Mootness Doctrine in Class Actions: United States Parole Commission v. Geraghty, The

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John M. Geraghty was sentenced to five years in prison for conspiracy to commit extortion and for the making of false material declarations to a grand jury.[1] After his sentence was reduced to thirty months, Geraghty applied for parole, but was refused. Under the Parole Release Guidelines[2] Geraghty would not have been eligible for parole until he had served his entire sentence, reduced by good-time credits. Geraghty brought suit challenging the constitutionality of the Parole Release Guidelines and petitioned for certification of a class of all federal prisoners who were or who would become eligible for release on parole.[3] The district court denied Geraghty's petition for certification and granted the Commission's cross motion for summary judgment on the merits.[4] Geraghty appealed both rulings,[5] but while his appeal was pending, he completed his sentence and was released from prison. The United States Parole Commission moved to dismiss the appeal as moot. The court of appeals ruled, however, that class certification had been erroneously denied, and that mootness of the plaintiff's claim did not bar further adjudication.[6] Finding that summary judgment had been improvidently granted, the appellate court remanded the case for further consideration.[7] The district court stayed the proceedings following the United States Supreme Court's grant of certiorari. *Held, va-*

1. Geraghty's conviction was affirmed in United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

2. 28 C.F.R. § 2.20 (1979). The United States Parole Board adopted these guidelines in 1973. They provide for the formulation of a customary release date for each prisoner based on the combination of a parole prognosis score and an offense severity rating.

3. Geraghty originally filed suit against the United States Parole Commission and others and sought certification as a class action in the United States District Court for the District of Columbia. The court transferred the case to the Middle District of Pennsylvania where Geraghty was in custody. Geraghty alleged that the Parole Release Guidelines were unconstitutional because they allowed the Parole Commissioner to make deferred sentencing decisions without due process and because they violated the constitutional prohibition against ex post facto laws. The petitioner claimed jurisdiction under 28 U.S.C. § 2241 (1976) (habeas corpus statute), 5 U.S.C. §§ 701-706 (1976) (Administrative Procedure Act), and 28 U.S.C. § 1331 (1976) (federal question jurisdiction).

4. Geraghty v. United States Parole Comm'n, 429 F. Supp. 737 (M.D. Pa. 1977). According to the court, FED. R. CIV. P. 23, governing class actions, applied to Geraghty's claim only by analogy. Finding that the action was in the form of a writ of habeas corpus, the court concluded that it had no jurisdiction to grant declaratory relief and that a class action was neither necessary, because affected prisoners could bring individual writs of habeas corpus, nor appropriate, because some prisoners might oppose changes in parole guidelines. 429 F. Supp. at 739-41.

Geraghty was brought as a § 23(b)(2) action, which requires the appropriateness of final injunctive or declaratory relief with respect to the class as a whole.

5. Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978).

6. *Id.* at 252-54.

7. The court of appeals found that the district court erred in regarding the claim solely as a writ of habeas corpus because declaratory relief was appropriate under 5 U.S.C. §§ 701-706 (1976) and 18 U.S.C. § 4218(c) (1976). 579 F.2d at 243. The court held that the erroneous denial of a certifiable class did not necessitate an end to the litigation even though the named representative's claim had expired. In addition, the court noted that the possibility of conflicting interests within the class could be reconciled through the use of subclasses. The

cated and remanded: Despite the mooting of a named plaintiff's individual claim on the merits after denial of class certification, the action is not moot. The named plaintiff may be a proper representative for purposes of appealing the denial of class certification when he maintains a personal stake in obtaining class certification sufficient to satisfy article III requirements. *United States Parole Commission v. Geraghty*, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

I. HISTORICAL TREATMENT OF THE MOOTNESS DOCTRINE IN CLASS ACTIONS

Article III of the Constitution restricts the exercise of federal judicial power to "cases" or "controversies."[8] This constitutional limitation requires a real and substantial controversy capable of conclusive judicial relief[9] and the presence of litigants with a sufficient personal stake[10] in the outcome of the case to assure the presentation of concrete issues in an adversary setting.[11] When a live controversy ceases to exist or the parties lose a legally cognizable interest in its outcome,[12] the federal courts, under the mootness doctrine, no longer have the power to decide the issue.[13]

In some instances, however, the Court allows an individual's own action to survive, despite the party's loss of a personal stake in the merits of the case, if the claim itself is "capable of repetition, yet evading review."[14] The Supreme Court has applied this traditional mootness exception to class actions, focusing by analogy on the impracticality and injustice of

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court, therefore, reversed the district court and ordered it to consider the use of subclasses sua sponte. *Id.* at 248-54.

8. U.S. CONST. art. III, § 2 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, the Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party;—[and] to Controversies between two or more States . . . .

For a discussion of the development of the case or controversy requirement from a common law doctrine to a constitutional mandate, see Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 374-79 (1974).

9. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).

10. Baker v. Carr, 369 U.S. 186, 204 (1962).

11. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).

12. Powell v. McCormack, 395 U.S. 486, 496 (1969).

13. North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937). The doctrine of justiciability is a blend of constitutional requirements and policy considerations, making it a doctrine of "uncertain and shifting contours." Flast v. Cohen, 392 U.S. 83, 97 (1968). Justiciability limits the business of courts to questions presented in an adversary context in cases capable of resolution, and assures effective separation of powers among branches of government. *Id.* at 94-97. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 52-114 (1978). Because the mootness doctrine is rooted in the constitutional requirements of article III, a federal court "is not empowered to decide moot questions or abstract propositions." California v. San Pablo & Tulare R.R., 149 U.S. 308, 314 (1893). *See also* United States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920).

14. The Supreme Court recognized the "capable of repetition, yet evading review" doctrine in Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911), in which the plaintiffs sought review of an ICC order, but the order expired before the case reached the Supreme Court.

depriving an individual plaintiff of legal recourse when he may again be subjected to the same injury.[15] Consideration of these factors is appropriate in class suits because although the expiration of the named plaintiff's claim may not lead to repetition as to him, it does not eliminate a continuing repetition and controversy as to remaining members.[16] The application of mootness principles in class actions, however, has caused considerable debate over whether the existence of a certified class or potential class should make a difference in how far to extend the exception.[17]

Prior to 1975 the Supreme Court had not directly addressed the question of whether a class action would be moot if there were no demonstrated probability of repeated injury to the class representative whose substantive claim expired before a final determination on the merits.[18] In *Sosna v. Iowa*[19] the Court held that the expiration of the named plaintiff's claim after certification of a class does not moot the action.[20] Sosna successfully petitioned the federal district court for class certification of all Iowa residents unable to initiate divorce or separation actions because of a one-year residency requirement. After a three-judge federal court denied relief on the merits, Sosna appealed directly to the Supreme Court. Before the appeal could be heard, however, Sosna fulfilled the Iowa residency requirement and secured a divorce. The Court relied on two lines of reasoning in ruling that the case was not moot. First, because Sosna originally had approached the district court in a representative capacity, the Court found that upon certification by the district court the class had acquired a distinct

15. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 110-11 n.11 (1975) (pretrial detention); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974) (welfare benefits); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Dunn v. Blumstein, 405 U.S. 330 (1972) (state voter residency requirement). For a discussion of the capable of repetition doctrine and group interests, see Note, *supra* note 8, at 386-88.

16. Avoiding a multiplicity of suits has motivated development of the procedural device of a class action. *See* 3B MOORE'S FEDERAL PRACTICE ¶ 23.02[1] (2d ed. 1978); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533, at 265 (1975) [hereinafter cited as WRIGHT & MILLER]. Further, the court in McGuire v. Roebuck, 347 F. Supp. 1111, 1125 (E.D. Tex. 1972), explained that the possibility of rendering decisions that have become academic is less likely in class actions, and therefore, the reasoning ascribed to the mootness doctrine does not necessarily apply.

17. *See, e.g.*, 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 1085-1092a (1977); Kane, *Standing, Mootness and Federal Rule 23—Balancing Perspectives*, 26 BUFFALO L. REV. 83 (1976-1977); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1463-71 (1976); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573; Comment, *A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions*, 54 TEXAS L. REV. 1320 (1976); Note, *supra* note 8; Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970).

18. *See* Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973) (per curiam) (remanded on question of mootness after named plaintiff's claim expired). Perhaps the earliest suggestion that an action might continue after dismissal of the named plaintiff came in Justice Marshall's concurrence to Johnson v. New York State Educ. Dep't, 409 U.S. 75, 79 (1972). The case was remanded for mootness determination, but Justice Marshall stated that "[e]ven if the case is now moot as to these particular petitioners, there may be other members of the class who remain aggrieved and thus the action may remain a viable one." *Id.* at 79 n.7.

19. 419 U.S. 393 (1975).

20. *Id.* at 402.

legal status.[21] This factor, the Court concluded, significantly affected the mootness determination.[22] Secondly, the Court recognized that although the possibility of repeated future claims by Sosna was unlikely, the state would continue to enforce the allegedly unconstitutional statute against unnamed class members.[23] While *Sosna* implied that timely certification was required to avoid mootness in a class action,[24] the Court alluded to the possibility that a claim might be so inherently transitory that no one plaintiff could sustain a personal stake long enough for a district court to rule on certification.[25] In such instances, the Court suggested, the certification might relate back to the filing of the complaint.[26]

Later that same year, the Supreme Court addressed this contingency in footnote eleven of *Gerstein v. Pugh*.[27] In *Gerstein* a class action was filed on behalf of all persons subject to pretrial detention. Before the class could be certified, however, the named plaintiffs were convicted. The Supreme Court concluded that the claim was capable of repetition yet evading review.[28] Applying the principles of *Sosna*, the Court held that the loss of the named plaintiffs' claims on the merits did not render the action moot.[29] The Court justified the absence of *Sosna*'s implied requirement of a named plaintiff with a substantive claim at the time of certification by reference to the relation back theory.[30] The inherently transitory nature of pretrial detention and the possible injury to other persons similarly situated, the Court reasoned, were factors meriting an exception to timely certification.[31]

In other cases, however, the Court drew the line differently, showing less concern for unnamed parties and favoring a strict construction of the live controversy requirement in relation to the class representatives.[32] In *Board*

21. *Id.* at 399.
22. *Id.*
23. *Id.* at 400. In Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972), the Court had previously applied the capable of repetition doctrine to persons other than the named plaintiff.
24. The *Sosna* Court stressed both the grant of certification and a controversy capable of repetition as prerequisites to avoiding mootness. 419 U.S. at 402. The second requirement was weakened in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), in which the Court found that identifying a situation repetitiously evading review was not required to establish a live controversy and functional adversity. *Id.* at 754. Moreover, the Court implied that timely certification could be an independent ground for avoiding mootness of a class action. *Id.* at 753-57.
25. 419 U.S. at 402 n.11.
26. *Id.*
27. 420 U.S. 103, 110-11 n.11 (1975).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* Following *Gerstein* a number of courts allowed certification on a "relation back" theory. *See, e.g.*, Basel v. Knebel, 551 F.2d 395, 397 (D.C. Cir. 1977); Zurak v. Regan, 550 F.2d 86 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977); Williams v. Wohlgemuth, 540 F.2d 163 (3d Cir. 1976).
32. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), involved a petition for injunctive relief from allegedly unconstitutional segregation of public schools in Pasadena. The trial court ordered the school board to adopt desegregation plans. Successors to the action sought modification of the order and the Court noted that, because of the graduation

of School Commissioners v. Jacobs,[33] decided later in the same term, six high school students brought a class action challenging allegedly unconstitutional interference with student publications. The students won on the merits, but in retrospect the Court found that the judgment did not adequately include other class members. By the time school officials appealed the decision, all six students had graduated. The Court held that the action was moot "[b]ecause the class action was never properly certified nor the class properly identified by the District Court."[34]

In the aftermath of *Sosna*, *Gerstein*, and *Jacobs* the guidelines for avoiding mootness raised some subtle questions. While *Gerstein* and *Sosna* had established class action exceptions to the mootness doctrine by employing equitable principles traditionally applicable to individual actions and by judicially creating the concept of the legal status of the certified class, the implications remained uncertain when the timing and correctness of the decisions on class certification could be put in issue. By granting certiorari in *United States Parole Commission v. Geraghty*, the Supreme Court assumed the task of refining the answers to some of these subtle questions.

II. UNITED STATES PAROLE COMMISSION V. GERAGHTY

In *United States Parole Commission v. Geraghty* the Supreme Court held that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim even though class certification has been denied. The Court further held that the named plaintiff in this instance was a proper representative for purposes of appealing the denial of certification.[35] Justice Blackmun, writing for the majority,[36] conceded that prior decisions of the Court did not necessarily mandate a ruling that the action was not moot.[37] The majority noted, however, that earlier decisions concerning mootness in class actions had relaxed the tra-

of students involved, the case would have been moot had the United States not been a suitable party for intervention. Weinstein v. Bradford, 423 U.S. 147 (1975) (per curiam), concerned a class challenge to state parole procedures. The district court refused to certify the class and denied relief on the merits. On appeal, the decision was reversed with no mention of the class suit. Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974). After state parole officials successfully petitioned for writ of certiorari, Weinstein v. Bradford, 421 U.S. 998 (1975), the proposed representative himself suggested that the action was moot because he had been released from prison, and the Court agreed. 423 U.S. at 147-48.

33. 420 U.S. 128 (1975) (per curiam).

34. *Id.* at 130.

35. 100 S. Ct. at 1212, 63 L. Ed. 2d at 495. The Court's holding extended only to the appeal of a denial of class certification. No decision was made on whether a certifiable class existed or whether Geraghty would be the proper representative for an appeal on the merits. As the Court noted, denial of class certification for a second time would end the litigation. *Id.* Additionally, the Court made clear that it was not addressing the question of whether an action would become moot when a named plaintiff settles his individual claim after denial of certification. *Id.* at 1212 n.10, 63 L. Ed. 2d at 495 n.10. Finally, the Court held that although the court of appeals could properly instruct the district court to consider subclasses sua sponte because the plaintiff had had no opportunity to do so at trial, the burden would be on the plaintiff to construct the subclasses. *Id.* at 1214, 63 L. Ed. 2d at 498.

36. Justice Blackmun was joined in the majority by Justices Brennan, White, Marshall, and Stevens.

37. 100 S. Ct. at 1212-14 n.11, 63 L. Ed. 2d at 496-97 n.11.

ditionally rigid contours of article III through a consideration of the practical and prudential implications of each case.[38] Examining the particular facts surrounding Geraghty's motion for certification,[39] the Court found that the proposed representative maintained a personal stake in obtaining certification sufficient to avoid compromising article III principles.[40]

While noting that the facts in *Geraghty* were unprecedented, the Court stated that its holding did not represent a significant departure from established mootness principles.[41] In order to demonstrate that the loss of the proposed class representative's personal stake does not automatically moot the action, the Court examined the exceptions to the mootness doctrine, reviewing those decisions that recognized the capable of repetition yet evading review doctrine.[42] The Court explained that the possibility of future claims arising as to the same plaintiff assures vigorous advocacy.[43] The Court further recognized that even if there is no chance of repetition as to a named plaintiff, certification alone is an effective means of avoiding mootness.[44] Finally, the Court discussed *Gerstein v. Pugh*[45] as representative of the narrow class of cases in which a claim is so inherently transitory that it is unlikely any named plaintiff will sustain a claim long enough for a court to rule on certification.[46] In such instances, the Court concluded, a relation back theory is appropriate.[47]

The Court also relied on a series of decisions providing that a certifica-

38. *Id.* The Court discussed in a footnote its perception of mootness in nontraditional litigation. According to the Court, an intelligible pattern was difficult to perceive, but the lack of consistency had been compensated for through a cautious approach to the underlying purposes of the case or controversy requirement. Unwilling to speculate how far the Court would proceed in its adaptation of the mootness doctrine to class suits, the majority insisted that *Geraghty* in no way approached the dissent's fear of bystander litigation. *Id.*

39. For a similar approach, see Kuahulu v. Employers Ins., 557 F.2d 1334 (9th Cir. 1977), in which the court stated that application of the mootness doctrine in class actions "to a large extent, depends on the idiosyncrasies of each case." *Id.* at 1337.

40. 100 S. Ct. at 1212, 63 L. Ed. 2d at 495. The Court explained that the elements of a live controversy continued to exist with regard to the certification issue. *See* text accompanying notes 63-64 *infra*.

41. 100 S. Ct. at 1212 n.11, 63 L. Ed. 2d at 496 n.11.

42. *Id.* at 1209-10, 63 L. Ed. 2d at 491-92.

43. *Id.* at 1209, 63 L. Ed. 2d at 492.

44. *Id.* The Court interpreted Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), as clearly establishing timely certification as an independent means of avoiding mootness. 100 S. Ct. at 1209, 63 L. Ed. 2d at 492; *see* note 24 *supra* and accompanying text. The court of appeals had suggested that certifiability of a class, rather than actual certification, should control. 579 F.2d at 249 n.43. This reasoning is persuasive because prior to certification a suit is treated as a class action for certain limited purposes, such as consideration of dismissal or settlement. *See* Moss v. Lane Co., 471 F.2d 853, 855 (4th Cir. 1973); Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969).

45. 420 U.S. 103 (1975).

46. 100 S. Ct. at 1209-10, 63 L. Ed. 2d at 492.

47. *Id.* at 1209, 1212-14 n.11, 63 L. Ed. 2d at 491, 496-97 n.11. The Court gave two indications that its decision was particularly dependent on *Gerstein*. First, the Court stated that "[t]he interest of the named plaintiff in *Gerstein* was precisely the same as that of Geraghty here." *Id.* at 1210, 63 L. Ed. 2d at 493. Secondly, the Court stated in a footnote: "We merely hold that when a District Court erroneously denies a procedural motion . . . an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial." *Id.* at 1212-13 n.11, 63 L. Ed. 2d at 496-97 n.11.

tion denial could be appealed after final judgment on the merits, despite a resolution of the named litigant's substantive claims.[48] In *United Airlines, Inc. v. McDonald*[49] the Court allowed an unnamed plaintiff to intervene in order to appeal a denial of class certification after the named plaintiff had prevailed on the merits. The Court ruled that the motion to intervene was timely because it had been filed within the time allowable for an appeal of the certification denial by the named plaintiffs.[50] In reaching this decision the Court stated that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs."[51] In *Coopers v. Lybrand*[52] the Court based its rejection of interlocutory appeals from denials of class certification largely on the availability of appeal after judgment on the merits.[53] Finally, in *Deposit Guaranty National Bank v. Roper*,[54] a decision entered the same day as *Geraghty*, the Court allowed the named plaintiffs to appeal the denial of class certification after a judgment was entered in their favor.[55] In *Geraghty* the Court stated that the expiration of a plaintiff's substantive claim rather than a judgment on the merits does not affect the plaintiff's personal stake in the certification issue and should not be an acceptable basis for distinction.[56]

Reluctant to rely exclusively on any given precedent,[57] the Court then shifted its focus to the constitutional requirement of a personal stake in the outcome of the litigation to support its conclusion that the action was not moot.[58] Reasoning that a named representative presents two separate issues for judicial determination, the claim on the merits and the claim that

48. *Id.* at 1210, 63 L. Ed. 2d at 492-93.
49. 432 U.S. 385 (1977).
50. *Id.* at 396.
51. *Id.* at 393.
52. 437 U.S. 463 (1978).
53. *Id.* at 469, 470 n.15.
54. 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980).
55. *Id.* at 1174-75, 63 L. Ed. 2d at 431.
56. 100 S. Ct. at 1211, 63 L. Ed. 2d at 493-94. The majority in *Geraghty* did not find its ruling inconsistent with *Roper*, but a realignment of the members of the Court in the two cases suggests otherwise. Chief Justice Burger delivered the opinion of the Court in *Roper*, joined by Justices Brennan, White, Marshall, Rehnquist, and Stevens. Justices Rehnquist and Stevens filed concurring opinions and Justice Blackmun filed an opinion concurring in the judgment. Justice Powell filed a dissenting opinion in which Justice Stewart joined. For the division of the Court in *Geraghty*, see note 36 *supra* and note 65 *infra*. At least some members of the *Roper* Court apparently based their decision on the named plaintiffs' sustained interest in a collateral matter. The named representatives maintained that they had an economic interest in sharing litigation costs with the class. Personal stake in such collateral matters had previously been recognized in Powell v. McCormack, 395 U.S. 486 (1969) (economic interest in back pay).
57. 100 S. Ct. at 1212 n.11, 63 L. Ed. 2d at 496 n.11. Arguably, the Court could not rely exclusively on *Sosna* because of Geraghty's inability to have a class certified prior to extinction of his claim; it could not depend entirely on *Gerstein* because the ability to obtain a ruling on certification showed that Geraghty's claim was not inherently transitory; it could not strictly follow the traditional capable of repetition cases because, unless certification had been approved, these decisions customarily required a demonstrated probability of future injury to the same plaintiff; and *Roper* is distinguishable because mootness was caused by a judgment on the merits and the named plaintiffs maintained an economic interest in appealing the denial of certification.
58. *Id.* at 1211-12, 63 L. Ed. 2d at 494-95.

he is entitled to represent a class, the Court stated that the certification question exists independently of a substantive resolution.[59] Although it acknowledged that the identification of a procedural claim as a "legally cognizable interest" has been rare,[60] the Court stated that a named plaintiff who approaches the court in a representative capacity deserves judicial resolution of his certification claim.[61] The Court reasoned that achieving the primary benefits of the class action device necessitates a right to have a class certified if the stipulated prerequisites are fulfilled.[62] Despite the expiration of the named plaintiff's claim, the Court held that the certification question remained a concrete, sharply presented issue capable of judicial resolution.[63] Geraghty's continued insistence that the certification decision be reviewed, the Court concluded, satisfied the functional adversity requirement of article III.[64]

The dissent, led by Justice Powell,[65] criticized the majority's unwillingness to effectuate "self-imposed restraints on the exercise of judicial power."[66] According to Justice Powell, the cases cited by the majority did not support recognition of a flexible approach to mootness in class actions.[67] Distinguishing both *Sosna* and *Roper*,[68] the dissent maintained that the majority had taken an unprecedented move toward allowing prac-

59. *Id.* at 1211, 63 L. Ed. 2d at 494. One commentator has stated, that because of the unique context of mootness in class actions, "the Court's willingness to consider quite speculative allegations of injury to personal interests seems appropriate." Note, *supra* note 8, at 386.

60. 100 S. Ct. at 1211, 63 L. Ed. 2d at 494 (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)).

61. *Id.* at 1212, 63 L. Ed. 2d at 495.

62. *Id.* The Court qualified its pronouncement of a right to certification by noting that the right was more analogous to the private attorney general concept than to the traditional personal injury requirement of article III. *Id.* For a discussion of the private attorney general concept, see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.05 (1958). Geraghty sought to have his action certified as a 23(b)(2) class action. For a discussion of the prerequisites of a 23(b)(2) class suit, see note 4 *supra*. Class suits for injunctive relief have typically involved redress of civil and constitutional rights. *See generally* 7A WRIGHT & MILLER, *supra* note 16, § 1776. The private attorney general concept is not unfamiliar in these actions. As one commentator noted, 23(b)(2) actions involve issues of public policy that typically maintain the interest of a named plaintiff even when his or her personal claim has expired. This is a persuasive factor when considering the adequacy of a plaintiff to represent the class. *See* Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 587.

63. 100 S. Ct. at 1212, 63 L. Ed. 2d at 495.

64. *Id.*

65. Justice Powell was joined in dissent by Chief Justice Burger and Justices Stewart and Rehnquist.

66. 100 S. Ct. at 1215, 63 L. Ed. 2d at 499.

67. *Id.* at 1216, 63 L. Ed. 2d at 501. The dissent was particularly troubled by the majority's relegation of *Weinstein*, *Jacobs*, and *Spangler* to a single footnote. In each of these cases, appeal was brought by the defendants on the merits prior to any attempt to appeal the certification order. *See* notes 32-34 *supra* and accompanying text.

68. 100 S. Ct. at 1218, 63 L. Ed. 2d at 502-03. The dissent distinguished *Sosna* on the ground that it was limited to the recognition that certification gives a class legal recognition. *Id.* The dissent dismissed any analogy to *Roper* by stating that the named plaintiffs in that case had an alleged economic interest in appealing the denial of certification, whereas Geraghty had denied any personal interest in the outcome of his appeal. *Id.* at 1219, 63 L. Ed. 2d at 504.

tical considerations to govern judicial discretion.[69] The dissent argued that the majority had redefined the personal stake requirement of article III by premising jurisdiction on the "bare existence of a sharply presented issue in a concrete and vigorously argued case."[70] Unwilling to approve of the majority's reliance on the procedural device of certification as supplying the personal stake requirement, the dissent concluded that the Court's redefinition of that requirement left no justification for its otherwise steadfast refusal to allow "public actions."[71] The dissent also argued that the Court's recognition of a right to certification violated the mandate[72] that no rule of procedure may enlarge the jurisdiction of the federal courts.[73] Finally, while sympathetic to the fate of class actions, the dissent stressed that article III offered no exceptions for nontraditional litigation.[74]

III. CONCLUSION

In *United States Parole Commission v. Geraghty* the Court held that despite the expiration of a named plaintiff's claim after denial of class certification, the action is not moot. The Court further held that a named plaintiff who maintains a personal stake in obtaining certification sufficient to satisfy article III requirements may be a proper representative for purposes of appealing the denial. The Court ruled that such a denial should be appealable whether the mootness issue arises due to a determination on the merits or an expiration of the named plaintiff's substantive claim through occurrences other than a final judgment. In traditional nonprivate attorney general litigation the judiciary must guard against rendering decisions that will have no effective application. In a class action seeking injunctive relief, as opposed to compensatory damages, the appropriateness of judicial intervention must be measured by different standards. Potential unnamed plaintiffs remain in the background, and matters of important public constitutional litigation are at issue. The *Geraghty* decision demonstrates the Court's concern for achieving the primary benefits of class actions and its recognition that public interest litigation demands a reevaluation of the mootness doctrine. The dissent may be correct in noting that the Court's decision allows continuation of a suit with no plaintiff, but this is but an acknowledgment of the fiction that has evolved to accommodate the differences between individual and class action litigation. Forcing Geraghty into the foreground, the Court continues the fiction. The Court's attempt to satisfy the constitutional requirements of article III through recognition of an independent right to certification, however, may leave the decision resting precariously upon its particular facts. Still, *Geraghty*'s viability may be assured through the Court's acknowledgment that

69. *Id.* at 1216, 63 L. Ed. 2d at 500.
70. *Id.* at 1222, 63 L. Ed. 2d at 507.
71. *Id.*
72. FED. R. CIV. P. 82.
73. 100 S. Ct. at 1221, 63 L. Ed. 2d at 506.
74. *Id.* at 1217, 63 L. Ed. 2d at 501.