abortion-prohibiting statute by woman who no longer was pregnant when case reached Court); S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-15 (1911) (allowing challenge to expired, short-term Commission order). The exceptions to the mootness doctrine also include situations of voluntary cessation of the challenged conduct when the defendant is free to resume that behavior and there is a reasonable expectation that he will do so. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 173-74 (2000) (refusing to dismiss as moot case in which defendant had ceased to violate mercury discharge limits but failed to meet its burden of showing that allegedly wrongful behavior could not reasonably be expected to recur); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953) (holding that elimination of interlocking directorates alleged to have violated antitrust laws and promise not to resume practice was insufficient to render moot suit brought to enjoin interlocking directorates). The court also has crafted special mootness doctrines for class actions. Some of these special rules are described supra notes 142-48 and accompanying text.


154 Id. at 331 (Rehnquist, C.J., concurring).

155 Id. at 339 (Scalia, J., dissenting).
probable jurisdiction, for two principal reasons: to avoid wasting the resources that the Court has invested in such cases, and to fully utilize the opportunities to bind all other U.S. courts by decisions of federal issues that the Court had decided were worthy of its attention. Justice Scalia, by contrast, did not see how the Court could ignore the impediment of mootness for purposes of permitting its own appellate review, without “affecting the principles” that govern district courts [and presumably intermediate appellate courts] in their assertions and retentions of jurisdiction.

Other commentators also have urged that mootness be regarded as a merely prudential limit on the Supreme Court’s jurisdiction and that the Court should have discretion to continue to hear cases that become moot while pending before it. Some of the arguments made in support of this position invoke special characteristics of the Supreme Court’s functions, while others seem equally applicable to lower federal courts. For example, the argument that the mootness requirement hampers the Court’s role as constitutional spokesman argues for reducing mootness considerations to merely prudential considerations only when a case becomes moot after it has been accepted for review by the Supreme Court. The arguments that mootness doctrine is internally inconsistent and result oriented, difficult to reconcile with other aspects of justiciability law, indecipherable, and so riddled with exceptions that it fails to provide a meaningful principle of restraint, provide reasons to “demote” mootness to a merely prudential consideration when cases become moot at any level of their processing. In light of the fact that, for many purposes, we determine jurisdiction, once and for all time, at the outset of a lawsuit, it would not seem radical to conclude that the case or controversy requirement can be satisfied, once and for all time, by the existence of a case or controversy when a suit is filed in, or removed to, federal court—regardless of what happens thereafter.

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156 Id. at 332 (Rehnquist, C.J., concurring).
157 Id. at 342 (Scalia, J., dissenting).
159 Id.
160 Id. at 706-14.
Proposals such as those by then-Justice Rehnquist and Professors Chemerinsky and Nichol implicitly seem to contemplate that those who would have had standing to prosecute and defend appeals but for mootness would continue to do so despite mootness.\footnote{See generally supra notes 149-60 and accompanying text.} Although one might conclude that, if mootness doctrine "fell," traditional restrictions on standing to appeal and to defend appeals could fall as well, I believe that policy considerations would push the other way. Without the systemic protections that mootness doctrine affords, the protections that doctrinal restrictions on standing to appeal and to defend appeals provide would be that much more essential to confining judicial action. That does not mean, however, that the doctrines governing standing to appeal and to defend appeals would have to be doctrines of constitutional stature.

3. Appealability and Reviewability. "Reviewability" refers to "whether a trial judge's [or other decision maker's] action can be scrutinized . . . by an appellate court at any time. . . . [A]ppealability . . . assumes that the trial judge's action is reviewable . . . ; the question is whether it can be reviewed immediately or whether review must await final resolution of the entire case in the trial court."\footnote{MEADOR ET AL., supra note 102, at 49-50; Robert R. Zitko, Note, The Appealability of Conditional Consent Judgments, 1994 U. ILL. L. REV. 241, 241 (noting that "appealability" refers to all forms of appellate review, including writ of certiorari and writ of error, but does not include any motions filed in trial court, such as motions to set aside judgment). Cases sometimes address or allude to these definitions, as well. See, e.g., Barlow v. Collina, 397 U.S. 159, 169 (1970) (Brennan, J., dissenting) (noting that canvass of relevant statutory material is made in cases challenging agency action, not to determine standing, but to determine whether Congress meant to allow judicial review of agency action at instance of plaintiff); Songbyrd, Inc. v. Estate of Grossman, 206 F.3d 172, 178 n.8 (2d Cir. 2000) ("[A] notice of appeal that explicitly refers to only one ruling antecedent to either a final judgment or a dispositive order might limit reviewability to the referenced ruling."); Barber v. Whirlpool Corp., 34 F.3d 1268, 1274 (4th Cir. 1994) (noting that separate document rule, by making clear when notice of appeal must be filed, is intended "to simplify and make certain the matter of appealability") (quoting Bankers Trust Co. v. Mallis, 435 U.S. 381, 386 (1978)); ITT Lighting Fixtures v. NLRB, 718 F.2d 201, 202 n.2 (2d Cir. 1983)

In cases coming to us from district courts, 'reviewability' has generally referred to whether a particular issue is available for our consideration upon a proper appeal, and 'appealability' has generally referred to whether a judgment or order can be the subject of a proper appeal. . . . Unfortunately, . . . the process of bringing an 'appealable' agency order to a court of appeals is generally called 'review.'

\textit{Id.; Polypastics, Inc. v. Transconex, Inc., 713 F.2d 875, 879 (1st Cir. 1983) (discussing
Whether a decision is reviewable at all and appealable immediately ordinarily are easy to distinguish from whether a particular litigant has standing to appeal a decision.\textsuperscript{163} And, of course, only if a decision were reviewable and immediately appealable could anyone have standing to appeal it. Lack of reviewability or immediate appealability arguably would imply lack of standing to appeal, but the latter would be entirely derivative.

Despite their conceptual distinctness, courts occasionally seem to confuse the questions. For example, in Deposit Guaranty National Bank v. Roper,\textsuperscript{164} the Court really was addressing whether named plaintiffs—whose substantive claims (arguably) had been fully satisfied, and hence mooted, by the tender to them of all they could recover—had standing to appeal the denial of certification of the class they sought to represent.\textsuperscript{165} Nonetheless, at one point the Court commented upon the latitude that courts have in formulating

prohibition on review of orders remanding cases to state court, and noting that “reviewability does not mean interlocutory reviewability,” thus making prohibition permanent).

But case usage of the terms also may sow confusion. See, e.g., Watkins v. U.S. Army, 875 F.2d 699, 732 n.2 (9th Cir. 1989) (Hall, J., dissenting) (observing that doctrine derived from Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), for determining the justiciability of claims concerning internal military affairs, like political question doctrine, limits types of disputes that courts are competent to resolve and consequently refers to “reviewability” rather than to subject matter jurisdiction); Peoples Gas, Light & Coke Co. v. U.S. Postal Serv., 668 F.2d 1182, 1188 (7th Cir. 1981) (posing that determination as to whether district court had authority to entertain plaintiff’s claim should precede determination of plaintiff’s standing to sue, because some person might have standing to bring suit if judicial reviewability existed; noting also that it could be argued with almost equal logic that standing issue should be resolved before subject-matter jurisdiction, which court then seemed to equate with reviewability; quoting commentator who asserted that “justiciability” sometimes had been used interchangeably with “reviewability”).

\textsuperscript{163} See, e.g., Ruthardt v. United States, 303 F.3d 375, 386-87 (1st Cir. 2002) (noting that final judgment renders appealable intermediate rulings of district court, including rulings upon intervention and, having so concluded, recognizing standing to appeal of entities that had been denied intervention by district court); H.R. Techs., Inc. v. Astrotechologies, Inc., 275 F.3d 1378, 1381-82 (Fed. Cir. 2002) (concluding that Astrotechologies had standing, as aggrieved party, to appeal from dismissal without prejudice of plaintiff’s claims, and distinguishing, as more difficult question, whether dismissal was final, appealable decision). When judicial review of agency action is sought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-06, it may be that reviewability involves both whether agency action is beyond judicial challenge and whether judicial review is available at the request of the particular person seeking it. See Barlow, 397 U.S. at 169-73, 169 n.2 (Brennan, J., concurring in the result and dissenting) (discussing two questions involved in reviewability). But such proceedings are not the focus of this Article.

\textsuperscript{164} 445 U.S. 326 (1980).

\textsuperscript{165} Id. at 327.
the standards that govern the appealability of procedural rulings.\textsuperscript{166} The appealability of a denial of class certification after final judgment was well-established,\textsuperscript{167} so appealability really was no part of the issue.

A case that better illustrates the tie between immediate appealability and standing to appeal is \textit{Boeing v. Van Gemert}.\textsuperscript{168} After a judgment against Boeing had established the amount of its liability to the class as a whole, fixed each member's entitlement, and imposed a proportionate share of plaintiffs' attorneys' fees and litigation expenses on the class members, Boeing appealed only the provision as to plaintiffs' attorneys' fees, contending that such fees should have been awarded only from the portion of the judgment-fund actually claimed by class members.\textsuperscript{169} Boeing contended that it had a claim for return of judgment-fund monies not actually claimed by class members that gave it standing to appeal from this aspect of the judgment, despite its having foregone the opportunity to appeal its liability and the compensatory award to the class.\textsuperscript{170} A majority of the Court members were of the opinion that the order assessing plaintiffs' attorneys' fees against the entire fund was a final, hence immediately appealable, judgment on the only issue as to which Boeing retained an interest, and was a judgment of which Boeing could seek review only by appealing as and when it had.\textsuperscript{171} Then-Justice Rehnquist dissented.\textsuperscript{172} In his view, it would have been preferable not to regard the judgment (on the merits and concerning attorneys' fees) as final until the district court entered judgment for a particular amount of attorneys' fees.\textsuperscript{173} Even without

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  \item\textsuperscript{166} \textit{Id.} at 340.
  \item\textsuperscript{167} \textit{See} Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (holding denial of class certification not to be appealable as collateral order and noting that such order is subject to effective review after final judgment at behest of named plaintiff or intervening class member); United Airlines, Inc. v. McDonald, 432 U.S. 385, 385 (1977) (holding to be timely class member's post-judgment motion to intervene to obtain appellate review of denial of class action status, where motion was made promptly after it became clear that purported class representatives would not appeal that denial).
  \item\textsuperscript{168} 444 U.S. 472, 472 (1980).
  \item\textsuperscript{169} \textit{Id.} at 472.
  \item\textsuperscript{170} \textit{Id.} at 477.
  \item\textsuperscript{171} \textit{Id.} at 481 n.7.
  \item\textsuperscript{172} \textit{Id.} at 482 (Rehnquist, J., dissenting).
  \item\textsuperscript{173} \textit{Id.}
departing so far from case law that had come to permit bifurcation of a merits appeal from an attorneys’ fee appeal, in Justice Rehnquist’s view the attorneys’ fee decision in this case remained “unfinal” because the fees had not yet actually been calculated and assessed against the judgment-fund, and the district court had not yet decided whether unclaimed sums should revert to Boeing, escheat to the state, or be disposed of otherwise. Until that was done, in Justice Rehnquist’s view, Boeing lacked standing to appeal from the court-ordered provision for attorneys’ fees. For both the majority and the dissent, however, the appealability of the judgment (or the lack thereof) determined Boeing’s standing to appeal it.

4. Other Procedural Prerequisites to Appeal and Appeal—Defense. There are a number of procedural prerequisites to bringing and pursuing an appeal or to defending a decision on appeal. These include (a) timely-filing a notice of appeal that specifies the parties taking the appeal, designates the judgment, order or portion thereof being appealed, and names the court to which the appeal is taken; (b) filing the appeal in the appeals court that is the proper venue; (c) facilitating the assembly and forwarding of the record, including a transcript of the proceedings below or a substitute therefor as provided in Rule 10 of the Federal Rules of Appellate Procedure; and (d) filing appellant’s or appellee’s briefs. The Supreme Court has even held some of these requirements to be “jurisdictional.”

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174 Id. at 483-84.
175 Id. at 482-89 (Rehnquist, J., dissenting); see also Parr v. United States, 351 U.S. 513, 513 (1956) (holding that criminal indictee lacked standing to appeal dismissal of first indictment against him because, considered in isolation, it did not aggrieve him, although it may have left him open to further prosecution in different location where second indictment had been obtained, and, considering indictments together as parts of single prosecution, there would be no final judgment which could aggrieve him unless and until his prosecution culminated in conviction). Most commentators and courts distinguish the situation presented in Parr from dismissals without prejudice of civil actions. See, e.g., H.R. Techs., Inc., 275 F.3d at 1382-83 (following majority rule and holding that Supreme Court’s decision in Parr did not deprive H.R. Techs., Inc. court of jurisdiction over defendant’s appeal from dismissal without prejudice in civil case); 15A Wright, Miller & Cooper, supra note 39, § 3902, at 80-82 (stating that defendant who seeks dismissal with prejudice should be entitled to appeal dismissal without prejudice in order to argue for dismissal that will finally preclude claim).
176 See generally Boeing, 444 U.S. at 472.
180 Most prominent among these requirements are Fed. R. App. P. 3(a)’s requirement that
an appeal permitted as of right from a district court to a court of appeals be taken by filing a notice of appeal with the district clerk within the time allowed by FED. R. APP. P. 4; FED. R. APP. P. 3(c)'s requirement that the notice of appeal (1) specify the parties taking the appeal by naming each in the caption or body of the notice (subject to a liberalization for attorneys representing more than one party), (2) designate the judgment, order, or part thereof being appealed, and (3) name the court to which the appeal is taken; and FED. R. APP. P. 4(a)(1)'s requirements concerning the time for filing a notice of appeal.

Cases holding the aforementioned rules to be jurisdictional include the following: FED. R. APP. P. 3(a), 4(a); Torres v. Oakland Scavenger Co., 487 U.S. 312, 315, 317 n.3 (1988) (holding both party specification provision of FED. R. APP. P. 3(c) and time limits for filing appeal set forth in FED. R. APP. P. 4 to be jurisdictional, and stating, "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court"); Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58, 61 (1982) (per curiam) (observing that timely filing of notice of appeal is mandatory and jurisdictional, and concluding that premature notice of appeal was nullity under FED. R. APP. P. 4(a)(4), as it was then framed); Browder v. Dir., Dept. of Corrs., 434 U.S. 257, 264 (1978) (stating that compliance with FED. R. APP. P. 4 is mandatory and jurisdictional); United States v. Robinson, 361 U.S. 220, 224 (1960) (holding that late notice of appeal under FED. R. CRIM. P. does not confer jurisdiction on appellate court); United States v. Hirsch, 207 F.3d 928, 930-31 (7th Cir. 2000) (dissmissing late-filed appeal for lack of jurisdiction despite contention that clerk failed to file notice on defendant's behalf despite request to do so, but inviting defendant to claim inadequate assistance of counsel entitling him to vacation of judgment and re imposition of sentence, permitting appeal); Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 446-47 (5th Cir. 1999) (holding that, where time to appeal had not been extended by motion for reconsideration, notice of appeal that was filed late did not vest court of appeals with jurisdiction to review sanction); see also FED. R. APP. P. 26(b) (disallowing courts from extending time to file notice of appeal or similar petition, except as authorized in FED. R. APP. P. 4). But see Torres, 487 U.S. at 321-22 (Brennan, J., dissenting) (disagreeing with interpretation of party specification provision as jurisdictional and characterizing Court as having held FED. R. APP. P. 3(c)'s judgment-designation requirement not to be jurisdictional in Foman v. Davis, 371 U.S. 178 (1962)).

FED. R. APP. P. 3(c); Smith v. Barry, 502 U.S. 244, 248-50 (1992) (stating that dictates of FED. R. APP. P. 3 are jurisdictional and their satisfaction prerequisite to appellate review; holding that appellant's brief may serve as notice of appeal that FED. R. APP. P. 3 requires); Torres, 487 U.S. at 314, 316-18 (stating that FED. R. APP. P. Rule 3(c)'s requirement that notice of appeal specify parties taking appeal is jurisdictional prerequisite to appellate review, although appeals court should find notice sufficient so long as it provides functional equivalent of what Rule requires; holding that use of "et al." in notice of appeal was insufficient to notify appellees or appellate court of appeal of intervening plaintiff who, due to clerical error, was not otherwise named in notice; hence, prior judgment of dismissal was final as to him); United States v. Universal Mgmt. Servs., Inc., Corp., 191 F.3d 750, 756-57 (6th Cir. 1999) (holding that, because notice of appeal referred only to summary judgment rulings, court lacked jurisdiction to consider issues raised by motion for reconsideration); AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 668, 571-72 (7th Cir. 1999) (stating that FED. R. APP. P. 3(c)'s requirement that notice of appeal designate what is appealed from is jurisdictional prerequisite to appellate review; holding that because order granting preliminary injunction necessarily encompassed refusal to refer antitrust claim to arbitration, identification of order in notice of appeal sufficiently manifested intent to appeal latter, but because injunctive order did not necessarily constitute refusal to stay, there was no appellate jurisdiction over that refusal); Burgess v. Suzuki Motor Co., 71 F.3d 304, 306-07 (8th Cir. 1995) (stating that, although court may construe FED. R. APP. P. liberally in
While these procedural requirements could be confused with standing to appeal (or to defend on appeal), they generally have not been.\textsuperscript{161}

There also are a number of doctrines that appellate courts have developed that confine the breadth of their review on an appeal. An example is the "rule" that a federal appeals court ordinarily will not entertain an issue or argument that was not raised in, or ruled on by, the district court, although the appellate court has power to decide such an issue.\textsuperscript{162} Because one can view such an issue as one

determining whether those Rules have been complied with, court may not waive jurisdictional requirement that notice of appeal designate judgment, order, or part thereof appealed from). But see Osterberger v. Relocation Reality Serv. Corp., 921 F.2d 72, 74 (5th Cir. 1991) (stating that, while portion of Fed. R. App. P. 3(c) requiring notice of appeal to specify parties is jurisdictional, portion requiring notice of appeal to designate proper judgment is construed broadly).


But some of the Fed. R. Civ. P. that have an impact on appellate jurisdiction have been held to be jurisdictional for the appellate courts. For example, the time limits in Fed. R. Civ. P. 59(e) have been held to be jurisdictional when applied in connection with Fed. R. App. P. 4(a). See Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."); EF Operating Corp. v. Am. Bidgs., 993 F.2d 1046, 1049 n.1 (3d Cir. 1993) (stating that time requirements in Fed. R. App. P. 4(a) and Fed. R. Civ. P. 59(e) are jurisdictional); De La Fuente v. Cent. Elec. Coop., Inc., 703 F.2d 63, 65 (3d Cir. 1983) (stating that ten day period of Fed. R. Civ. P. 59(e) is jurisdictional); see also Browder, 434 U.S. at 267, 271-72 (holding appeal jurisdictionally defective because untimely motion under Fed. R. Civ. P. 59 did not toll time for filing notice of appeal, and observing that time limits of Fed. R. Civ. P. 52(b) and 59 are mandatory and jurisdictional). Cf. Joan Steinman, After Steel Co., "Hypothetical Jurisdiction" in the Federal Appellate Courts, 58 Wash. & Lee L. Rev. 855, 896-98, 897 n.163 (2001). The text of this footnote slightly modifies and updates that which appeared in that earlier article.

\textsuperscript{161} See, e.g., Britell v. United States, 318 F.3d 70, 73, 76 (1st Cir. 2003) (having concluded that Federal Circuit had exclusive jurisdiction over this appeal and that First Circuit lacked jurisdiction to decide its merits, transferring appeal); Florian v. Sequa Corp., 294 F.3d 828, 828 (7th Cir. 2002) (per curiam) (dismissing appeal as unripe where motion to alter or amend judgment remaining pending in district court). But see McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (noting that party who seeks exercise of jurisdiction must allege facts essential to show jurisdiction: "If he fails to make the necessary allegations he has no standing").

\textsuperscript{162} See, e.g., Reddy v. Yancey, 317 F.3d 914, 916-17 (8th Cir. 2003) (refusing to review jury verdict at behest of plaintiff who failed to challenge verdict at trial level by filing motion for
as to which no party rightly can claim to be "aggrieved," appeals courts sometimes say that a party lacks standing to raise such an issue on appeal.\(^{183}\) This conflation of reasons not to entertain an issue could be problematic if, for example, it led courts to believe that they lacked all authority to hear newly-raised issues when they have the authority and can exercise it, where appropriate.

5. Non-Acquiescence in a Judgment as a Prerequisite to Appeal. Parties may acquiesce in a judgment. They may settle a dispute by agreement among themselves or with the assistance of the court, and may consent to the entry of a judgment that embodies their agreement, or invite a dismissal (for failure to prosecute, or on other grounds) for the purpose of creating an immediately appealable judgment. Federal appeals courts have concluded that a dismissal without prejudice can be a final, appealable order,\(^{184}\) but if the courts find evidence that one or more parties attempted to manipulate appellate jurisdiction by artificially manufacturing finality, they will dismiss the appeal.\(^{185}\) Parties generally cannot appeal a consent judgment, except on the grounds of failure to consent or lack of subject-matter jurisdiction, or if they have explicitly reserved a right

\(^{183}\) See, e.g., In re Baker & Getty Fin. Servs., Inc. v. Nat'l Union Fire Ins. Co., 954 F.2d 1169, 1174 (6th Cir. 1992) (concluding that party lacked standing to appeal issue not raised in, or ruled on by, district court, since not aggrieved by district court ruling on that issue).

\(^{184}\) E.g., H.R. Techs., Inc. v. Atechnologies, Inc., 275 F.3d 1378, 1381–82 (Fed. Cir. 2002) (holding that dismissal without prejudice of alleged patent assignee's infringement claim against competitor was appealable as final order where it was less favorable than dismissal with prejudice sought by competitor, and subjected competitor to further litigation).

\(^{185}\) See, e.g., Am. States Ins. Co. v. Dastar Corp., 318 F.3d 881, 891–92 (9th Cir. 2003); Adonican v. City of Los Angeles, 297 F.3d 1106, 1107–08 (9th Cir. 2002); cf. Natural Res. Def. Council v. Pena, 147 F.3d 1012, 1018–19 (D.C. Cir. 1998) (holding that Department of Energy (DOE) did not waive its right to appeal permanent injunction preventing DOE from using report prepared by committee allegedly formed in violation of statute, by seeking expedited entry of that injunction, where DOE had reserved its right to appeal and ground of its appeal, lack of subject-matter jurisdiction in district court, was unwaivable); Custer v. Sweeney, 89 F.3d 1158, 1168–69 (4th Cir. 1996) (recognizing standing to cross-appeal discretionary dismissal of claim without prejudice, pursuant to supplemental jurisdiction doctrine).
to appeal, thus eliminating the waiver.\textsuperscript{186} Parties who have consented to the entry of judgment sometimes are described as lacking standing to appeal. An alternative view, and one that has been embraced by the Supreme Court, is that the obstacle to appeal is waiver of the right to appeal, predicated upon the consent to the judgment, and that the proper judicial response is affirmance of the judgment, rather than dismissal of the appeal.\textsuperscript{187} Despite the jurisdictional cast of "standing to appeal" language, the consent-to-judgment doctrine is generally regarded as not implicating subject-matter jurisdiction of the court.\textsuperscript{188}

Issues may arise as to whether all conditions of the waiver have occurred, as to the scope of the waiver, and as to the scope of a reservation of right to appeal,\textsuperscript{189} but they are peripheral to the

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  \item[186] Verzilli v. Flexon, Inc. 295 F.3d 421, 424 (3d Cir. 2002).
    
    If . . . the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, but we must still receive and decide the case. If all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing.

  Id.; see generally 15A WRIGHT, MILLER & COOPER, supra note 39, § 3902, at 92.

  Waivers of the right to appeal may be found in civil cases. See, e.g., Burke v. Ruttenberg, 317 F.3d 1261, 1263 (11th Cir. 2003) (per curiam) (holding that entity that consented to settlement without reservation of right to appeal any aspect had no right to challenge, on appeal, allocation of fees to counsel and to special master or rejection of its claimed right to have been designated lead plaintiff); Fischel v. Equitable Life Assurance Soc'y of the U.S., 307 F.3d 997, 1005-06 (9th Cir. 2002) (holding that class action plaintiffs could not challenge subject-matter jurisdiction in post-settlement attorneys' fee proceeding, where they could not appeal judgment in underlying action, having voluntarily surrendered their right to review by settling claim and consenting to stipulated judgment); Univ. of W. Va. v. VanVoorhis, 278 F.3d 1288, 1301 (Fed. Cir. 2002) (holding that inventor could not appeal denial of its contention that university breached its patent policy concerning payment of royalties where, after entry of partial summary judgment to university, inventor agreed to dismiss without prejudice any remaining contract claims).

  In the context of criminal cases, courts frequently hold appeal rights to have been waived through a plea agreement. See, e.g., United States v. Baymon, 312 F.3d 725, 727-28, 729-30 (5th Cir. 2002) (holding that defendant's guilty plea waived his right to appeal his sentence); United States v. Jessup, 305 F.3d 300, 302 (5th Cir. 2002) (holding that defendant waived appeal of denial of his motion to suppress by entering unconditional guilty plea).

  \textsuperscript{188} Natural Res. Def. Council, 147 F.3d at 1018 (citing Shores v. Sklar, 885 F.2d 760, 764 n.7 (11th Cir. 1989)).

  \textsuperscript{189} See, e.g., United States v. Andis, 333 F.3d 886, 889-92 (8th Cir. 2003) (en banc) (concluding that defendant's waiver of right to appeal his sentence, made as part of plea bargain, cannot extend to illegal sentence, but holding that principle inapplicable to facts presented); United States v. Hernandez, 322 F.3d 592, 599-600 (9th Cir. 2003) (holding that, through conditional plea agreement that failed to reserve right to appeal any issue other than

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concerns of this Article. On the other hand, questions going to whether, and under what circumstances, (a) litigants who are not parties to a judgment consented to by others, and (b) settling parties who would like to challenge a judgment later entered among non-settling parties may appeal that later judgment raise standing-to-appeal issues related to whether the judgment adversely affects the interests of those parties who are not bound by it, but who may nonetheless be practically affected by it. Issues concerning the standing to appeal of non-parties to a judgment are addressed in the separately published sequel to this Article.\(^{190}\)

denial of motion to suppress his arrest on particular grounds, defendant waived right to appeal denial of evidentiary hearing on other issues); United States v. Molina-Marrero, 320 F.3d 64, 67-69 (1st Cir. 2003) (assessing clarity and scope of waiver in plea agreement as predicate to determining whether defendant waived right to appeal his sentence); United States v. Pena, 314 F.3d 1152, 1157-58 (9th Cir. 2003) (holding plea to have been involuntary and therefore not to have waived defendant’s right to appeal his conviction); United States v. Rangel, 319 F.3d 710, 715-16 (5th Cir. 2003) (holding that, under plea agreement waiving right to appeal except for punishment constituting upward departure from Sentencing Guidelines, defendant could appeal decision to impose federal sentence to run consecutively with state sentence); United States v. Colin, 314 F.3d 439, 447 (9th Cir. 2002) (holding that, through conditional plea agreement that failed to reserve right to appeal any issue other than denial of motion to suppress, defendant waived right to appeal denial of ex parte application for out-of-district subpoena duces tecum); United States v. Whited, 311 F.3d 259, 262 (3d Cir. 2002) (entertaining appeal, although defendant who pleaded guilty did not preserve her right to appeal by entering conditional plea, where all issues presented fell within scope of review not barred by guilty plea); Frederick v. Warden, Lewisburg Corr. Facility, 308 F.3d 192, 196 (2d Cir. 2002) (holding that plea agreement waiver of right to collaterally attack plea did not waive right to attack validity of plea agreement itself); United States v. White, 307 F.3d 336, 343-44 (5th Cir. 2002) (holding that ineffective assistance of counsel claim survives waiver of appeal in plea agreement only when claimed ineffective assistance directly affected validity of waiver or plea and concluding that defendant had waived his ineffective assistance claim); United States v. $92,422.57, 307 F.3d 137, 142-45 (3d Cir. 2002) (upholding appellate jurisdiction over civil forfeiture action in which district court entered final judgment based on stipulation under which claimant conceded lack of defense but retained right to appeal rulings on motion to suppress evidence and to dismiss complaint); Waters v. Int’l Precious Metals Corp., 237 F.3d 1273, 1276 (11th Cir. 2001) (holding that entry into settlement of fraud class action, without reservation of right to appeal specified issues, did not waive defendant’s right to appeal post-settlement adjudications interpreting settlement agreement).

\(^{190}\) Steinman, supra note 1.
II. DIGGING INTO THE DOCTRINE OF STANDING TO APPEAL AND TO DEFEND APPEALS

A. ORDINARY GRIEVANCES OF AGGRIEVED PARTIES

To have standing to appeal, every appellant has to be aggrieved by the order or judgment he seeks to appeal. In the usual case—where a plaintiff has been awarded nothing or simply less than all he prayed for, or where a defendant has had a money judgment entered against him or has been ordered to act or refrain from acting in specified ways via mandatory or prohibitory injunctions—the party who has “lost” to the extent just described has standing to appeal the adverse decision. Once a reviewable, appealable, decision has been rendered and entered, a losing party may appeal so long as he has not waived the right to appeal and the case has not become moot.\textsuperscript{191}

B. COURT CONFUSION ABOUT PARTIES WHO PREVAIL FOR SOME PURPOSES BUT NOT FOR OTHERS

Occasionally, standing to appeal issues arise when courts seem to forget that a party can be a prevailing party for some purposes but not others. In those instances, courts may wrestle with doctrines that govern the circumstances in which prevailing parties may appeal. The courts need not and should not do so, insofar as

\textsuperscript{191} Vast numbers of cases illustrate this point. See, e.g., Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 96 (1993) (upholding standing to appeal of defendant protesting court of appeal's vacatur of declaratory judgment of patent invalidity that had been in its favor); Quinn v. Millsap, 491 U.S. 95, 96-101, 104 (1989) (upholding standing to appeal of federal court plaintiffs, defendant-counterclaimants in mirror-image state court suit, whose claims that state law violated their equal protection rights had been rejected); Swann v. Adams, 385 U.S. 440, 443 (1967) (upholding standing to appeal of resident voters of Dade County, Florida, who challenged reapportionment of state legislature, whose alternative plan district court rejected, and who had been treated as representing other citizens of state); cf. Viraj Group Ltd. v. United States, 343 F.3d 1371 (Fed. Cir. 2003) (holding that government had standing to appeal Court of International Trade's decision affirming Department of Commerce's redetermination of antidumping duty order where government "prevailed" only because, after repeated remands to it, it acquiesced in appeal's courts view of how duty should be calculated, adopting under protest position forced upon it by court, and there would have been no question that government was aggrieved had it taken interlocutory appeal of remand to it under exception to final decision requirement).
the appellants are not prevailing parties with respect to the matters on which they seek to appeal. Two examples are Ruvalcaba v. Los Angeles\textsuperscript{192} and Intellectual Property Development, Inc. v. TCI Cablevision of California, Inc.\textsuperscript{193} In Ruvalcaba, the court invoked principles applicable to a prevailing party when addressing the standing to appeal of a § 1983 plaintiff who appealed the dismissal of his claims against a city and police chief and the directed verdict for a defendant physician, while also raising some issues related to his successful claims against a police officer.\textsuperscript{194} The court did, however, allow his appeal to go forward on all claims as to which he had not won.\textsuperscript{195} In Intellectual Property Development, Inc., the court similarly invoked principles concerning the inability to appeal of a party who received all he sought, while explaining that the defendant actually was aggrieved.\textsuperscript{196} In this patent infringement case, the claims against the defendant had been dismissed with prejudice and its counterclaims, challenging the validity and enforceability of the patent, dismissed for lack of subject-matter jurisdiction, without prejudice.\textsuperscript{197} The court found that the latter disposition left defendant vulnerable to liability to potential transferees of the patent, and such vulnerability a sufficient grievance to allow defendant to appeal the dismissal without prejudice.\textsuperscript{198}

More careful thought by the courts as to whether an appellant was a prevailing party with respect to the issues it seeks to appeal

\textsuperscript{192} 167 F.3d 514 (9th Cir. 1999).
\textsuperscript{193} 248 F.3d 1333 (Fed. Cir. 2001).
\textsuperscript{194} Ruvalcaba, 167 F.3d at 516-20, 523-24.
\textsuperscript{195} Id. at 525.
\textsuperscript{196} Intellectual Prop. Dev., Inc., 248 F.3d at 1339-40.
\textsuperscript{197} Id. at 1337-39.
\textsuperscript{198} Id. at 1340. The court clearly believed that such vulnerability to potential transferees of the patent rights ought to be considered a sufficient grievance to allow for appeal of the without-prejudice dismissal of the counterclaim. If so, defendant counter-claimant was only a partially prevailing party. The court's reasoning explains why that party would be entitled to appeal the without-prejudice dismissal of its counterclaim; however, why the court also permitted defendant to appeal the dismissal of the complaint with prejudice, or the trial court's decision to allow the complaint to be amended to add the patentee (to the licensee) as a plaintiff, is less clear. Id. at 1340. See also infra notes 216-19 and accompanying text regarding dismissals without prejudice as potentially aggrieving.
would eliminate some unnecessary and confusing invocation of the doctrines that govern circumstances in which prevailing parties may appeal.

C. PREVAILING PARTIES’ USUAL LACK OF STANDING TO APPEAL

Black letter law says that ordinarily prevailing parties cannot appeal,¹⁹⁹ that courts review judgments, not opinions,²⁰⁰ and

¹⁹⁹ Lindheimer v. Ill. Bell Tel. Co., 292 U.S. 151, 176 (1934) (holding successful party not to have right to appeal to procure review of findings); Corning v. Troy Iron & Nail Factory, 56 U.S. 451, 465-67 (1853) (holding that defendant who had succeeded in having complaint alleging patent infringement dismissed on ground that defendant’s conduct was permitted by license could not appeal from adverse finding that one Burden was inventor of patented item, stating that, “The law . . . does not give the party who is not aggrieved an appeal from a decree in his favor because the judge has given no reasons, or recited insufficient ones”); Grinnell Mut. Reinsurance Co. v. Reinke, 43 F.3d 1152, 1153-54 (7th Cir. 1995) (holding automobile accident victims to be without standing to appeal ruling that tortfeasor’s insurer had no duty to defend insured in action by victims, reasoning that victims were, if anything, benefitted by absence of insurer from presentation of defense, and that loss of opportunity to receive payment from insurer seeking to avoid cost of defense was not cognizable legal injury that could ground standing to appeal); In re DES Litig., 7 F.3d 20, 23 (2d Cir. 1993) (stating proposition that prevailing parties cannot appeal); Abbe v. Sullivan, 963 F.2d 918, 924 (7th Cir. 1992) (same); see also Perez v. Ledesma, 401 U.S. 82, 87 n.3 (1971) (holding that Court lacked jurisdiction to review particular order on direct appeal from district court, noting that Louisiana, which successfully opposed injunction against enforcement of parish ordinance, could not appeal from its victory); Gunn v. Univ. Comm. to End the War in Vietnam, 399 U.S. 383, 390, 390 n.5 (1970) (dismissing appeal for lack of jurisdiction under 28 U.S.C. § 1253 where trial court had neither granted nor denied injunction, but noting in dicta that, if district court were regarded as having denied injunction, defendant-appellants could not appeal that order in their favor); Pub. Serv. Comm’n v. Brashear Freight Lines, Inc., 306 U.S. 204, 206-07 (1939) (holding dismissal of counterclaim not to be appealable under applicable statute conferring jurisdiction on Supreme Court to hear only certain appeals from three-judge district courts, and observing that Commission, as successful party below, against which injunction had been denied, had no standing to appeal from decree denying injunction); Sheldon v. PHH Corp., 135 F.3d 848, 856 (2d Cir. 1998) (stating that prevailing party cannot appeal, in holding that sole named defendant, whose motion to dismiss complaint had been granted on ground that it was not real party in interest, could not challenge court’s rulings as to governing law and that claim alleging emotional harm was legally sufficient); City of Cleveland v. U.S. Nuclear Regulatory Comm’n, 68 F.3d 1361, 1370 (D.C. Cir. 1995) (stating that prevailing party cannot appeal, in connection with holding that cities and electricity buyer were not “parties aggrieved” within meaning of Hobbs Act, as required to seek judicial review).

²⁰⁰ Texas v. Hopwood, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., concurring in denial of certiorari) (explaining denial of petition for writ of certiorari by noting that petition did not challenge lower court’s judgment that particular admissions procedure used by University of Texas Law School during prior year was unconstitutional, for procedures had been abandoned; petition challenged only rationale relied on by court of appeals); California v.
consequently that prevailing parties may not appeal reasoning.

Rooney, 483 U.S. 307, 311 (1987) (refusing to review pronouncement that search of trash was unconstitutional, where state, which sought to appeal, had won judgment that its search warrant nonetheless was valid); Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (invoking principle that Court reviews judgments, not opinions, in conjunction with observing that plaintiff-respondents could rely on arguments rejected by court of appeals and could choose not to defend court of appeals' legal reasoning); Black v. Cutter Labs., 351 U.S. 292, 297 n.8 (1956) (invoking principle in connection with deciding that Court would not pass on federal questions discussed in state court opinion that appeared to rest on adequate and independent state grounds). See generally Chatham v. Local 134 IBEW, 233 F.3d 508, 512 (7th Cir. 2000) (stating that "[a]lthough dicta are not appealable rulings . . . [j]udgments are appealable; opinions are not"); Asarco, Inc. v. Sec'y of Labor, 206 F.3d 720, 723-24 (6th Cir. 2000) (declining to recognize prevailing party's standing to appeal due to highly speculative nature of injury allegedly arising from dicta); In re O'Brien, 184 F.3d 140, 142 (2d Cir. 1999) (holding that disagreement with reasons for judgment in party's favor is insufficient to confer standing to appeal); United States v. Accra Pac., Inc., 173 F.3d 630, 632 (7th Cir. 1999) (observing that "one who seeks an alteration in the language of the opinion but not the judgment may not appeal," whether the decision is administrative or judicial); Sea-Land Serv., Inc. v. Dept. of Transp., 137 F.3d 640, 647 (D.C. Cir. 1998) (holding that plaintiffs lack standing to appeal because "[w]ithout an adverse judgment, or extraordinary circumstances . . . objectionable interpretations and findings are not enough to ground an appeal"); EEOC v. Chicago Club, 96 F.3d 1423, 1431 (7th Cir. 1996) (observing that "a judgment is the resolution of the case or controversy, not a statement or intermediate finding to which the prevailing party might take exception").

Circuit courts are divided over whether a district court's decision finding attorney misconduct but imposing no separate sanctions is appealable. See United States v. Gonzales, No. 01-2188, 2003 U.S. App. LEXIS 8382, at *7-*11 (10th Cir. Apr. 29, 2003) (describing conflict and positions of various federal courts of appeals on issue). Compare, e.g., Walker v. City of Mesquite, 129 F.3d 831, 832 (5th Cir. 1997) (holding attorney to have standing to appeal verbal reprimand and finding of professional misconduct, stated in court opinion, as injurious to his reputation and career prospects), with Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817, 820 (7th Cir. 1992) (holding that attorney could not appeal from order finding misconduct but not imposing monetary sanction, despite potential, but speculative, effects on professional reputation; dismissing appeal as moot, vacating judgment to extent it imposed sanctions on attorney but declining to vacate opinions), and Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984) (dismissing appeal from finding of attorney misconduct for lack of final decision). Both Clark Equipment Co. and Bolte suggest that an attorney so situated should seek a writ of mandamus against the district judge. Clark Equip. Co., 972 F.2d at 820; Bolte, 744 F.2d at 573. Some courts have taken a middle road, permitting appeal when, but only when, the court makes a formal finding of a violation of a specific rule of ethical conduct, as akin to an explicit reprimand. See, e.g., Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1350-53 (Fed. Cir. 2003) (holding formal reprimand for misconduct to be appealable); United States v. Talao, 222 F.3d 1133, 1137-38 (9th Cir. 2000) (finding appealable sanction where district court found that attorney had violated specified state Rule of Professional Conduct, distinguishing between routine judicial commentary and that which is "inordinately injurious to lawyer's reputation"); Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1199-2000 (9th Cir. 1999) (holding disparaging remarks about counsel and criticism of specific conduct not to constitute appealable sanction because they were not identified as reprimand); In re Williams, 166 F.3d 86, 90-92 (1st Cir. 1998) (concluding that published findings of fact attributing misconduct to government attorney were not appealable sanctions following nullification of monetary sanctions, where not expressly identified as reprimand).
unfavorable findings of fact, unfavorable conclusions of law, unfavorable applications of law to fact,\textsuperscript{201} or a failure of the court to rule on the grounds preferred by the would-be appellant.\textsuperscript{202}

\textsuperscript{201} Mathias v. Worldcom Techs., Inc., 535 U.S. 682, 684 (2002) (dismissing writ of certiorari as improvidently granted, citing facts that, "petitioners were the prevailing parties below, and seek review of unconvincing findings not essential to the judgment and not binding upon them in future litigation"); Rooney, 483 U.S. at 311 (refusing to review pronouncement that search of trash was unconstitutional, where state, which sought to appeal, had won judgment that its search warrant nonetheless was valid, noting that fact that court's analysis "may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review"); Corning, 56 U.S. at 465 (see parenthetical supra note 199); see also Elec. Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939) ("A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree."); Asarco, Inc., 206 F.3d at 722 (holding that mine operator that had succeeded in having vacated citation against it for violation of safety standards lacked standing to challenge administrative conclusion that certain method of sampling or of analyzing samples was permissible); In re O'Brien, 184 F.3d at 142 (dismissing appeal from order granting Vermont's motion to dismiss adversary proceeding against it, where Vermont objected to court's rationale; noting that risk that court might defer to dicta in opinion, as persuasive, did not make Vermont aggrieved party); Accra Pac., Inc., 173 F.3d at 632 (holding that property owners that entered into consent decree with federal government were not aggrieved by federal agency's approval of owners' proposed cleanup plan, notwithstanding language in agency decision that displeased owners; such "unwelcome language . . . is not the kind of adverse effect that meets the requirement of actual injury" under Administrative Procedure Act); Sea-Land Serv., Inc., 137 F.3d at 647 (noting that appeal may not be taken simply to challenge court's reasoning, and holding that would-be appellants lacked standing to appeal certain legal conclusions reached by ALJ, when complaint against them had been dismissed); United States v. Good Samaritan Church, 29 F.3d 487, 488-89 (9th Cir. 1994) (holding prevailing parties not entitled to appeal from judgment dismissing quiet title action against them, notwithstanding earlier adverse determination that Church was alter ego of its co-parties in litigation, where adverse determination was not reflected in judgment and no language or relief established any rights or liabilities on basis of alter ego determination); Affiliate Ute Citizens v. Ute Indian Tribe, 22 F.3d 254, 255 (10th Cir. 1994) (stating that prevailing party may not appeal and obtain review of findings not necessary to support decree); Warner/Elektra/Atl. Corp. v. County of DuPage, 991 F.2d 1280, 1282 (7th Cir. 1993) (holding that, if appellant county, against whom judgment for $0 had been entered, was complaining about finding that county was negligent and was inverse condemnor, appeal had to be dismissed for lack of jurisdiction, for there was no real case or controversy); Abbs v. Sullivan, 963 F.2d 918, 924 (7th Cir. 1992) (commenting that, "a winner cannot appeal a judgment merely because there are passages in the court's opinion that displease him—that may indeed come back to haunt him").

\textsuperscript{202} See, e.g., Chathas, 233 F.3d at 512 (holding that plaintiff union members could not appeal grant of permanent injunction that was not to be construed as admission of liability). Plaintiffs in Chathas sought a declaration or judicial finding that defendants had violated the Taft-Hartley Act, but the appeals court concluded that, as winning parties, they could not appeal merely because the court did not say what they wanted to hear—that defendant was a lawbreaker. Moreover, with the case having become moot, the absence of an Article III controversy precluded the court from issuing an opinion on whether defendant violated the
Sometimes this inability to appeal is framed in terms of the prevailing party having no standing to appeal the findings or conclusions (or absence thereof) about which it is unhappy. One also could say that objectionable findings and conclusions are unreviewable at the behest of the successful would-be appellant. Courts sometimes indicate that these limitations on standing to appeal or reviewability are dictated by Article III, at other times,
courts indicate that these limits have their roots in the less grand soil of long-standing practice of the federal courts.205

Although courts often state these general principles without exploring their policy bases, one occasionally does find an articulation of the latter. In United States v. Accra Pac, Inc., for example, Judge Easterbrook explained,

Reluctance to review language divorced from results has a sound footing in the statutory requirement of an adverse effect—not to mention the constitutional requirement of a “case or controversy”—and has practical support too. Few victors in litigation . . . are thrilled with the opinion; almost everyone perceives that different language could have produced benefits—perhaps ammunition for some future dispute . . . perhaps psychic gratification. It is work enough to resolve claims made by losers; review of claims made by winners could double the caseload, and to what end? [The] judicial time [it would take] . . . is time unavailable to resolve other, more concrete, disputes. No wonder appellate courts do not issue Writs of Erasure to change language in district judges’ opinions . . . .206

While this language suggests that the principle that federal appeals courts will review only judgments, and not opinions, is constitutionally as well as statutorily compelled, it also identifies strong policy bases in judicial economy. Time and energy are scarce resources for federal appellate courts, that are strained by crowded dockets filled with adverse final judgments and adverse decisions that are immediately appealable before final judgment207 in order to

205 See, e.g., Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 333-34 (1980) (speaking of rule that party who receives all that he sought is not aggrieved by judgment and cannot appeal from it as statute- and history-derived rule of federal practice, lacking source in Article III); Good Samaritan Church, 29 F.3d at 488 (stating that, “[t]he rule that only a party aggrieved by a judgment may appeal from it is one of federal appellate practice, not Article III jurisdiction,” in explaining how collateral ruling may give rise to right to appeal in party who has prevailed on merits).

206 173 F.3d 630, 632 (7th Cir. 1999).

207 See supra note 116.
assure review that is effective, avoids irreparable harm, and serves other important policies.\textsuperscript{208} If federal appellate courts had jurisdiction, and were obliged to exercise jurisdiction, to (1) entertain appeals from reasoning, findings of fact, conclusions of law, or applications of law to fact, when the ultimate disposition of a case would be unchanged, or (2) review the failure of trial courts to select some alternative ground for an identical disposition, they would be that much more overburdened. The consequences likely would include some combination of the following: further delay in the disposition of appeals in the same case, whose decision could be outcome-altering (and that are, in that sense, more important), as well as in the disposition of other cases' appeals; reduction in the time spent on each appeal; diminution in the quality of judicial analysis and thought devoted to each case; the writing of fewer full opinions and an increase in "unpublished" opinions; greater delegation of responsibilities to non-Article III personnel such as court staff attorneys and law clerks; reduced time for collegial activities among judges both within and beyond their judicial functions; worsened quality of life for the judges, with ramifications for the desirability of the position among potential candidates for federal appellate judgeships; and perhaps an increase in the number of judges and support staff needed, with potential implications for the quality of the judiciary, of judicial interactions, of consistency of

\textsuperscript{208} Common bases for appeals before final judgment are the "collateral order doctrine," 28 U.S.C. §§ 1292(a)(1) and (b), and FED. R. CIV. P. 23(f) and 54(b). To be a collateral order under the Court's precedents, an order must be conclusive on the matter it addresses, resolve questions that are too independent of the merits to need to be deferred, too important to be denied review, and involve rights that will be lost if immediate review is not afforded. See, e.g., Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994). Section 1292(a)(1) authorizes an interlocutory appeal from orders granting, modifying, refusing or dissolving injunctions, because of the risk of irreparable harm from such orders. Section 1292(b) permits a district judge to certify that an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation; the appeals court, in its discretion, may accept the interlocutory appeal if timely application has been made to it. Because of the importance of orders granting or denying class action certification, their impact on whether the litigation will proceed, the stakes, and the scope of the proceedings, FED. R. CIV. P. 23(f) authorizes courts of appeals to permit appeals from such orders. Finally, FED. R. CIV. P. 54(b) permits district courts in multi-party or multi-claim cases to direct the entry of final judgment as to one or more but fewer than all of the claims or parties upon an express determination that there is no just reason for delay.
decisions, and for the costs of selecting and maintaining federal judges.

The ostensible constitutional and statutory bases of the above-described limitations of judicial review seem dubious by comparison. In a world where federal courts can decide state law issues and even state law claims as part of an Article III case or controversy,209 and in which federal appellate courts can review myriad rulings and determinations that are viewed as being merged in a judgment,210 as well as rulings that ordinarily would have to await final judgment but that are pendent to a proper interlocutory appeal,211 it seems implausible that Article III would be violated, or the authority granted by the statutory authorizations of appeal exceeded, by federal appeals courts' review of reasoning, unfavorable findings of fact, unfavorable conclusions of law, unfavorable applications of law to fact, or a failure of the court to rule on the ground preferred by the would-be appellant, in cases that have been within the federal courts' jurisdiction, are not moot, and in which one or more parties has standing to appeal some lower court decision.212 To limit federal


210 When a litigant appeals after final judgment, typically all interlocutory orders and decrees that led up to the final judgment (and from which no appeal yet has been taken) become immediately appealable; the court is not limited to reviewing the final decision, narrowly construed. See generally 15A WRIGHT, MILLER & COOPER, supra note 39, § 3905.1.

211 In Swint v. Chambers County Comm'n, 514 U.S. 35, 51 (1995), the Court indicated that courts of appeals may assert pendent appellate jurisdiction over an otherwise nonappealable decision that is inextricably intertwined with an appealable decision or where review of the former is necessary to ensure meaningful review of the latter. Recent cases heeding this guidance include: Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842, 847-48 (8th Cir. 2002) (exercising pendent appellate jurisdiction and granting plaintiffs' summary judgment motion where, in reviewing grant of summary judgment to defendant, court resolved in plaintiffs' favor all issues raised by their motion); Timpangos Tribe v. Conway, 286 F.3d 1195, 1200-01 (10th Cir. 2002) (exercising pendent appellate jurisdiction over subject-matter jurisdiction issue, in connection with collateral order appeal of decision denying Eleventh Amendment immunity, but declining to exercise such jurisdiction over issues of res judicata, failure to join indispensable parties, and laches, that were not inextricably intertwined with Eleventh Amendment issues).

212 See, e.g., Cardinal Chem. Co. v. Morton Intl', Inc., 508 U.S. 83, 96-103 (1993) (holding that court of appeals' practice of routinely vacating declaratory judgments of patent invalidity after determining that patent was not infringed was not supported by Article III's case or controversy requirement, because party seeking declaratory judgment had discrete claim within lower courts' jurisdiction; alternative ground for decision would become determinative if non-infringement ruling were reversed by Supreme Court; that is, appellate court's "decision to rely on only one of two possible alternative grounds ... did not strip it of power to decide the second question, particularly when its decree was subject to review by ... [the
appeals courts in this way, as a matter of constitutional or statutory law, seems unnecessary and imprudent, and might require excessively fine distinctions.

If a narrowly issue-based standing to appeal doctrine, or a narrowly-defined set of grievances, is mandated by Article III or the statutes governing federal appellate jurisdiction, however, then that constitutional provision (or those statutes) could prohibit review of reasoning, of unfavorable findings and conclusions, and of alternative grounds of decision, when urged by a prevailing party. Perhaps the best approach lies in the familiar technique of interpreting Article III broadly, while construing implementing legislation more conservatively, although I would prefer to argue for a similarly broad interpretation of the federal jurisdictional statutes governing appeals. Then, the Article III case-or-controversy requirement (and statutory language) could be interpreted to permit review of reasoning, of unfavorable findings and conclusions, and of alternative grounds of decision, in cases that have been within the federal courts’ jurisdiction and are not moot, whenever an appellant “claims” a colorable grievance deriving from that which it challenges. The judicial economy-based reasons for federal appeals courts to refrain from deciding such challenges at the behest of a prevailing party could be counted on to be effective most of the time, and would impose an appropriate level (source) of restraint, while allowing for flexibility.

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Supreme Court”). The successful litigant has an interest in preserving the value of the declaratory judgment, and there exists a strong public interest in the finality of judgments in patent litigation so as not to prolong the life of invalid patents, to avoid uncertainty, re-litigation, and the imposition of burdens on competitors convinced of a patent’s invalidity. Id. See supra notes 78, 88, 94-96, 199-202 and accompanying text.

213 In general, it is said that statutes authorizing appeals should be narrowly construed. See Stone v. INS, 514 U.S. 386, 405 (1995) (construing judicial review provisions of Immigration and Nationality Act); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 247 (1984) (holding that § 1254(2) jurisdiction did not lie where punitive damages award, but not state punitive damages statute, was struck down); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 43 (1983) (construing 28 U.S.C. § 1254(2) not to apply where collective bargaining agreement had been held constitutionally invalid, but granting certiorari).
D. WHAT'S THE BEEF?: LESS OBVIOUS GRIEVANCES

Cases that involve grievances that are different in kind from those described above as the ordinary grievances of losing parties and of those who have failed to win all they sought\(^\text{215}\) are the more interesting and difficult cases. Standing to appeal issues may arise out of contentions that an apparently favorable decision is not entirely so. Many arise in appeals by persons who have prevailed in the trial court but who fear that some aspect of the lower court's opinion will harm them in the future. A decision may be subtly unfavorable due to the potential for collateral estoppel consequences, because it leaves open the possibility of renewed litigation on the same claims, or because of adverse practical consequences. Federal courts' decisions as to whether to recognize standing to appeal also may be influenced by the egregiousness of lower court conduct in rendering decisions after they recognized that they no longer had Article III power to rule. What do these cases look like, and how are the courts responding to them?

1. **Dismissals Without Prejudice and Voluntary DDismissals.** One of the easiest categories of cases to understand is that in which courts allow appeals by defendants who succeeded in having a case dismissed, but where the dismissal was without prejudice, rather than with prejudice, as requested. In those cases, the defendant won less than the relief for which he had asked. Rather than being free of the litigation for all time, the defendant remains vulnerable to having to defend against the same claim at another time, and perhaps in another place.\(^\text{216}\) Such a defendant fits within the concept of a "traditional" aggrieved party.

Cases dismissed without prejudice on the grounds that the federal court cannot, or should not, entertain the case are a subset

\(215\) *See supra* notes 191-98 and accompanying text.

\(216\) *See, e.g.,* Nicodemus v. Union Pac. Corp., 318 F.3d 1231, 1235 (10th Cir. 2003) (permitting defendant to appeal *sua sponte* dismissal for lack of subject-matter jurisdiction, presumably because such victory was not as complete as victory on merits); Amazon, Inc. v. Dirt Camp, Inc., 273 F.3d 1271, 1275-76 (10th Cir. 2001) (holding that defendant counterclaimant had standing to appeal district court dismissal without prejudice of state law claims and counterclaims, as function of decision not to exercise supplemental jurisdiction after grant of summary judgment on sole federal claim); Custer v. Sweeney, 89 F.3d 1156, 1163-64 (4th Cir. 1996) (recognizing standing to cross-appeal refusal to exercise supplemental
of dismissals without prejudice, and the loss of the federal forum itself can be the grievance that can be appealed, either by plaintiffs or by defendants, depending on the circumstances.\footnote{217}

A dismissal without prejudice over the claim-asserting party’s objection usually is held to be a final, appealable order that the claim-asserting party has standing to appeal\footnote{218} at least if the grounds for dismissal are incurable and will prevent the parties from litigating the merits of the case in federal court.\footnote{219} Although

jurisdiction because it imposed on defendant expense of litigating claim in state court, when defendant contended claim ought to have been dismissed with prejudice as substantively preempted by federal law; Disher v. Info. Res., Inc., 873 F.2d 136, 138-39 (7th Cir. 1989) (permitting defendants to appeal dismissal without prejudice of some claims); LaBuhn v. Bulkmatic Transp. Co., 865 F.2d 119, 122 (7th Cir. 1988) (upholding standing to appeal dismissal without prejudice, where defendant had sought dismissal with prejudice and faced renewed litigation); cf. Parr v. United States, 351 U.S. 513, 516-17 (1956) (holding that criminal indictee lacked standing to appeal dismissal of first indictment against him because, considered in isolation, it did not aggrieve him although it may have left him open to further prosecution in different location where second indictment had been obtained; considering indictments together as parts of single prosecution, there would be no final judgment which could aggrieve him unless and until his prosecution culminated in conviction).

\footnote{217}See, e.g., Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77-78 (1991) (permitting appeal of removal pursuant to 28 U.S.C. § 1442(a)(1) by plaintiffs who sued to challenge use of certain monkeys for federally funded medical experiments and whose standing to sue in federal court had been rejected by court of appeals; making clear that plaintiffs’ loss of ability to sue in state court, the forum of their choice, was appealable injury, regardless of whether plaintiffs had standing to assert their claim on merits in federal court); Tex. Cmty. Bank v. Mo. Dept' of Soc. Servs., 232 F.3d 942, 943 (8th Cir. 2000) (upholding standing to appeal of state defendant complaining of abstention-based dismissal without prejudice rather than Eleventh Amendment dismissal with prejudice); Cella v. Togum Constructeur Ensembleur en Industrie Alimentaire, 173 F.3d 909, 911-12 (3d Cir. 1999) (holding that defendant had standing to appeal dismissal without prejudice of action over which court had diversity jurisdiction, where dismissal was effected after suit was consolidated with action over which district court lacked subject-matter jurisdiction; reasoning that defendant's reasonable expectation that it would be able to defend in federal court was frustrated, and that dismissal, in combination with state statute, deprived defendant of viable statute of limitations defense to state court proceeding).

\footnote{218}See United States v. Wallace & Tiernan Co., 336 U.S. 793, 794-95 n.1 (1949) (recognizing United States' right to appeal decision dismissing its antitrust complaint without prejudice and noting that denial of relief and dismissal of case ended suit so far as lower court was concerned); H.R. Tech v. Astechnologies, Inc., 275 F.3d 1378, 1383-84 (Fed. Cir. 2002) (permitting defendant to appeal dismissal without prejudice of its counterclaims); Cyprus Amcor Coal Co. v. United States, 205 F.3d 1369, 1372 (Fed. Cir. 2000) (holding involuntary dismissal of complaint, without prejudice, to be appealable by plaintiff as final judgment). Review is made available to protect the plaintiff's right to proceed in the court he chose, with the alignment of parties he chose. 15A WRIGHT, MILLER & COOPER, supra note 39, § 3914.6.

\footnote{219}See Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, 923-24 (7th Cir. 2003) (permitting appeal by plaintiff whose complaint had been dismissed without prejudice where any new claim of his would be barred by statute of limitations, and plaintiff, by foregoing
the focus in these cases generally is the appealability of the decision, one cannot have standing to appeal an unappealable decision.

A claimant generally cannot appeal a voluntary dismissal with prejudice because it is voluntary, and hence not regarded as adverse. However, several circuits hold that such dismissals are reviewable at the claimant's request when the dismissal was sought to expedite review of an adverse interlocutory ruling. Apparently, the idea is that if the claimant deemed the interlocutory ruling so prejudicial, and immediate review of the ruling so essential, that it warranted risking forfeiture of his claim, the court should acknowledge that the dismissal was adverse despite its merely apparent voluntariness and permit the appeal.\footnote{See Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 306-10 (1st Cir. 2002) (allowing plaintiff-appellant to appeal its voluntary dismissal, as sought to expedite review of adverse ruling in summary judgment order); cf. Purdy v. Zeldes, 337 F.3d 253, 257-58 (2d Cir. 2003) (in light of risk that plaintiff's malpractice case would end if his appeal were unsuccessful, allowing plaintiff to appeal grant of partial summary judgment to defendants where trial court dismissed remaining claim without prejudice to its refiling if appeals court reversed loss on plaintiff's other two claims).}

Some examples of cases that involved both dismissals without prejudice and the collateral estoppel exception to the rule generally disallowing prevailing parties to appeal are presented immediately after the discussion of the latter,\footnote{See infra notes 238-65 and accompanying text.} which follows.

2. \textit{The Collateral Estoppel Exception.} Courts often say that they make an exception to the rules disallowing review when the otherwise successful litigant would be collaterally estopped from relitigating the matters reflected in unfavorable findings and conclusions.\footnote{One Supreme Court case goes so far as to indicate that a successful litigant may seek review of \textit{favorable} findings and conclusions that could be given collateral estoppel effect. See Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 99 n.6 (1954) (stating that Partmar might have appealed from judgment declaring its lease and related franchise agreement to be valid, where these were essential to determination that Paramount, the lessor-franchisor, was not entitled to possession of theater). However, the language here has to be taken in context. These findings, while favorable to Partmar as defendant, were unfavorable to it as a counter-claimant, seeking treble damages on the ground that the lease} (This Article will refer to this doctrine as "the
collateral estoppel exception.”) That is, the courts recognize adverse collateral estoppel effect as a harm (caused by the judgment, and redressable by appeals courts) that an otherwise prevailing litigant has standing to seek to avoid by appeal.\textsuperscript{223} The number of cases in which courts actually have held this exception to be applicable, and allowed the appeal, is small.\textsuperscript{224} The number of cases in which courts have held the exception not to apply, and therefore refused the appeal, is far greater. In the latter cases, the courts either have opined that the would-be appellant is not collaterally estoppable because the requirements of that doctrine are not satisfied,\textsuperscript{225} or

and film franchise agreement were the product of a conspiracy in violation of the antitrust laws. \textit{Id.} at 96-97.

\textsuperscript{223} See, e.g., Agripot v. Miami-Dade County, 195 F.3d 1225, 1230 (11th Cir. 1999) (stating that when prevailing party is prejudiced by collateral estoppel effect of district court’s order, he is aggrieved and has standing to appeal prejudicial aspect of order); Nat’l Presto Indus., Inc. v. Dazey Corp., 107 F.3d 1576, 1579 (Fed. Cir. 1997) (stating that threat of preclusive effect of adverse judicial determination may constitute injury that confers standing to appeal cause of that injury); see also Mathias v. Worldcom Techs., Inc., 535 U.S. 682, 684 (2002) (dismissing writ of certiorari as improvidently granted, and noting that prevailing party petitioners sought review of “uncongenial findings not essential to the judgment and not binding upon them in future litigation”). The Court thus implied that petitioners \textit{would} have had standing to appeal if the uncongenial findings were essential to the judgment and binding upon them in future litigation. \textit{Id.}

\textsuperscript{224} See, e.g., AT&T Corp. v. F.C.C., 317 F.3d 227, 238 (D.C. Cir. 2003) (noting that neither Supreme Court nor Court of Appeals for D.C. Circuit actually had found standing on basis of collateral estoppel, but holding this appropriate case to do so where, on resumption of litigation, district court would be bound to follow its order holding that entity referred to as Total lawfully could assess AT&T reasonable terminating access charges, “giving it a preclusive effect more akin to law of the case than to mere collateral estoppel” in litigation between AT&T and Total, and holding that this injury to AT&T gave it stake sufficient to support its standing to petition for review of Commission’s ruling on its liability for access charges, although Commission had not required AT&T to pay anything); Homestead Golf Club, Inc. v. Pride Stables, 224 F.3d 1195, 1197 n.1 (10th Cir. 2000) (concluding that prevailing party Pride was entitled to appeal because decision that parties had not entered into enforceable contract would collaterally estop Pride in its state court suit against HGC, presumably for anticipatory breach of contract) (discussed in more detail \textit{infra} note 265); see also K & A Radiologic Tech. Servs., Inc. v. Comm’r Dep’t of Health, 189 F.3d 273, 282-83 n.11 (2d Cir. 1999) (granting standing to appeal aspects of opinion detailing defendant’s obligations under stipulation, in order to allow defendant, governmental entity, to avoid having to flout court’s determination and face contempt of court in order to get appellate review).

\textsuperscript{225} See, e.g., Dixon v. Wallowa County, 336 F.3d 1013, 1020 (9th Cir. 2003) (rejecting collateral estoppel exception as basis for appeal where conclusion that defendant had participated in constitutional violation had no issue preclusive effect because it was immaterial to final judgment and was not appealable); Pension Trust Fund for Operating Eng’rs v. Fed. Ins. Co., 307 F.3d 944, 947 & n.1 (9th Cir. 2002) (noting that district court held that insurer did not have duty to defend, and holding that insurer did not have standing to cross-appeal alternative grounds on which it had sought summary judgment and that district
they have found insufficient proof of a significant risk of future litigation in which collateral estoppel could be asserted. As court had rejected, since they were immaterial to judgment and hence could not serve as basis for collateral estoppel in other litigation; noting, however, that appellate court would consider issues raised insofar as they were relevant to plaintiff's appeal); Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co., 257 F.3d 1071, 1074, 1076 (9th Cir. 2001) (concluding that trial court order granting preliminary injunction and later explanation would not have collateral estoppel effect because they were immaterial to judgment dismissing case as moot); Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 649 (D.C. Cir. 1998) (holding that administrative law judge's statutory interpretation was not necessary to dismissal of complaint, would not have issue-preclusive effect in later judicial proceedings, and therefore that such effect could not afford prevailing party standing to appeal); Sheldon v. Phih Corp., 135 F.3d 848, 856 n.5 (2d Cir. 1998) (concluding that neither defendant dismissed as non-party-in-interest nor entity that persuaded court not to add it as defendant could appeal trial court's conclusions regarding governing law and sufficiency of emotional harm claim, since trial court's conclusions would have no preclusive effect because they were unnecessary to judgment); Concerned Citizens of Cohocton Valley, Inc. v. N.Y. State Dep't of Envtl. Conservation, 127 F.3d 201, 205-06 (2d Cir. 1997) (finding that appellant had failed to identify any ruling entitled to preclusive effect, without deciding whether appeal should be allowed to prevailing party to avoid preclusive effect of adverse ruling); Keyes v. Sch. Dist. No. 1, 119 F.3d 1437, 1446 n.14 (10th Cir. 1997) (opining that statements about constitutionality of state law in district court's opinion were not essential to any issue properly before court, presented no threat under doctrines of claim or issue preclusion, and hence were not appealable); Penda Corp. v. United States, 44 F.3d 967, 970-73 (Fed. Cir. 1994) (refusing to permit third-party defendant, Cadillac, which was not adverse party to U.S. in the proceedings, to appeal judgment against United States in patent infringement action because judgment could not preclude Cadillac from litigating validity of patent; Cadillac was only nominal defendant before Court of Federal Claims because of limits on its subject-matter jurisdiction, and because court would not permit appeal) (citing RESTATEMENT (SECOND) OF JUDGMENTS §§ 28, 37 cmt. f. 38); Affiliated Ute Citizens v. Ute Indian Tribe, 22 F.3d 254, 256 (10th Cir. 1994) (stating that Tribe's concern that ruling that defendant Tribe waived its sovereign immunity would be preclusive was unwarranted because ruling was not necessary to judgment that dismissed action on grounds that plaintiff lacked standing to sue, and instructed district court to vacate its sovereign immunity ruling); In re DES Litig., 7 F.3d 20, 23-25 (2d Cir. 1993) (dismissing appeal), holding that manufacturer in whose favor judgment with prejudice was entered for want of prosecution could not appeal prior orders upholding personal jurisdiction under state statute and determining which state's law would govern merits, as neither would have collateral estoppel effect because judgment had been based on neither, and noting that court of appeals' decision to decline to review those decisions further rendered collateral estoppel unavailable); Sierra Club v. Babbitt, 995 F.2d 671, 575 (5th Cir. 1993) (holding certain findings not to have preclusive effect because they were irrelevant to relief ordered, and hence that appellants lacked standing to challenge them); Abb's v. Sullivan, 963 F.2d 918, 924 (7th Cir. 1992) (disallowing appeal of dicta upon constitutionality of administrative rules, in part on ground that "[d]icta have no preclusive effect").

See Warner/Eletra/Atl. Corp. v. County of DuPage, 991 F.2d 1280, 1282-83 (7th Cir. 1993) (holding that appellant county, against whom judgment for $0 had been entered, had no standing to cross-appeal in part because there was no suggestion of any future litigation for contribution or indemnification in which question whether county had engaged in wrongful conduct might affect county's pocketbook); see also City of Cleveland v. U.S. Nuclear Regulatory Comm'n, 68 F.3d 1361, 1370 (D.C. Cir. 1995) (concluding that City was not
discussed in Part II.D.2, the collateral estoppell basis for standing to appeal is tainted by a circularity problem, and it would be best to break the circle by abandoning this basis for appeal. First, establishing some essential preliminaries would be helpful.

In order to collaterally estop a former litigant from relitigating an issue in federal court: (a) the issue must be identical to one previously actually litigated; (b) its determination must have been necessary to the decision in the earlier case; (c) the burden of persuasion on the party seeking the estoppell must not be significantly heavier than that carried in the prior litigation against the party to be estopped; (d) the court that rendered the earlier decision must have had subject-matter jurisdiction over the case and personal jurisdiction over the parties, and afforded due process; (e) particularly if the collateral estoppell would be used offensively (by a claimant rather than one defending on a claim) and in a

agrieved by final order of NRC so as to have standing to appeal ruling that NRC has authority to modify antitrust license conditions where NRC had refused to suspend conditions, and future litigation between these parties over conditions was not inevitable).

227 See infra notes 232-35 and accompanying text.

228 Restatement (Second) of Judgments § 17(3) (1982) (hereinafter Restatement (Second) of Judgments) states that, "A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to the judgment"; see also Restatement (Second) of Judgments § 27 (stating general rule of issue preclusion, to same effect). Interlocutory orders can be given direct or collateral estoppell effect; there need not have been a final judgment for collateral estoppell to apply. See Restatement (Second) of Judgments § 13 cmt. g ("If the second action is on the same claim, preclusion is an instance of direct estoppell; if it is on a different claim, preclusion is an instance of collateral estoppell.").

229 Restatement (Second) of Judgments, supra note 228, § 28(4) (providing that relitigation of issue is not precluded if "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to the adversary; or the adversary has a significantly heavier burden than he had in the first action").

230 Restatement (Second) of Judgments, supra note 228, § 1 (describing requisites of valid judgment to include subject-matter jurisdiction over case and personal jurisdiction over parties). In addition, a judgment generally is not entitled to full faith and credit unless it satisfies the requirements of due process. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part) (noting that in class actions, due process requires adequate representation of class); see also In re Bridgestone/Firestone, Inc., 333 F.3d 763, 767 (7th Cir. 2003) (holding that earlier determination by court of appeals that certification of nationwide classes of sports utility vehicle owners and lessees was not appropriate was sufficiently firm to have collateral estoppell effect, and that unnamed class members who did not participate in proposed class action were bound by that determination, because they had been adequately represented).
situation where estoppel would not be mutual (typically because the
party asserting the estoppel was not a party or in privity with a
party to the earlier litigation), the court has to find that permitting
the estoppel would be equitable; and (f) as articulated by some
courts, the decision has to be appealable.232

231 See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979) (requiring courts to
consider whether offensive collateral estoppel would be unfair to defendant, and setting forth
specific factors for courts to consider); Agristop, Inc. v. Miami-Dade County, 195 F.3d 1225,
1230 n.11 (11th Cir. 1999) (listing several requirements for ruling to have preclusive
collateral estoppel effect). See also RESTATEMENT (SECOND) OF JUDGMENTS, supra note 228,
§ 28(2)-(3), (5), providing that relitigation of issue is not precluded if:

(2) The issue is one of law and . . . (b) a new determination is warranted to
avoid inequitable administration of the laws; or (3) A new determination
of the issue is warranted by differences in the quality or extensiveness of
the procedures followed in the two courts or by factors relating to the
allocation of jurisdiction between them; or . . . (5) There is a clear and
convincing need for a new determination of the issue (a) because of the
potential adverse impact of the determination on the public interest or the
interests of persons not themselves parties in the initial action, (b)
because it was not sufficiently foreseeable at the time of the initial action
that the issue would arise in the context of a subsequent action, or (c)
because the party sought to be precluded, as a result of the conduct of his
adversary or other special circumstances, did not have an adequate
opportunity or incentive to obtain a full and fair adjudication in the initial
action.

Id.

232 See Dixon v. Wallowa County, 336 F.3d 1013, 1020 (9th Cir. 2003) (concluding that
collateral estoppel exception did not save defendant sheriff’s cross-appeal because
determination of his participation in constitutional violation had no issue preclusive effect
where it was immaterial to final judgment in his favor, and hence was unappealable);
Lombardi v. City of El Cajon, 117 F.3d 1117, 1121-22 (9th Cir. 1997) (holding that plaintiff
alleging violation of his Fourth Amendment rights in action against police officer was not
precluded from relitigating materiality of false statement made by officer when seeking
search warrant, noting that defendant could not have appealed state court’s finding that false
statement was not material since he prevailed at suppression hearing); Johnson v. Watkins,
101 F.3d 792, 796 (2d Cir. 1996) (holding that plaintiff’s acquittal of criminal charges
precluded district court from giving collateral estoppel effect to determination of probable
cause to arrest, made at earlier suppression hearing, because plaintiff had neither
opportunity nor incentive to appeal that adverse finding, and therefore issue was not fully
and fairly litigated); In re DES Litig., 7 F.3d 20, 22-24 (2d Cir. 1993) (dismissing appeal and
noting that court of appeals’ decision to decline to review orders upholding personal
jurisdiction under state statute, and determining which state’s law would govern merits,
rendered collateral estoppel unavailable); RESTATEMENT (SECOND) OF JUDGMENTS, supra note
228, § 27 cmt. h (observing that determinations not essential to judgment “have the
characteristics of dicta, and may not ordinarily be the subject of an appeal by the party
against whom they were made. In these circumstances, the interest in providing an
opportunity for a considered determination, which if adverse may be the subject of an appeal,
outweighs the interest in avoiding the burden of relitigation”); id. § 28(1) & cmt. a (permitting
relitigation of issue if “[t]he party against whom preclusion was sought could not, as a matter
The circularity problem derives from the final requirement noted above. If a decision can have preclusive collateral estoppel effects only if it was appealable, but it is appealable only if it has collateral estoppel effects, one is caught in the circle. The better view is that since (or when) a decision cannot preclude relitigation of an issue if the decision is not appealable, it is best to deny an appeal if the only reason to find a grievance justifying an appeal is the potential collateral estoppel effects of that decision. In repudiating the collateral order exception, the Court of Appeals for the D.C. Circuit recently wrote:

The argument for standing would necessarily have a bootstrap quality: it would infer standing [to appeal] in an initial case from the possibility of collateral estoppel in a later one—a possibility that . . . could . . . materialize [only] if standing were found in the first case. To create

of law, have obtained review of the judgment in the initial action," and noting in comment that if review is unavailable because party who lost on issue obtained judgment in his favor, issue preclusion is inapplicable).

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233 See supra note 232 and accompanying text.

234 In support of the position that "it is better to deny appeal and forbid preclusion than to permit appeal in order to support preclusion," 15A WRIGHT, MILLER & COOPER, supra note 39, § 3902, at 83, the Wright & Miller treatise offers the following arguments:

Since appellate review is an integral part of the system, there is strong reason to insist that preclusion should be denied to findings that could not be tested by the appellate procedure ordinarily available . . . . It would be possible to respond to this concern by recognizing the right of a winning party to appeal adverse findings, with the consequence that issue preclusion is available as to any findings that are not appealed or that are affirmed on appeal. There are many reasons to reject any such step. Winning parties may have excellent reasons for preferring not to appeal a judgment that otherwise might be accepted without appeal by their adversaries. Possible future preclusion is apt to figure small in their calculations. If an appeal is taken, moreover, the appellate process may not work well, particularly if the losing party has no real hope of reversing the necessary findings that dictate his defeat. And the immediate cost of a present appeal is not likely to be redeemed by savings in future litigation—preclusion is more likely to affect the terms of private settlement than to control the disposition of actual litigation. The present system that denies appeal and with it denies preclusion is much better than the alternative of offering the opportunity to appeal and enforcing preclusion accordingly.

standing out of the preclusive effect that would flow from granting standing is to create it ex nihilo. In contrast, our denial of standing here necessarily implies that petitioners may not be estopped from challenging these findings in a later court case.\footnote{Ala. Mun. Distrib. Group v. FERC, 312 F.3d 470, 474 (D.C. Cir. 2002); see also Env'tl Prot. Info. Ctr., Inc. v. Pac. Lumber Co., 257 F.3d 1071, 1076 (9th Cir. 2001) ("As collateral estoppel does not apply to an unappealable determination, simply holding a ruling unappealable eliminates any prospect of preclusion.") (quoting Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 648 (D.C. Cir. 1998)); Concerned Citizens of Cohocton Valley, Inc. v. N.Y. State Dep't of Env'tl Conservation, 127 F.3d 201, 205-06 (2d Cir. 1997) (noting circularity problem but not deciding whether appeal should be granted to prevailing party to avoid preclusive effect of adverse ruling; opining, however, that "a prevailing party should not be entitled to appeal to avoid the preclusive effect of a subsidiary ruling, since the fear of preclusion is unfounded").}

Moreover, through rejection of the collateral estoppel exception, the appellate courts' resources are conserved, and a litigant can have confidence that she will remain free to relitigate an issue, should it arise again in another case.

This Article's conclusion that it is better to deny appeal and collateral estoppel than to grant appeal and permit collateral estoppel is bolstered by an examination of the cases addressing this issue.\footnote{See infra notes 238-65 and accompanying text.} That examination suggests that the cases that have found standing to appeal on the basis of the availability of collateral estoppel were wrongly decided, and could have been decided, far more simply, on other grounds. First, the requirements of collateral estoppel doctrine, other than the appealability of the pertinent decision, seldom, if ever, are met in these cases. Assume that the issue known to be presented by existing litigation, or expected to be presented in future litigation, is identical to that just actually litigated; that there are no problematic differences in burden of persuasion in the two cases; that the court that rendered the earlier decision had subject-matter jurisdiction over the case and personal jurisdiction over the parties and afforded due process to the parties; and, if the collateral estoppel would be used offensively in a situation where estoppel would not be mutual, that permitting the estoppel would be equitable. Even then, there always will be a
problem satisfying the requirement that the determination that the proponent of estoppel seeks to have held binding (so that the underlying issue is not re-litigable) has been necessary to the judgment in the earlier-concluded case. How can a determination that was adverse to the prevailing party ever have been necessary to the final judgment? As a general matter, courts permit parties to be collaterally estopped from re-litigating only those issues that necessarily were determined in a particular way in prior litigation on the theory that the parties, court, and fact-finder presumably will have given such issues careful attention and their best efforts, whereas they may well have paid less careful attention to other factual or legal matters.  

Let us look at some examples. The court in *Agripost v. Miami-Dade County* faced a situation in which a suit brought by the operator of a waste disposal facility who claimed that revocation of a zoning permit constituted a taking without just compensation had been dismissed as unripe. The prevailing county appealed, arguing that the claim should have been dismissed under the *Rooker-Feldman* doctrine or that the county should have been given judgment on the merits on the basis of res judicata or collateral estoppel, *i.e.*, that Agripost already had raised and lost its takings claim. The dismissal for lack of ripeness, being without prejudice and potentially curable, was less desirable than a dismissal on *Rooker-Feldman* or res judicata/collateral estoppel grounds. The

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237 See *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir. 1944); *see generally* 18 WRIGHT, MILLER & COOPER, *supra* note 234, § 4421, at 536-41 (noting that issue preclusion attaches only to determinations necessary to judgment in prior action).

238 195 F.3d 1225, 1225 (11th Cir. 1999).

239 *Id.* The *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257 to bar direct review, in the lower federal courts, of a decision of the highest court of a state, viewing such review authority as vested exclusively in the U.S. Supreme Court. The doctrine derives from *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 482, 476 (1983) and *Rooker v. Fiduciary Trust Company*, 263 U.S. 413, 416-16 (1923).

240 Under *FED.R.CIV.P. 41(b), “[u]nless the court in its order of dismissal otherwise specifies, . . . any dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.” A *Rooker-Feldman* dismissal, indicating lack of federal subject-matter jurisdiction, is not an "adjudication on the merits"; however, parties would be directly or collaterally estopped from re-litigating the jurisdictional issue in federal court. A federal court has jurisdiction to determine its jurisdiction, and the other requirements for direct or collateral estoppel, as well as "law of the case," would have been met. A dismissal predicated on res
ripeness-based dismissal therefore should have been enough for standing to appeal, but the Eleventh Circuit relied on preclusion.\textsuperscript{241} It held that the collateral estoppel exception applied and permitted the county's appeal for that reason.\textsuperscript{242}

The trial court had rejected the county's res judicata and collateral estoppel defenses, and the Circuit court concluded that, unless set aside, that ruling would be prejudicially preclusive in pending litigation against the county, specifically in identical state court litigation brought by the plaintiff after its federal suit was dismissed.\textsuperscript{243} There was no question that the res judicata/collateral estoppel issue actually had been litigated in the federal district court proceeding, and there did not seem to be any issue with respect to certain other requirements of collateral estoppel doctrine.\textsuperscript{244} Pivotal to the analysis, however, was the Eleventh Circuit's conclusion that the ruling rejecting the res judicata/collateral estoppel defense was necessary to the decision that the takings claim was unripe. In a complex portion of the opinion, the Eleventh Circuit reasoned that the Fifth Amendment claim was unripe if the property owner failed to allege either that state law provided him no process for obtaining just compensation or that any process provided was inadequate.\textsuperscript{245} The court found that the necessary allegations had not been made, and indeed that those allegations could not have been made until after the state court had resolved proceedings brought there earlier to determine whether the revocation of Agripost's permit was justified as within the revoking board's police power.\textsuperscript{246} Consequently, neither

\begin{footnotesize}
judicata/collateral estoppel would be "on the merits" and hence with prejudice. Thus, various doctrines would prevent the waste disposal facility from successfully re-asserting the same claim, at least in federal court.

\textsuperscript{241} Agripost, 195 F.3d at 1230.

\textsuperscript{242} Id. In contrast, the court of appeals rejected the county's effort to appeal the dismissal for failure to state a claim on which relief could be granted of an "equal protection" claim that also had been asserted by the owner. Id. at 1230-31 n.12. The county would have preferred that this claim be dismissed on the basis of res judicata/collateral estoppel, or Rooker-Feldman. Id. Concluding that the FED. R. CIV. P. 12(b)(6) dismissal would be res judicata, the court saw no manner in which collateral estoppel deriving from the rejection of the county's preferred bases of decision could prejudice the county. Id.

\textsuperscript{243} Id. at 1230.

\textsuperscript{244} Id.

\textsuperscript{245} Id. at 1231-32.

\textsuperscript{246} Id. at 1232.
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collateral estoppel, res judicata, nor Rooker-Feldman afforded the county a defense to the owner's constitutional takings claim.\textsuperscript{247} The absence of the allegations that might have rendered those defenses available was the predicate for the determination that the plaintiff's constitutional claim was unripe.\textsuperscript{248}

Is the "predicate determination" the same as, or a sufficient basis for, concluding that the ruling rejecting the res judicata/collateral estoppel defense was necessary to the decision that the takings claim was unripe? It seems not. One can reason directly from the absence of certain allegations to the conclusion that the claim was unripe without "passing through" the conclusion that res judicata and collateral estoppel were not a bar. If this reasoning is correct, the res judicata/collateral estoppel ruling should not have been held to be preclusive in the new litigation against the county.

Notice, however, that one cannot use this case to illustrate that an adverse ruling cannot be necessary to a favorable judgment, because here the adverse ruling (the rejection of the res judicata/collateral estoppel defense) led to what was, from the county's standpoint if not from the court's, an unfavorable result: a dismissal without prejudice, rather than with prejudice. However, because the county was aggrieved and should have been recognized to have standing to appeal for the very reason of that less-than-maximally favorable result, the Eleventh Circuit's error in reasoning was harmless.

In \textit{National Presto Industries, Inc. v. Dazey Corp.}, a patentee appealed from an order dismissing for lack of subject-matter jurisdiction a competitor's action seeking a declaration of its rights under a settlement agreement that had terminated a prior action brought by the patentee asserting patent and trade dress infringement.\textsuperscript{249} The Federal Circuit allowed the appeal on the theory that the trial court had held that a particular Dazey fryer violated the settlement agreement and then deprived National Presto of the benefit of that interlocutory holding by vacating it in connection with the dismissal, which was prompted by the plaintiff-competitor's

\textsuperscript{247} \textit{Id.} at 1231-33.
\textsuperscript{248} \textit{Id.}
\textsuperscript{249} 107 F.3d 1576, 1576 (Fed. Cir. 1997).
own motion to dismiss.250 The Federal Circuit reasoned that the decision below, allowing Dazey a second opportunity to litigate the merits issues, established National Presto's standing to appeal.251 The court cited the proposition that, "[t]he threat of an unfavorable determination in future litigation due to the res judicata effect of an adverse judicial determination may be such an injury [supporting standing to appeal]."252 Whether the court thought that this case represented an application of that principle is not entirely clear. It is difficult to see that the cited principle governs Presto since the threat of a determination unfavorable to National Presto in future litigation arose, not from the res judicata effect of any adverse judicial determination, but from the elimination of a holding that could have had res judicata or collateral estoppel effect against Dazey in future litigation if this case had gone to a final judgment on the merits against Dazey.

Presto does not hold up as an example of the collateral estoppel exception to the rule that prevailing parties lack standing to appeal. The case is, however, similar to the cases in which courts have allowed appeals by defendants who succeeded in having a case dismissed, but where the dismissal was without prejudice rather than with prejudice. National Presto remained similarly vulnerable and, if one can regard it as having sought a final judgment in its favor on the merits, and having gotten less than that (with the dismissal for lack of subject-matter jurisdiction), its situation is indistinguishable from those described above.

Another case that involved both the collateral estoppel exception and the doctrine of aggrievedness described in the preceding paragraph is Jarvis v. Nobel/Sysco Food Services Co.253 A former employee brought suit alleging, inter alia, breach of a collective bargaining agreement in violation of the Labor-Management Relations Act (LMRA), and retaliatory discharge in violation of state law.254 The district court granted summary judgment to defendants on all claims except that alleging retaliatory discharge, and

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250 Id. at 1578-79.
251 Id. at 1579.
252 Id.
253 985 F.2d 1419, 1419 (10th Cir. 1993).
254 Id.
dismissed that claim in the exercise of its discretion not to assert supplemental jurisdiction.²⁵⁵ The employee appealed, and the employer cross-appealed the denial of its motion for summary judgment on the retaliatory discharge claim, a motion predicated on the argument that that claim was preempted by the LMRA.²⁵⁶ The Tenth Circuit held that the employer had standing to cross-appeal to seek reversal and directions to remand with instructions to dismiss the retaliatory discharge claim with prejudice.²⁵⁷ The employer, Nobel, had received only part of what it sought, and now faced the prospect of additional long and costly litigation.²⁵⁸ Nobel had not waived its right to appeal by moving the trial court to decline to exercise supplemental jurisdiction, after that court had denied its summary judgment motion; and, the Tenth Circuit held, Nobel had standing to appeal because the trial court’s adverse determination of the preemption issue would collaterally estop it from re-litigating that issue in the state court litigation in which the retaliatory discharge claim likely would be pursued.²⁵⁹ In the Tenth Circuit’s view, the ruling on preemption “was essential to [the trial court’s] decision to dismiss without prejudice on jurisdiction grounds rather than with prejudice on the merits,”²⁶⁰ so the requirements for collateral estoppel were met.

Certainly, rejection of the preemption defense was the basis of the district court’s denial of defendant’s motion for summary judgment, but that rejection was more tenuously connected to the court’s decision to dismiss without prejudice. Having rejected all of the plaintiff’s federal question claims, the district court was on solid ground in declining to exercise supplemental jurisdiction over his state law claims, under 28 U.S.C. § 1367(c)(3),²⁶¹ but the reasons for declining related to the absence of any continuing federal question claim with which this state law claim shared a common nucleus of

²⁵⁵ Id. at 1421-22.
²⁵⁶ Id. at 1424.
²⁵⁷ Id. at 1424-25.
²⁵⁸ Id.
²⁵⁹ Id.
²⁶⁰ Id. at 1425.
²⁶¹ 28 U.S.C. § 1367(c)(3) (2000) (allowing district courts to decline to exercise supplemental jurisdiction over claim when court has dismissed all claims over which it has original jurisdiction).
operative fact. It is true that if the district court had granted summary judgment on preemption grounds, it never would have had occasion to decide whether to exercise supplemental jurisdiction over the retaliatory discharge claim. But, far from resting upon the grounds for denying defendant's summary judgment motion, the reasons to decline jurisdiction had no other apparent connection to those grounds. Thus, the district court was incorrect to characterize its preemption ruling as essential to the decision to dismiss without prejudice. If the preemption ruling was not necessary in support of the discretionary dismissal, collateral estoppel should not apply, nor furnish a basis for an appeal of the decision declining jurisdiction.

It should be noted that the Tenth Circuit seems to have gotten somewhat confused in its reasoning. The defendant employer was not seeking to appeal the discretionary dismissal, only the denial of its motion for summary judgment. That denial did rest on the district court's preemption ruling, and the Tenth Circuit properly held the denial of that motion to be appealable by the employer inter alia because the employer did not receive all it had sought in the trial court. Nobel, however, would not have been collaterally estopped from relitigating preemption of the retaliatory discharge claim because the final decision of the district court, the dismissal without prejudice, was not based on the preemption ruling. The two are related only in the sense that a grant of summary judgment to the defendant based on the preemption defense would have obviated the question whether to retain jurisdiction over the retaliatory discharge claim for purposes of trial. As in Agripost, one cannot use this case to illustrate that an adverse ruling cannot be necessary to a favorable judgment, because here the adverse ruling (the rejection of the preemption defense) led to what was, from the employer's standpoint if not from the court's, an unfavorable result: a dismissal without prejudice. And like the Eleventh Circuit's error in Agripost, the Tenth Circuit's error in reasoning was harmless because the employer was aggrieved and should have been recog-

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252 See Jarvis, 985 F.2d at 1424 (stating only that Nobel sought to appeal denial of motion for summary judgment).
253 See id. at 1424-25 (noting that Nobel failed to achieve its ultimate goal).
254 See id. at 1424 (stating that Nobel asked Tenth Circuit to remand with instructions to dismiss claim with prejudice).
nized to have standing to appeal for the very reason of that less-than-maximally favorable result.265

Thus, decisions that have held collateral estoppel effects to justify standing to appeal often are tainted by faulty application of collateral estoppel doctrine. The near, if not absolute, impossibility of satisfying the requirements of collateral estoppel doctrine, the dangers of prohibiting re-litigation of issues whose determination in

265 See also Schwartzmiller v. Gardner, 752 F.2d 1341, 1345 (9th Cir. 1984) (holding, in connection with appeal of denial of habeas corpus petition, that state had standing to cross-appeal ruling that statute under which petitioner was convicted was void for vagueness on its face and void as applied to part of petitioner’s conduct). The Ninth Circuit in Schwartzmiller reasoned that the as-applied ruling would bind the state in subsequent litigation, and that the state could appeal the on-its-face ruling because parties may appeal a ruling that creates a risk that they might become aggrieved upon reversal of the direct appeal, i.e. the government risked having the facial ruling take effect if the as-applied holding were reversed. The decision is not a good example of the collateral estoppel exception: the as-applied ruling would seem to bind the state only in litigation with this petitioner, in which case the governing doctrine would be “law of the case.” Moreover, these rulings were not necessary to the judgment, and the rationale as to the on-its-face ruling was merely dictum because the as-applied holding was not reversed. In Homestead Golf Club, Inc. v. Pride Stables, 224 F.3d 1195, 1197 n.1 (10th Cir. 2000), the court concluded that Pride, the prevailing party-defendant, was entitled to appeal the judgment because a decision that the parties had not entered into an enforceable contract would collaterally estop Pride in its state court suit against HGC, presumably for anticipatory breach of contract. The decision is a bit hard to evaluate. First, the court also gave as a ground for allowing the appeal that Pride had received only part of what it sought and thus was not an entirely prevailing party. Id. In addition, Pride won in the bankruptcy court on the ground that HGC had anticipatorily repudiated the contract. Id. at 1199. Without reversing that determination, the appeals court affirmed on the alternative ground that there was no enforceable contract. Id. at 1199. According to RESTATMENT (SECOND) OF JUDGMENTS, supra note 228, § 27 cmt. o, if a judgment rendered by a trial court was based on a determination of two issues, either of which would be sufficient to support the result, and the appeals court upholds one and refuses to consider the other, and accordingly affirms, the judgment is conclusive only as to the first determination. Perhaps by analogy, if the trial court judgment was based on one determination and the appeals court fails to explicitly consider it, but affirms on alternative grounds, the judgment should be conclusive only as to that which the appellate court decided. Assuming that the parties actually had litigated the question whether there was an enforceable contract, it might seem to be “true” that the decision that the parties had not entered into an enforceable contract would collaterally estop Pride in its state court suit against HGC. However, plaintiff Homestead Golf’s failure to carry the burden of establishing an enforceable contract in the first suit should not imply that defendant Pride could not carry that burden as plaintiff in the state court suit. RESTATMENT (SECOND) OF JUDGMENTS, supra note 228, § 28(4) addresses some of the situations in which changes in the magnitude of the burden of proof or in who has the burden of persuasion, from one case to another, provide reason not to preclude relitigation of an issue in subsequent litigation between the parties. Section 28 cmt. f, illus. 10 (discussing a change in who has the burden of proof), bears some resemblance to the situation contemplated in Homestead Golf Club, and calls for no preclusion.
a particular way was not necessary to a judgment, the circularity problem, and the interests of appellate courts in conserving their resources, all argue in favor of disavowing the collateral estoppel exception.

3. Adverse Practical Consequences. One of the most opaque Supreme Court decisions concerning standing to appeal is Electrical Fittings Corp. v. Thomas & Betts Co. A defendant who had won a case based upon plaintiff’s failure to prove patent infringement appealed so much of the decree as adjudicated the patent valid. Despite defendant’s success below, and despite the immateriality of the patent-validity determination to the final disposition of the case, the Court upheld defendant’s standing to appeal to have that portion of the decree eliminated, although not to have the appeals court pass on the merits of the validity issue. The Court failed to explain why it so held, beyond noting that the court of appeals, which had dismissed the appeal, believed that the validity determination would not bind appellants in subsequent suits, whereas in the Court’s view, the validity determination “[stood] as an adjudication of one of the issues litigated.”

The rationale for the decision is difficult to discern. The Court previously had held, but distinguished in Electrical Fittings, the doctrine that a party may not appeal from a judgment in its favor to obtain review of adverse findings not necessary to support the judgment. (In Electrical Fittings, appellant was not permitted to seek review of adverse findings, only to have them eliminated from the decree.) But the ability to distinguish past precedent does not

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267 Id. at 242.
268 Id.
269 Id.
270 Id. (citing Lindheimer v. Ill. Bell Tel. Co., 292 U.S. 151, 176 (1934)) (refusing to hear cross-appeal by prevailing party seeking review of findings concerning value of defendant’s property and other matters; noting, however, that defendant’s contentions had been considered in connection with main appeal from decree permanently enjoining state commerce commission from enforcing rate reduction and releasing defendant from obligation to refund monies it collected during suit); see also N.Y. Tel. Co. v. Maltbie, 291 U.S. 645, 646 (1934) (dismissing appeal by successful litigant who had obtained permanent injunction against enforcement of rate orders, but who sought review of portions of decree fixing value of appellant’s property in specified years and its permissible rate of return, reasoning that matters in question would not be res judicata).
afford a reason to allow even such a limited appeal. One key treatise speculates that the Court may have thought such relief appropriate because of the possibility that the validity determination might pose difficulties if the defendant changed its conduct so as to come closer to infringement, or to avoid issue preclusion controversies. But the treatise concludes, "It is difficult to believe that prevailing party appeals should often be accepted on the theory that unnecessary findings may have adverse practical consequences. The principle of this decision has yet to be refined and controlled."

In a 1980 case raising mootness issues, the Court cast Electrical Fittings as an illustration of the principle that "appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying . . . Art. III."

The relevance of Electrical Fittings for then-present purposes was its holding "that the federal courts retained jurisdiction over the controversy notwithstanding the District Court's entry of judgment in favor of petitioners." The Court commented that (unspecified) policy considerations permitted an appeal from the final judgment in Electrical Fittings. Petitioners alleged a stake

\footnote {15A WRIGHT, MILLER & COOPER, supra note 39, \$ 3902, at 86-86. The latter concern is corroborated by the Court's discussion of Electrical Fittings in Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 334 (1980). The Court there reported that, in Electrical Fittings, "petitioners asserted a concern that their success in some unspecified future litigation would be impaired by stare decisis or collateral estoppel application of the District Court's ruling on patent validity. This concern supplied the personal stake . . . required by Art. III." Roper, 445 U.S. at 337. For reasons elaborated earlier, proper application of collateral estoppel doctrine would not have permitted the validity determination to be given preclusive effect, since it was not necessary in support of the judgment, and it seems hard to imagine that the mere stare decisis effect of a decision could give someone standing to appeal it. So, it remains difficult to understand why the Court viewed appellants in Electrical Fittings as having standing to challenge the patent validity determination, even if their described stake was sufficient to avoid mootness. Parenthetically, it seems peculiar that the Court in Roper spoke of the rule that a party who receives all that he sought is not aggrieved by a judgment and cannot appeal from it as a statute- and history-derived rule of federal practice, lacking a source in Article III, while attributing the personal stake requirement to Article III. Roper, 445 U.S. at 333-34.}

\footnote {15A WRIGHT, MILLER & COOPER, supra note 39, \$ 3902, at 86-87.}

\footnote {Roper, 445 U.S. at 334.}

\footnote {Id. at 335.}

\footnote {Id. The Court further explained that the district court had been "incorrect to adjudge the patent valid after ruling that there had been no infringement." Id. at 335-36 n.7. (However, chronologically speaking, it may well be that the court adjudged the patent valid before ruling that there had been no infringement.)}
in the outcome, so the case still was alive, leading the Court to note that, "a judgment in favor of a party at an intermediate stage of litigation . . . does not in all cases terminate the right to appeal." All of this is as hard to decipher as Electrical Fittings itself. Perhaps the Court was indicating that a case either is moot from the perspective of both parties or it is not moot from the perspective of either, and the Electrical Fittings case certainly still was alive from the perspective of the losing plaintiff, who clearly was aggrieved by the judgment and could have appealed it. But how this gives the prevailing defendant standing to appeal remains mysterious. Perhaps the case stands for the proposition that, where a "procedural" error is made that leads a court to address a hypothetical controversy (in Electrical Fittings the validity of the patent), policy reasons make it appropriate to allow the party who may (sometime, somehow) be adversely affected by that procedural error to appeal it, so as to avoid any untoward consequences of the procedural error and deter similar such errors in the future. But a case so opaque cannot act as an effective deterrent to procedural errors, however prophylactic it may be in avoiding untoward consequences to the parties in the "real world." Nor has the Court been at all clear about the sequence in which issues must be addressed so as to avoid "procedural errors" in the sequencing of decisions or the choice of decisional grounds.  

\[\text{this [procedural] error because . . . they continued to assert an interest in the outcome of that issue, and for policy reasons [still unspecified] this Court considered the procedural question of sufficient importance to allow an appeal." Id.} \]

\[\text{276} \text{ Id. at 335.} \]

\[\text{277} \text{ See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 574 (1999) (stating that, in removed cases, as in cases originating in federal court, there is no unyielding hierarchy requiring federal court to decide subject-matter jurisdiction before challenge to personal jurisdiction, and upholding district court's decision to dismiss for lack of personal jurisdiction on basis of insufficiency of contacts with forum state rather than address motion to remand for lack of statutory diversity jurisdiction, where personal jurisdiction issue was not complex and alleged defect in subject-matter jurisdiction raised difficult, novel, questions). The Court also noted:} \]

\[\text{It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits. Thus, . . . district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionar} \]

\[\text{y grounds without determining whether those claims fall within their pendent jurisdiction . . . or abstain under Younger v. Harris . . . without deciding whether the parties present a case or controversy . . .} \]
Perhaps the case would best be viewed as an extension of those precedents that allow vacatur of adverse decisions when a case has become moot. In *Electrical Fittings* the case had not become moot but, by virtue of the decision that defendant had not infringed plaintiff's patent, the issue of the validity of the patent was moot, and the decision that the patent was valid was adverse to defendant. In those circumstances, it arguably made sense to allow the defendant to seek vacatur of the immaterial, adverse ruling, although not to allow it to appeal the ruling on the merits. That is precisely what the Court permitted.

4. *Decisions Rendered in Violation of Article III.* At least two courts (the Third and Ninth Circuits) have indicated that they will recognize a grievance sufficient for standing to appeal when a court knowingly renders a decision that is beyond its Article III authority. In *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*, the Ninth Circuit held that, even though the trial court later had dismissed the suit as moot, the defendant could appeal from, and seek vacatur of, both a decision preliminarily enjoining its timber harvesting operations as in violation of statute, and later explanation of the court's reasons, because the trial court knew that the case had been mooted by the issuance of a "biological opinion" by two Federal Services at the time it issued the injunction. Although the situation presented came within none of the "established prudential routes . . . by which a winning party may be deemed 'aggrieved,'" the court held that,

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*Id.* at 585 (citations omitted); cf. *In re Arbitration between Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 496 (2d Cir. 2002) (holding that both district court and appellate court could determine whether to dismiss pursuant to forum non conveniens, rather than address issues of personal and subject-matter jurisdiction); *HCA Health Servs. v. Metro. Life Ins. Co.*, 957 F.2d 120, 123-24 (4th Cir. 1992) (finding injury from future lawsuits speculative and unlikely, holding that Metropolitan Life lacked standing to cross-appeal trial court's failure to reach ERISA preemption defense, when plaintiffs' claims were rejected on other grounds, even if court erred in failing to first address preemption issue); see generally Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2001); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235 (1999).

*278 See supra note 136, infra note 283 and accompanying texts.
279 257 F.3d 1071, 1071 (9th Cir. 2001).
280 *Id.* at 1075. The three established routes being the reformation doctrine of *Electrical Fittings*; the doctrine allowing appeal if future economic loss will result on account of adverse collateral rulings, typified by *Roper*, 445 U.S. at 326; and the collateral estoppel exception.
the District Court's decision to flout the dictates of Article III and render an opinion in spite of knowing the cause was moot did render [defendant] an 'aggrieved party'. . . . [D]icta entered after a court has lost jurisdiction . . . inflicts a wrong . . . of a different order than that which exists in the usual case of extraneous judicial pronouncement.281

Similarly in New Jersey v. Heldor Industries Inc.282 the Third Circuit determined that a party had standing to request vacatur of an opinion entered after the lower court had lost jurisdiction by virtue of the mootness of the case through settlement. The Ninth Circuit in Environmental Protection purported to follow this case.

The doctrine of these cases really is not an exception to the general rule that a prevailing party may not appeal. In Environmental Protection, it was the defendant who had been preliminarily enjoined from conducting its business who sought vacatur; and in New Jersey v. Heldor Industries, Inc., the case had been mooted by settlement, so neither party fairly can be called the "prevailing party." The party who sought vacatur had had its objection to the proposed settlement overruled by the district court in the opinion that it sought to have vacated.

The courts have long recognized that, in general, if a case became moot before a final judgment was rendered by the district court, that court's final judgment should be vacated and the case dismissed.283

See Envtl. Prot., 257 F.3d at 1075-76. See supra notes 266-70 and accompanying text for discussion of Electrical Fittings and notes 271, 273-276 and accompanying text for discussion of Roper.

281 Envtl. Prot., 257 F.3d at 1077.
282 989 F.2d 702, 702 (3d Cir. 1993).
283 Envtl. Prot., 257 F.3d at 1077 (remanding to district court to vacate judgment and reform orders entered after case had become moot); Heldor Indus., 989 F.2d at 708-09 (vacating bankruptcy judge's memorandum opinion as constitutional nullity because entered after dispute was moot, noting that court could not exercise judicial power of United States over non-existent dispute); CFTC v. Bd. of Trade, 701 F.2d 653, 658 (7th Cir. 1983) (requiring district court to vacate findings where case had become moot pending appeal); Ruiz v. Estelle, 688 F.2d 266, 267 (5th Cir. 1982) (vacating appellate court opinion rendered after issue had become moot by settlement); United States v. Miller, 685 F.2d 123, 124 (5th Cir. 1982) (vacating appellate court opinion and district court judgment holding attorney in contempt, and remanding with instructions to quash subpoena and dismiss case that had become moot).
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998), cites to "a long and
If a case became moot while on appeal, lower court judgments may be vacated and the case remanded with instructions to dismiss. However, the decision to vacate is equitable. If the mootness is traceable to the actions of the party seeking vacatur (including the action of agreeing to a settlement), the decisions of lower courts may be allowed to stand *inter alia* to preserve their precedential value. The primary justification of vacatur, which lies in the unfairness of allowing an unfavorable decision to stand when the power to appeal has been lost for reasons beyond the would-be appellant and vacatur-seeker's control, is not applicable when the mootness is traceable to the actions of the party seeking vacatur. 284

E. A FEW WORDS ABOUT CROSS-APPELLANTS

Cross-appellants typically also are appellees. To the extent they are prevailing parties, the usual rule (and the exceptions to the rule) that prevailing parties may not appeal apply to them. However, as cross-appellants they, like other appellants, must be aggrieved in some measure by the lower court decision, and appeal rulings that culminated in their grievance. Contingent cross-appellants who prevailed fully in the district court must assert that they could be adversely affected by the disposition of the appeal and must assert a trial court error that would adversely affect them if a specified aspect of their win were reversed or vacated. Two examples help explain: First, when plaintiffs appeal a judgment on the merits for defendant, defendant may contingently cross-appeal the district court's grant of plaintiff-class certification. 285 Such a defendant

284 See *supra* note 136 and accompanying text.

285 *Hartman v. Duffy*, 19 F.3d 1459, 1465-67 (D.C. Cir. 1994); Council 31, Am. Fed'n of State, County & Mun. Employees v. Ward, 978 F.2d 373, 380 (7th Cir. 1992) (stating that, "[a]lthough prevailing parties are entitled to file...cross-appeals against the contingency that this court will reverse an otherwise thoroughly satisfactory judgment," and allowing defendant, whose win of summary judgment was reversed, to cross-appeal class certification and order permitting consultation between counsel for different parties).
wants the court of appeals to reach the class certification issue if, but only if, it "takes away" defendant's win on the merits. Second, when plaintiffs appeal the grant of summary judgment to defendant on particular claims, after the dismissal without prejudice of claims as to which the court declines to exercise supplemental jurisdiction, defendant may contingently cross-appeal the denial of summary judgment on the dismissed state law claims.\(^{286}\)

There are, of course, various other doctrines concerning cross-appeals, such as those defining the kinds of arguments that an appellee will be heard to make without having cross-appealed.\(^{287}\) Those matters are beyond the scope of this Article.

F. A PROMINENT RECENT EXAMPLE OF PREVAILING PARTIES' INABILITY TO APPEAL—OR IS IT?: MCCCAULEY V. FORD MOTOR CO.

A prominent, and in some respects unusual, recent example of the rejection of an appeal by a prevailing party (of sorts) is McCauley v. Ford Motor Co.\(^{288}\) Six state court cases had been removed to federal court, and consolidated for pre-trial under a new complaint that involved somewhat different parties and causes of action than the removed suits presented.\(^{289}\) The transferee court decided that diversity jurisdiction was lacking for want of the requisite amount in controversy, dismissed the consolidated class action complaint, and remanded the predicate actions to the respective state courts in which they had been filed.\(^{290}\) The Supreme

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\(^{287}\) The classic statement was made in United States v. American Railway Express Co., 265 U.S. 425, 435 (1924):

[T]he appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But... the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

Id. See generally 15A WRIGHT, MILLER & COOPER, supra note 39, § 3904, at 195-229.


\(^{289}\) Id. at 955-56.

\(^{290}\) Id. at 956.
Court granted certiorari to decide whether the cost to the defendant of complying with an injunction reinstating its rebate program could satisfy the amount in controversy requirement where compliance would cost the defendant more than $75,000 whether the injunction covered the entire plaintiff class or any single member.\footnote{Ford Motor Co. v. McCauley, 534 U.S. 1126, 1126 (2002).} Although the remands themselves were unreviewable,\footnote{Subject to an exception for civil rights cases, 28 U.S.C. § 1447 (2000) makes remands for lack of subject-matter jurisdiction unreviewable by appeal or otherwise.} under common law doctrine, dismissals that “in logic and in fact” precede and undergird a remand may be reviewed,\footnote{Waco v. United States Fid. & Guar. Co., 293 U.S. 140, 143 (1934) (holding appealable dismissal of third-party complaint [a “cross-action”], existence of which had been predicate for removal of separable controversy, and dismissal of which was predicate for remanding remaining claims to state court).} and the dismissal of plaintiffs’ consolidated complaint, predicated on the court’s ruling on subject-matter jurisdiction, arguably became appealable when a final decision was reached in the cases. The Court has held that remands to state court constitute final decisions within the meaning of 28 U.S.C. § 1291, reviewable if review is not prohibited by 28 U.S.C. § 1447.\footnote{Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712-15 (1996) (permitting review of abstention-based remand, as not barred by 28 U.S.C. § 1447, and concluding that remand to state court, putting litigants out of federal courts, constitutes final decision within meaning of 28 U.S.C. § 1291).} The Court, however, asked for supplemental briefing on the question whether there was appellate jurisdiction when petitioners, as the nominally prevailing parties in the district court, appealed the dismissal of the complaint for lack of subject-matter jurisdiction.\footnote{Ford Motor Co. v. McCauley, 536 U.S. 987, 987 (2002). Ford Motor Co. v. McCauley, 537 U.S. 1, 1 (2002).} Having received the briefs, the Court dismissed the writ of certiorari as having been improvidently granted.\footnote{Plaintiffs took the positions that, if the appeal sought review of a remand order, appellate jurisdiction was lacking. If the appeal sought review of the dismissal of the consolidated action, however, appellate jurisdiction may have existed under \textit{Waco}, although plaintiffs doubted it because “there was no substantive decision on the merits to review or any threat that some order of the court will be unreviewable at a later date.” Supplement Brief for Respondents at 6, Ford Motor Co. v. McCauley, 284 F.3d 952 (9th Cir. 2001), \textit{cert. granted in part}, 534 U.S. 1126 (2002), \textit{cert. dismissed as improvidently granted}, 537 U.S. 1 (2002) (No. 296).} Plaintiff-appellees’ Supplemental Brief did not take a position on the question whether this appeal was barred by principles disallowing appeals by prevailing parties,\footnote{HeinOnline -- 38 Ga. L. Rev. 913 2003-2004} and the very short discussion of
the point on plaintiff's oral argument before the Court indicated that plaintiffs did not quarrel with the notion that defendants were aggrieved. Defendant-appellants' position was that, although defendants' nominally were prevailing parties—the consolidated complaint against them having been dismissed—defendants were aggrieved by the decision below in that it deprived them of a single forum, and a federal forum, relegating them to multiple suits in "home-state-court forums." Moreover, the decision below denied them a judgment in their favor, on the merits and with prejudice to renewed litigation of the underlying issues. Such effects, they argued, are detriments that qualified them as aggrieved parties and gave them a personal stake in the appeal.

The Court did not issue an opinion explaining its decision to dismiss, so it is speculative (but a pretty safe bet) that the Court dismissed the writ of certiorari because it believed that it lacked appellate jurisdiction over the case, or at least because it did not want to render a decision on an important issue of diversity jurisdiction in a case in which its own appellate jurisdiction was questionable. Did the Court lack appellate jurisdiction based upon defendant's lack of standing to appeal?

01-896. The plaintiffs feared that permitting review of dismissals based on lack of subject-matter jurisdiction, when included in the same order as a remand, would swallow the rule against review of subject-matter jurisdiction based remands. Id. at 2-8.

The only relevant portion of the transcript of the oral argument before the Court states as follows:

Question: [T]he contention is that it [the action that was instituted by the consolidated complaint] was improperly disposed of and that it was disposed of on a basis that injures the defendants and that they can appeal because they're aggrieved under the cases that Mr. Waxman cites. And that's all we're talking about.

Mr. Berman: And I understand that, Justice Kennedy, but the case that Mr. Waxman cites and the cases he cites for the proposition than an aggrieved party can appeal, I don't quarrel with that.

The problem with that authority in this case is that none of those cases that he cites are cases where there's been a dismissal, which there was in this case, of the consolidated complaint on the grounds of a lack of subject matter jurisdiction. And—at which point a Justice asked another question which changed the focus of the discussion.

Transcript of Oral Argument at 35, McCauley, 264 F.3d at 952.

Supplemental Brief for Petitioner at 2, McCauley, 264 F.3d at 952.

Id. at 2-9.
The Court did lack appellate jurisdiction, but not based upon defendant's lack of standing to appeal. That is, the defendant was sufficiently aggrieved to have standing to appeal the denial of the federal forum. However, the appeal either was barred by § 1447, or was premature. Ordinarily, when a case is removed and plaintiff seeks to challenge the removal on the grounds that the federal court lacks subject-matter jurisdiction over the case, a motion to remand is the vehicle used to make that challenge. In McCauley v. Ford Motor Co., the § 1407 transferee court dismissed the consolidated complaint because of the absence of the requisite amount in controversy. Consolidated complaints are an administrative convenience used in multi-district pretrial proceedings primarily to facilitate pleading (so that defendants do not have to answer multiple complaints) and discovery (so that discovery issues can be uniformly resolved by reference to the issues framed in a single set of pleadings). Section 1407 requires the transferee court to remand each transferred action to the district from which it was transferred, except those that terminate during consolidated pretrial proceedings. Given this statutory structure, the position of defendants in McCauley that the consolidated complaint created a new civil action that was dismissed by the federal district court in an appealable order is untenable. The more accurate interpretation of the events is that the transferee judge dismissed the consolidated complaint, but dismissed no civil action, and left intact the removed civil actions, which he then remanded for lack of subject-matter jurisdiction. (As some Justices pointed out in the oral argument, under § 1407 the transferee judge arguably ought to have remanded the respective removed actions to the districts from which they were transferred, and left it to judges of those districts to remand the actions to state court. Although a step was skipped, the ultimate result would have been the same.)

301 McCauley, 264 F.3d at 958-64.
302 See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 256 F. Supp. 2d 884, 889 (S.D. Ind. 2003) (noting that primary purpose of Master Complaint prepared upon order of § 1407 transferee court in this case "was to create the operative document by which the pretrial procedures to be accomplished . . . most notably, discovery, the class certification determination, and the testing of the class claims' legal sufficiency . . . could be completed").
303 This is how the Ninth Circuit viewed the situation. See McCauley, 264 F.3d at 965.
304 Transcript of Oral Argument at 32-35, McCauley, 264 F.3d at 952.
In this situation, the plaintiffs were correct in arguing that either the appeal impermissibly sought review of a remand order, or the appeal sought review of a pleading dismissal that, while arguably the predicate of the remand, ought not to be regarded as appealable because there was no substantive decision on the merits, apart from any jurisdictional decision, to review. Thus, I believe review was barred by § 1447(d), despite defendant having been aggrieved (1) by the loss of the federal forum, and (2) perhaps by the denial of a judgment on the merits precluding continued litigation. If the remands were not effective because the transferee court ought only to have remanded the cases back to transferor federal district courts and lacked authority itself to remand the removed cases to state court, the appeal was premature, and the Court lacked jurisdiction for that reason.

G. SUMMARY AND CONCLUSIONS ABOUT APPELLATE GRIEVANCE DOCTRINE

To have standing to appeal, every appellant has to be aggrieved by the order or judgment he seeks to appeal. In the usual case, that is, where a plaintiff has been awarded nothing or simply less than all he prayed for, or where a defendant has had a money judgment entered against him or has been ordered to act or refrain from acting in specified ways via mandatory or prohibitory injunctions, the party who has "lost" to the extent just described has standing to appeal the adverse decision, and may do so, once a reviewable, appealable decision has been rendered and entered, so long as he has not waived the right to appeal and the case has not become moot. By contrast, in general, prevailing parties may not appeal. Some complexity arises unnecessarily in the case law when courts


\footnote{Cf. Waco v. United States Fid. & Guar. Co., 293 U.S. 140, 143 (1934) (permitting review of dismissal of cross-action that, "in logic and in fact" preceded remand, because substantive decision would have been binding on parties). The rationale is that the principle of unreviewability of a remand order does not preclude review of judicial action taken prior to remand that would prejudice a right of one of the parties, if left undisturbed.}

\footnote{See supra notes 292-93, 303 and accompanying texts.}
seem not to realize that a party can be a prevailing party for some purposes but not for others, and set about wrestling with supposed exceptions to the general rule.

The prohibition against appeal by prevailing parties, who sometimes would like to appeal reasoning, unfavorable findings of fact, unfavorable conclusions of law, unfavorable applications of law to fact, or a failure of the court to rule on the ground preferred by the would-be appellant, is of unclear stature, sometimes having been traced to Article III and sometimes having been found to originate in statute and long-standing federal practice. The practical and policy reasons for eschewing what Judge Easterbrook of the Seventh Circuit dubbed “writs of erasure” are powerful;\textsuperscript{308} the constitutional arguments much weaker.

Review of the categories of cases that have given the courts some difficulty has led me to conclude that there should be fewer exceptions to the general rule that prevailing parties may not appeal. Some of the controversial categories of cases involve actual grievances that should be appealable, and require no exception. Thus, dismissal without prejudice, where dismissal with prejudice was sought, is a grievance. Dismissal without prejudice over the claim-asserting party’s objection is a grievance that should provide standing to appeal \textit{when} the decision is appealable. Issues of finality and manipulation of appellate jurisdiction should be addressed in the context of determining the appealability of dismissals without prejudice, rather than in determining standing to appeal. Courts recognize standing to appeal a “voluntary” dismissal \textit{with} prejudice only when they perceive that the dismissal “really” was adverse, despite its merely apparent voluntariness, the claimant having deemed an interlocutory ruling so prejudicial, and immediate review of the ruling so essential, that the situation justified risking forfeiture of the dismissed claim.

The collateral estoppel “exception” should be rejected for other reasons. While it seems attractive to recognize adverse collateral estoppel effect as a harm that an otherwise prevailing litigant has

\textsuperscript{308} See supra note 206 and accompanying text.
standing to seek to avoid by appeal, this basis for standing to appeal often is tainted by circularity (if a decision can have collateral estoppel effects only if it is appealable but is appealable only if it has collateral effects, one is ensnared in the circle), and is undermined by the requirement of collateral estoppel doctrine that the determination the proponent of estoppel seeks to have held binding have been necessary to the judgment in the earlier-concluded case. For how can a determination that was adverse to the prevailing party ever have been necessary to the final judgment? If the determination was not adverse when made, but will be adverse in a different lawsuit, additional qualifications on collateral estoppel doctrine, such as those involving shifts in, or changes in the magnitude of, the burden of persuasion may defeat preclusion. Moreover, the decisions that purport to rely on the collateral estoppel exception seldom, if ever, represent true examples of the supposed exception, and often are contaminated by faulty application of collateral estoppel doctrine. The near, if not absolute, impossibility of satisfying the requirements of collateral estoppel doctrine, the dangers of prohibiting re-litigation of issues whose determination in a particular way was not necessary to a judgment, the circularity problem, and the interests of appellate courts in conserving their resources all argu in favor of disavowing the collateral estoppel exception.

The exception, if any, created by the Electrical Fittings case is hard to discern, and so provides little useful guidance to courts. If it stands for the notion that appeal by a prevailing party who seeks vacatur may be permitted when unnecessary findings may have adverse practical consequences, that could create an exception one could “drive a truck through.” If it stands for the proposition that, where a “procedural” error is made that leads a court to address a hypothetical controversy (one mooted by other decisions in the case), policy reasons may make it appropriate to allow the party who may be adversely affected by that procedural error to appeal it, seeking vacatur, the implications of the decision seem more manageable and the “exception” acceptably limited. Both this version of the Electric-

309 This theory requires an actual harm, and hence really is not an exception to the requirement of a grievance caused by a court decision.
cal Fittings doctrine, and the "exception" for decisions rendered in violation of Article III, are akin to other decisions that allow vacatur of unfavorable holdings when a case has become moot. The "exception" for decisions rendered in violation of Article III also need not be an exception to the rule disallowing appeals by prevailing parties, because there may be no prevailing party when a case becomes moot, as by settlement. If someone did prevail in the trial court, ordinarily it would not be that person who would seek vacatur.

Since the language and decisions sought to be vacated in cases that have become moot, or when particular issues have become moot, could not properly be given preclusive effect, it is not entirely clear what values vacatur would serve. The Supreme Court has said that vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented." But when the question is whether a litigant has standing to present a particular issue to an intermediate federal appellate court, the decision that would not be vacated if standing to appeal were denied is merely the decision of a district court, which lacks precedential effect. If an intact district court opinion would have neither preclusive effect nor precedential effect, nor presumably "law of the case" value, its consequences would be limited to those arising from the persuasive force of the opinion. The benefits of having the opinion available might outweigh the values served by vacating it. Making the decision whether to allow standing to appeal discretionary, and the decision whether to vacate an equitable one, which takes into account the interests of justice and the public interest, as well as litigants' private interests, seems best. Allowance of appeal and of vacatur makes an inroad into the policies against having federal courts of appeals grant "writs of erasure," but putting into the courts of appeals' hands the ability to accept or reject such appeals allows prudential control over the appellate door.

H. CAUSATION AND REDRESSABILITY AS REQUIREMENTS FOR STANDING TO APPEAL

Although causation and redressability are requirements for standing to appeal, that is, the judicial decision complained of has to be the cause of appellant's injury and the court of appeals has to have the ability to redress the injury, these elements so seldom are in controversy that one finds almost no mention of them in the cases, much less extended discussion. A few cases that had something to say about the causation and redressability issues, either finding it or not, are noted in the margin.311

The standing to appeal of "irregulars," persons other than full-fledged parties, will be explored in the sequel to this Article.312

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311 See, e.g., Int'l Primate Prot. League v. Adm'r of Tulane Educ. Fund, 500 U.S. 72, 77-78 (1991) (permitting appeal of removal pursuant to 28 U.S.C. § 1442(a)(1) by plaintiffs who sued to challenge use of certain monkeys for federally funded medical experiments and whose standing to sue in federal court had been rejected by court of appeals, Court making clear that plaintiffs' loss of ability to sue in state court, the forum of their choice, was appealable injury, regardless of whether plaintiffs had standing to assert their claim on merits in federal court, that injury was fairly traceable to removal, and that injury was redressable by remand); Dixon v. Wallowa County, 336 F.3d 1013, 1020-21 (9th Cir. 2003) (disallowing cross-appeal from denial of defendants' motion for summary judgment predicated on qualified immunity, where defendants' grievance was having had to stand trial and that grievance was not redressable after trial); Cella v. Togum Constructeur Ensembleier en Industrie Alimentaire, 173 F.3d 909, 912 (3d Cir. 1999) (holding that where cognizable deprivation was caused by district court's order and appellate court could remedy deprivation by reversing dismissal of case, adversely affected defendant had standing to appeal deprivation); Grinnell Mut. Reinsurance Co. v. Reinke, 43 F.3d 1152, 1154 (7th Cir. 1995) (holding automobile accident victims to be without standing to appeal ruling that tortfeasor's insurer had no duty to defend insured in action by victims, reasoning that victims were, if anything, benefitted by absence of insurer from presentation of defense, and that loss of opportunity to receive payment from insurer seeking to avoid cost of defense was not cognizable legal injury that could ground standing to appeal; stating that, "Litigants ... who cannot show how the judgment injured them in a way the court of appeals can correct, are not proper appellants"); Warner/Elektro/Atl. Corp. v. County of DuPage, 891 F.2d 1280, 1282 (7th Cir. 1983) (holding that if appellant county, against whom judgment for $0 had been entered, was complaining about finding that county was negligent and was inverse condemnor, appeal had to be dismissed for lack of jurisdiction, for there was no real case or controversy); cf. Spencer v. Casavilla, 44 F.3d 74, 78-79 (2d Cir. 1994) (denying standing to appeal, holding that set aside of verdicts on plaintiffs' federal claims did them no harm where jury had not awarded any damages on those claims and set aside did not disturb awards on their state law claims).

312 Steinman, supra note 1.
I. STANDING TO BE AN APPELLEE: INTERESTS JUSTIFYING DEFENSE OF APPEAL

Cases examining standing of a full-fledged party to be an appellee are pretty rare.\textsuperscript{313} Ordinarily, reversal or vacatur of a decision that was adverse to the appellant will disfavor the opposing parties, who are named appellees. The loss they would suffer upon such a reversal or vacatur gives them an interest that entitles them to defend on appeal. One unusual case was \textit{Legault v. Zambarano}.\textsuperscript{314} There, defendant-appellants challenged the plaintiff's standing to participate in their appeal of sanctions that they had been ordered to pay to the town for which defendants worked, where the plaintiff had settled his case on the merits but had successfully moved for sanctions against defendants.\textsuperscript{315} The court rejected the challenge, upon reasoning that left something to be desired. The court found plaintiff's interest in the appeal to lie in defendant-appellants' request for a ruling that the district judge erred in declining to impose sanctions on plaintiff, a matter distinct from appellants' challenge to the imposition of sanctions upon them.\textsuperscript{316} The court also noted that, even if plaintiff lacked a personal stake in the outcome of the appeal of sanctions against defendants, the court would hear plaintiff as an \textit{amicus curiae}.\textsuperscript{317}

The standing of "irregulars," persons other than full-fledged parties, to act as appellees will be explored in the sequel to this Article.\textsuperscript{318}

\textsuperscript{313} As the separately published sequel to this Article will illustrate, more cases deal with the standing of intervenors and other irregulars to serve as appellees. See Steinman, supra note 1.

\textsuperscript{314} 105 F.3d 24 (1st Cir. 1997).

\textsuperscript{315} \textit{Id.} at 25. The opinion is not entirely clear as to whether appellants also sought to challenge the imposition of sanctions that were payable to plaintiff. I think they did not, because plaintiff's stake in a reversal of those sanctions would have made clear its standing to be an appellee.

\textsuperscript{316} \textit{Id.} at 26.

\textsuperscript{317} \textit{Id.}

\textsuperscript{318} Steinman, supra note 1.
III. CONCLUSION

The law of standing to appeal and defend appeals in many ways tracks the law of standing to sue and to defend in the trial court. A somewhat fluid mix of constitutional, prudential, and practice-based doctrines appears to govern each, and considerations of injury, causation, and redressability are crucial to each. The nature and source of the injury claimed on appeal differ from those claimed in district court but, in each context, the plaintiff or appellant, as the case may be, typically stands to gain relative to his pre-existing condition, should the court rule for him. The defendant or appellee, as the case may be, typically stands to suffer relative to his pre-existing condition, if the court rules against him.

Just as the nature of the injury sufficient to justify recognition of standing to sue is the most controverted element of standing to sue (although causation and redressability may be challenged as well), the nature of the grievance sufficient to justify recognition of standing to appeal is the most controverted element of standing to appeal.

Having examined this case law, we are in a position to evaluate whether the recurring criticisms of constitutional standing to sue doctrine\textsuperscript{319} are equally-well leveled at standing to appeal doctrine. These include whether courts are able to manipulate, and have manipulated, the characterization of injuries deriving from court decisions so as to render some injuries unworthy of appellate redress, although on other, equally legitimate characterizations, the injuries would be worthy of such redress.

In most cases there is little appellate parallel to the vagaries of injury characterization, or to the difficulty of making proper determinations of causation and redressability that plague standing to sue doctrine. The nature of the injuries claimed generally will not be subject to greatly varying characterizations. Typically, if a plaintiff had an injury that sufficed for standing to sue, and it has not been awarded complete relief from or compensation for that injury, the nature and sufficiency of its grievance will be clear. Likewise, if a defendant has been ordered to do or refrain from

\textsuperscript{319} See supra notes 12, 14-16 and accompanying texts.
particular activities, or to pay money to redress plaintiff's injuries, the nature and sufficiency of its grievance will be clear. But, as Part II showed, courts sometimes have been confused about the standing to appeal of litigants who have prevailed in some respects but failed in others, and courts have had some difficulty in determining the sufficiency-for-appeal of grievances that substantially prevailing litigants have claimed.

The courts increasingly recognize dismissal without prejudice to impose an appealable grievance on defendants who have sought dismissal with prejudice. Dismissal without prejudice over the claim-asserting party's objection continues to split the courts. The appeals courts see that such dismissals afford to claimants less than they sought, but seek to guard against manufacture of appellate jurisdiction through merely apparent objection and possible re-filing of the subject claims. I have proposed that issues of finality and manipulation of appellate jurisdiction be addressed in the context of determining the appealability of dismissals without prejudice. Then, dismissal without prejudice over the claim-asserting party's objection would be a grievance that provides standing to appeal decisions that are held to be appealable.

The collateral estoppel exception has, with good intentions, sought to recognize the injuries that adverse findings and resolutions of mixed questions of law and fact can have, even on prevailing litigants. However, as applied, it reflects misunderstanding of the requirements of collateral estoppel and creates the danger of prohibiting re-litigation of issues whose determination was not necessary to the judgment. Further, the doctrine is tainted by circular reasoning, often tends to be invoked where simpler doctrines should suffice, and consumes appellate resources. For the reasons elaborated earlier, abolition of the doctrine, and acceptance of possible re-litigation of issues that were decided against a prevailing party, would be preferable.

Insofar as the Supreme Court's Electrical Fittings case itself was cryptically based on concerns about the issue-preclusive effect of a determination (patent validity) that was not necessary in light of the resolution of the case (holding no infringement), it too should fall. To the extent that it cryptically was predicated on possible adverse real-world consequences of that same determination, it should be
rejected because of the speculativeness of such consequences. If it stands for the proposition that, where a "procedural" error is made that leads a court to address a hypothetical controversy (one mooted by other decisions in the case), policy reasons may make it appropriate to allow the party who may be adversely affected by that procedural error to appeal it, seeking vacatur, the implications of the decision seem more manageable and the "exception" acceptably limited. As previously noted, both this version of the Electrical Fittings doctrine, and the "exception" for decisions rendered in violation of Article III, are akin to other decisions that allow vacatur of unfavorable holdings when a case has become moot. For the reasons articulated above, the decision whether to allow standing to appeal should be discretionary and the decision whether to vacate should be an equitable one. Then, although allowance of appeal and of vacatur may make some inroad into the policies against having federal courts of appeals grant "writs of erasure," putting into the courts of appeals' hands the ability to accept or reject such appeals will allow prudential control over the appellate door.

It remains true that some uncertainty inevitably arises from the fact that causation and redressability are assessments of probability (assessments of how likely it is that the trial court's rulings or judgment would be the cause of injury to the appellant, and of how likely it is that a favorable appellate court decision would remedy the harm), but these assessments generally are inherently easier to make than the assessments that go into the decision whether to recognize or confer standing to sue. Moreover, when an appellate court has to determine whether a challenged trial court decision would cause a claimed injury to the would-be appellant, the appellate court has access to the entire trial court record,320 as well as to the parties' legal arguments, as compared with the meager record that a trial court has when determining a plaintiff's standing.

320 Under FED. R. APP. P. 10-12, the parties must arrange for the filing with the court of appeals of at least a partial record including the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the district clerk. If anything material is omitted, a supplemental record may be certified and forwarded by either the district court or by the court of appeals, as well as on stipulation of the parties. FED. R. APP. P. 10(e).
to sue, and both should inform and facilitate the court's reaching a conclusion.

Over all, despite the theoretical questions that lurk—such as whether, and to what extent, mootness and standing to appeal truly are grounded in Article III—and despite my modest criticisms of some federal doctrines of standing to appeal, the federal courts generally have reached reasonable conclusions in deciding which parties should have standing to appeal, and which should not; which parties should have standing to defend an appeal, and which should not. The sequel to this Article will examine whether they have done as well in answering those questions when dealing with "irregulars" such as persons whose litigating capacity has changed, persons who were parties in cases consolidated with the case on appeal, intervenors, absent members of classes certified or sought to be certified, shareholders in derivative suits, "de facto" and "quasi" parties, and non-parties.