State of Vermont
WATER RESOURCES BOARD

In re: Application of Snowridse. Inc,
Appeal, of Vermont Natural Resources Council (VNRC)
Docket No. 's-197-93 WnCa

In re: Avveal of VNRC,
Docket Nos. DAM-92-02 and WQ-92-05

MEMORANDUM OF DECISION

On April 11, 1995, a Second Interim Order was issued by the Washington Superior Court (Jenkins, J.) in the appeal In re: Application of Snowridoe. Inc., Docket No. S-197-93 WnCa, remanding this matter to the Water Resources Board (Board) for its consideration of the parties' Agreement filed with the court on June 16, 1993, and issuance of an order reversing and vacating the Board's prior decisions and orders as specified in Section 8 of the Agreement. As explained below, the Board believes that it is neither necessary nor appropriate to reverse and vacate its prior decisions and orders in In re: Anneal of VNRC, Docket Nos. DAM-92-02 and WQ-92-05.

I. BACKGROUND

On February 11, 1991, Elwin R. and Janice L. Kingsbury and Snowridge, Inc. (SRI.), filed an application with the Department of Environmental Conservation, Vermont Agency of Natural. Resources (ANR), under the provisions of 10 V.S.A. Chapter 43 (Dams), for a permit to construct an impoundment consisting of a water withdrawal facility and an off-stream storage pond (the project). On January 8, 1992, the ANR issued an Order of Approval authorizing the project.. On February 6, 1992, the Vermont Natural Resources Council and others (VNRC)[1] appealed the ANR's dam decision to the Board/pursuant to 10 V.S.A. § 1099(a).

On May 7, 1991, SRI applied for a Water Quality Certification from the ANR under 10 V.S.A. § 1004 in connection with its application for a permit from the U.S. Army Corps or Engineers, On May 6, 1992, the ANR issued a Water Quality Certification (401 Certification) finding generally that the operation of the proposed project, when conducted in accordance with certain conditions imposed by the ANR, would not violate the applicable Vermont Water Quality Standards (VWQS). On May 20, 1992, VNRC appealed the ANR's 401 Certification decision to the Board, pursuant to 10 V.S.A. § 1024(a).

[1] The Mad Dog Chapter of Trout Unlimited, the Vermont Group of the Sierra Club and Peter F. Cammann, all of whom were represented by counsel for VNRC.

On June 15, 1992, the Board issued an order providing for joint 'evidentiary hearings in the two appeals. The Board conducted a de novo hearing during September and October, 1992. Parties presenting evidence and argument were VNRC, SRI, the ANR, and Winooski One Partnership. The Board issued' a decision on February 8, 1993. In re: Awweal of VNRC, Findings of Fact, Conclusions of Law and Order (Feb. 8, 1993; amended Feb 11, 1993). On February 23, 1993, both VNRC and SRI filed motions to alter and/or reconsider with the Board. On March 1, 1993, the Board issued a Memorandum of Decision 'in response to the parties' motions.

VNRC filed a Notice of Appeal on March 30, 1995. Negotiations between several, but not all, of the parties to the Board proceeding resulted in a Stipulation, which was filed with the court on or about June 16, 1993. Notably, .the AWR was not among the parties that-signed the agreement. On June 18, 1993, the court issued an Interim Order placing this appeal on inactive status for a period of thirteen (13) months to enable the parties to take such steps as were "necessary and appropriate to achieve the negotiated resolution of this appeal as set forth in their Agreement." Interim Order at 1, In re: Awwlication of Snowridae,, Inc., Docket No. S-197-93 WnCa (Cheever, J.) (June 18, 1993).

On March 6, 1995, SRI and VNRC filed a Joint Motion with the court requesting that the several orders and decisions issued by the Board in the dam and 401 Certification appeals be reversed, and vacated. A Second Interim Order was issued on April 11, 1995, remanding this matter to the Board for its consideration of the parties' stipulated agreement of June 16, 1993, and issuance of an order reversing and vacating the Board's prior decisions and orders as specified in Section 8 of that agreement. Second Interim Order at 2, In re: Awwlication of Snowridge. Inc., Docket No. S-197-93 WnCa (Jenkins, J.) (June 18, 1993).

II. DISCUSSION

The terms of Section,? of the agreement requiring that the Board's decisions and orders (hereinafter referred collectively as "decisions") be reversed and vacated, without a prior showing that these decisions are arbitrary, unreasonable and contrary to law, pose a threat to the delicate balance between the respective agencies and branches. of government. Their enforcement would create the dangerous precedent of privatizinq decision-making about the allocation of' important public resources, eliminating or truncating the public process and Board oversight envisioned by the Legislature to assure a project's compliance with applicable water quality criteria and standards.

The Board is required to conduct de novo hearings in both dam and 401 Certification appeals. 10 V.S.A. § 1099(a) and § 1024(a). The Board's final decision is based upon a record developed by the parties during the course of contested case hearings. The Board's final order in a dam permit appeal is "binding upon the department [of environmental conservation]." 10 V.S.A. §§ 1080(1) and 1099(a). An appeal from a Board's dam or § 401 Certification decision is to superior court. Unless that court determines upon a review of the administrative record that the Board's decision is "arbitrary, unreasonable,, and contrary to law," that decision stands. In re Town of Sherburne, 154 Vt. 596 (1990).

Following a lengthy and contentious hearing, the Board issued its Findings of Fact, Conclusions of Law and Order, in which it made substantially more findings, reached alternative conclusions and imposed different and more stringent conditions than did the ANR. However, the Board concluded, like the ANR, that the proposed project merited approval. Therefore, VNRC effectively "lost" its case before the Board.

VNRC then appealed the Board's decisions to the Washington Superior Court. If the appeal had followed its ordinary course, VNRC would have to have met a substantial burden to overturn the Board's decision. Instead of proceeding to hearing, VNRC voluntarily pursued settlement negotiations. It entered into an agreement whereby SRI agreed to file applications (acceptable to VNRC) for new approvals from the ANR. In exchange, VNRC agreed not to oppose or appeal such approvals.

By electing for settlement and the issuance of new permits, VNRC conditionally forfeited certain remedies that might have been the outcome of adjudication in this appeal had it prevailed on the merits; including a court order reversing and vacating the Board's decisions. See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, __ U.S. __, 115 S. Ct. 386, 392 (1994) (discussing vacation of orders in the context of settlement practice). See attachment. It would be utterly inappropriate and groundless for the Board to now "reverse and vacate" its own earlier decisions -- no matter what the parties have agreed -- without additional evidentiary hearings based on new information -- something none of the parties has suggested.

VNRC has sought reversal and vacation of the Board's decisions in In re: Appeal of VNRC because it deems these to be "bad" precedent. In fact, the Board's Findings of Fact, Conclusions of Law and Order is a narrow decision based on the particular facts in the record, and its substantive value will no doubt

be further limited by new rules to be adopted thi summer by the ANR governing water withdrawals for snowmaking. e onetheless, the Board's decisions are declarations of public poli . The Board's analysis of the VWQS contained within the Findin of Fact, Conclusions of Law and Order and the party status nd other determinations contained in its preliminary orde continue to serve as guidance to those who practice before th Board.[2] "They are not merely the property of private litigants, U.S. Bancorp, 115 S.Ct. at 392.

The Legislature has prescribed appeal as of right to superior court, through which parties may seek relief from the legal consequences of the Board's decisions. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would -- quite apart from any consideration of fairness to the parties -- disturb.the orderly operation of the administrative decisionmaking process contemplated by the Legislature. See id.

Moreover, while the availability of vacatur may facilitate settlement after the'decision under review has been issued and appeal filed, as' a general practice, it may actually deter settlement at an earlier and more appropriate stage of litigation. Id. at 393. Indeed, in'the interest of fostering judicial economy, settlement practice before the administrative decisionmaker is expressly authorized by the Administrative Procedure Act. 3 V.S.A. 809(d). Settlement practice before the Board in this case would have eliminated'court intervention and potential usurpation of executive powers.'

Finally, when the dispute involves the allocation of important public resources, decisionmaking concerning that pro-' cess should be conducted in an open forum under the supervision of the state agency charged with management and protection of that resource. In the present dispute, the ANR, which was a party to the proceeding before the Board, was statutorily bound by the Board's decision in the,dam appeal and therefore did not

[2] Indeed, VNRC recently cited the Board Prehearing Conference Order and Preliminary Order (April 10, ~1992) in In re: Appeal of VNRC, Docket No. 92-02, with respect to the scope of the Board's de novo review authority. VNRC Memorandum of Law in Opposition to CVPS Objections at 11-13, 16, and 18 (June 30, 1995), In re: Lamoille River Hydroelectric Project, Docket Nos. WQ-94-03 and WQ-94-05.

participate in the appeal to the superior court. Had negotiations occurred while this matter was pending before the Board, the ANR could have actively and openly participated in the shaping of a negotiated settlement and that settlement would have been subject to review by the Board, thereby assuring that the State's interest in the protection of the water resource that was the subject of the dam and § 401 appeals was properly represented in any agreement.

For the foregoing reasons, the Board respectfully informs the court that while it has considered the stipulated agreement of the parties, it does not believe that, under the circumstances of this case, it is either necessary or appropriate to reverse and vacate its own earlier decisions and orders. To do so would be unjust, inappropriate, and contrary to the public interest.,

Dated at Montpelier, Vermont, this 13th day of July 1995.

Vermont Water Resources Board
by its Chair

William Boyd Davies

Concurring:
William Boyd Davies
Stephen Dycus
Ruth Einstein
Jane Potvin

Attachment

112 S.Ct., at 1886. In light of the lower court opinion, it is apparent that we rejected this point—rather than Justice STEVENS' construction of § 846—before reaching the double jeopardy issue. In any event, Shabani's strained reading of *Felix* is of little consequence for precedential purposes, since "[q]uestions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979), quoting *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 149, 69 L.Ed. 411 (1925).

Shabani reminds us that the law does not punish criminal thoughts and contends that conspiracy without an overt act requirement violates this principle because the offense is predominantly mental in composition. The prohibition against criminal conspiracy, however, does not punish mere thought; the criminal agreement itself is the *actus reus* and has been so viewed since *Regina v. Bass*, 11 Mod. 55, 88 Eng.Rep. 881, 882 (K.B.1705) ("[T]he very assembling together was an overt act"); see also *Iannelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act") (citations omitted).

[3, 4] Finally, Shabani invokes the rule of lenity, arguing that the statute is unclear because it neither requires an overt act nor specifies that one is not necessary. The rule of lenity, however, applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute. See, *e.g.*, *Beecham v. United States*, 511 U.S. ——, ——, 114 S.Ct. 1669, 1672, 128 L.Ed.2d 383 (1994); *Smith v. United States*, 508 U.S. ——, ——, 113 S.Ct. 2050, 2059–2060, 124 L.Ed.2d 138 (1993). That is not the case here. To require that Congress explicitly state its intention *not* to adopt petitioner's reading would make the rule applicable with the "mere possibility of articulating a narrower construction," *id.*, at ——, 113 S.Ct. at 2059, a result supported by neither lenity nor logic.

As the District Court correctly noted in this case, the plain language of the statute and settled interpretive principles reveal that proof of an overt act is not required to establish a violation of 21 U.S.C. § 846. Accordingly, the judgment of the Court of Appeals is

Reversed.

U.S. BANCORP MORTGAGE COMPANY, Petitioner,

v.

BONNER MALL PARTNERSHIP.

No. 93–714.

Argued Oct. 4, 1994.

Decided Nov. 8, 1994.

Creditor moved for relief from automatic stay and dismissal of Chapter 11 case, alleging that debtor's plan was not confirmable. The Bankruptcy Court, Alfred C. Hagan, Chief Judge, granted relief from stay but denied motion to dismiss, and debtor appealed. The United States District Court for the District of Idaho, Ryan, J., 142 B.R. 911, reversed and remanded, holding that new value exception to absolute priority rule survived enactment of bankruptcy code, and creditor appealed. The Court of Appeals for the Ninth Circuit, 2 F.3d 899, affirmed, and remanded, and certiorari was granted. Parties entered into settlement agreement, mooting merits of case, but creditor requested vacation of Court of Appeals judgment. The Supreme Court, Justice Scalia, held that: (1) Supreme Court had power to decide motion to vacate, despite mooting of merits of judgment, but (2) mootness by reason of settlement does not justify vacatur of judgment under review.

Motion denied and case dismissed as moot.

1. Bankruptcy ⇐3781
Federal Courts ⇐12.1, 452, 462

Settlement between objecting creditor and Chapter 11 debtor as to dispute about confirmation of Chapter 11, after Court of Appeals had affirmed district court decision reversing bankruptcy court decision finding that plan was unconfirmable, did not deprive Supreme Court of power to entertain creditor's motion to vacate, under Article III. U.S.C.A. Const. Art. 3, § 1 et seq.

2. Federal Courts ⇐12.1, 723.1

No statute can authorize federal court to decide merits of legal question not posed in Article III case or controversy; for that purpose, case must exist at all stages of appellate review. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Federal Courts ⇐723.1

Federal appellate court may still take action with regard to piece of litigation once it has been determined that requirements of Article III no longer are, or never were, met; if the reverse were true, court would be powerless to award costs or even to enter order of dismissal upon finding that district court lacked Article III jurisdiction. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Federal Courts ⇐452

If judgment has become moot while awaiting review, Supreme Court may not consider its merits, but may make disposition of whole case as justice may require. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Federal Courts ⇐1.1

As with other matters of judicial administration and practice reasonably ancillary to primary, dispute-deciding function of federal courts, Congress may authorize Supreme Court to enter orders necessary and appropriate to final disposition of suit that is before it for review.

6. Federal Courts ⇐932.1

Vacatur must be decreed for those judgments whose review is prevented through happenstance, that is to say, where controversy presented for review has become moot due to circumstances unattributable to any of parties.

7. Federal Courts ⇐452

Moot cases are disposed of by Supreme Court in manner most consonant to justice, in view of nature and character of conditions that have caused case to become moot.

8. Federal Courts ⇐723.1

Parties who seek review of merits of adverse ruling, but who are frustrated by vagaries of circumstances, ought not in fairness to be forced to acquiesce in judgment, and same is true when mootness results from unilateral action of party who prevailed below.

9. Federal Courts ⇐932.1

Where mootness results from settlement, losing party has voluntarily forfeited his legal remedy by ordinary processes of appeal or certiorari, thereby surrendering his claim to equitable remedy of vacatur; judgment is not unreviewable, but simply unreviewed by his own choice, and denial of vacatur is merely one application of principle that suitor's conduct in relation to matter at hand may disentitle him to relief he seeks.

10. Federal Courts ⇐932.1

Mootness by reason of settlement does not justify vacatur of federal civil judgment under review.

11. Federal Courts ⇐452, 462

It is burden of petitioner for writ of certiorari, as party seeking relief from status quo of appellate judgment, to demonstrate not mere equivalent responsibility for mootness, but equitable entitlement to extraordinary remedy of vacatur, and petitioner's voluntary forfeiture of review is failure of equity that makes burden decisive, whatever respondent's share in mooting of case might have been.

12. Federal Courts ⇐7

When federal courts contemplate equitable relief, decision must take account of public interest.

13. Federal Courts ⇐932.1

Exceptional circumstances may conceivably justify vacatur even though mootness of appeal has arisen by reason of settlement;

however, such exceptional [redacted] do not include mere fact that settlement agreement provides for vacatur, which neither diminishes voluntariness of abandonment of review nor alters any policy considerations; however, even in absence of extraordinary circumstances, Court of Appeals that is presented with request for vacatur of district court judgment may remand case with instructions that district court consider request. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

Syllabus *

After this Court granted the petition for a writ of certiorari and received briefing on the merits, the parties entered into a settlement and agreed that the case was thereby mooted. Petitioner, however, also requested that the Court exercise its power under 28 U.S.C. § 2106 to vacate the judgment of the Court of Appeals. Respondent opposed the motion.

Held:

1. This Court does not lack the power to entertain petitioner's motion to vacate. Section 2106 supplies the vacatur power, and respondent's suggestion is rejected that Article III's case or controversy requirement *prohibits* the exercise of that power when no live dispute exists due to a settlement that has mooted the case. Although Article III prevents the Court from considering the merits of a judgment that has become moot while awaiting review, the Court may nevertheless make such disposition of the whole case as justice may require. *Walling v. Reuter Co.*, 321 U.S. 671, 677, 64 S.Ct. 826, 829, 88 L.Ed. 1001. Pp. 389–390.

2. Mootness by reason of settlement does not justify vacatur of a federal civil judgment under review. *United States v. Munsingwear*, 340 U.S. 36, 39–40, 71 S.Ct. 104, 106–107, 95 L.Ed. 36, and subsequent cases distinguished. Equitable principles have always been implicit in this Court's exercise of the vacatur power, and the principal equitable factor to which the Court has looked is whether the party seeking vacatur caused the mootness by voluntary action. Where mootness results from settlement, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the extraordinary equitable remedy of vacatur. It is irrelevant that the party who won below also agreed to the settlement, since it is the losing party who has the burden of demonstrating equitable entitlement to vacatur. This result is supported by the public interest in the orderly operation of the federal judicial system; petitioner's countervailing policy arguments are not persuasive. Although exceptional [redacted] may conceivably justify vacatur when mootness results from settlement, such circumstances do not include the mere fact that the settlement agreement provides for vacatur. Pp. 390–394.

Motion to vacate denied and case dismissed as moot. Reported below: 2 F.3d 899 (CA 9 1993).

SCALIA, J., delivered the opinion for a unanimous Court.

Bradford Anderson, Seattle, WA, for petitioner.

Edwin S. Kneedler, Washington, DC, for U.S. as amicus curiae by special leave of the Court.

John Ford Elsaesser, Jr., Sandpoint, ID, for respondent.

1994 WL 198808 (Pet.Brief)
1994 WL 269793 (Resp.Brief)
1994 WL 388008 (Reply.Brief)
1994 WL 249619 (Resp.Brief)
1994 WL 233917 (Reply.Brief)
1994 WL 223905 (Reply.Brief)
1994 WL 183470 (Pet.Brief)
1994 WL 96846 (Reply.Brief)

Justice SCALIA delivered the opinion of the Court.

The question in this case is whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

I

In 1984 and 1985, Northtown Investments built the Bonner Mall in Bonner County, Idaho, with financing from a bank in that State. In 1986, respondent Bonner Mall Partnership (Bonner) acquired the mall, while petitioner U.S. Bancorp Mortgage Co. (Bancorp) acquired the loan and mortgage from the Idaho bank. In 1990, Bonner defaulted on its real-estate taxes and Bancorp scheduled a foreclosure sale.

The day before the sale, Bonner filed a petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*, in the United States Bankruptcy Court for the District of Idaho. It filed a reorganization plan that depended on the "new value exception" to the absolute priority rule.[1] Bancorp moved to suspend the automatic stay of its foreclosure imposed by 11 U.S.C. § 362(a), arguing that Bonner's plan was unconfirmable as a matter of law for a number of reasons, including unavailability of the new value exception. The Bankruptcy Court eventually granted the motion, concluding that the new value exception had not survived enactment of the Bankruptcy Code. The court stayed its order pending an appeal by Bonner. The United States District Court for the District of Idaho reversed, *In re Bonner Mall Partnership*, 142 B.R. 911 (1992); Bancorp took an appeal in turn, but the Court of Appeals for the Ninth Circuit affirmed, *In re Bonner Mall Partnership*, 2 F.3d 899 (1993).

Bancorp then petitioned for a writ of certiorari. After we granted the petition, 510 U.S. ——, 114 S.Ct. 681, 126 L.Ed.2d 648 (1994), and received briefing on the merits, Bancorp and Bonner stipulated to a consensual plan of reorganization, which received the approval of the Bankruptcy Court. The parties agreed that confirmation of the plan constituted a settlement that mooted the case. Bancorp, however, also requested that we exercise our power under 28 U.S.C. § 2106 to vacate the judgment of the Court of Appeals. Bonner opposed the motion. We set the vacatur question for briefing and argument. 511 U.S. ——, 114 S.Ct. 1367, 128 L.Ed.2d 44 (1994).

II

[1] Respondent questions our power to entertain petitioner's motion to vacate, suggesting that the limitations on the judicial power conferred by Article III, see U.S. Const., Art. III, § 1, "may, at least in some cases, *prohibit* an act of vacatur when no live dispute exists due to a settlement that has rendered a case moot." Brief for Respondent 21 (emphasis in original).

[2, 3] The statute that supplies the power of vacatur provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.

Of course no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all the stages of appellate review. *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975); *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). But reason and authority refute the quite different notion that a federal appellate court may not take any action with regard to a piece of litigation once it has been determined that the requirements of Article III no longer are (or indeed never were) met. That proposition is contradicted whenever an appellate court holds that a

1. As described by the Court of Appeals for the Ninth Circuit, the new value exception "allows the shareholders of a corporation in bankruptcy to obtain an interest in the reorganized debtor in exchange for new capital contributions over the objections of a class of creditors that has not received full payment on its claims." *In re Bonner Mall Partnership*, 2 F.3d 899, 901 (1993). We express no view on the existence of such an exception under the Bankruptcy Code.

district court lacked Article III jurisdiction in the first instance, vacates the decision, and remands with directions to dismiss. In cases that become moot while awaiting review, respondent's logic would hold the Court powerless to award costs, *e.g.*, *Heitmuller v. Stokes*, 256 U.S. 359, 362–363, 41 S.Ct. 522, 523–524, 65 L.Ed. 990 (1921), or even to enter an order of dismissal.

[4, 5] Article III does not prescribe such paralysis. "If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Walling v. Reuter Co.*, 321 U.S. 671, 677, 64 S.Ct. 826, 829, 88 L.Ed. 1001 (1944). As with other matters of judicial administration and practice "reasonably ancillary to the primary, dispute-deciding function" of the federal courts, *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 111, 90 S.Ct. 1648, 1667, 26 L.Ed.2d 100 (1970) (Harlan, J., concurring in denial of writ), Congress may authorize us to enter orders necessary and appropriate to the final disposition of a suit that is before us for review. See *Mistretta v. United States*, 488 U.S. 361, 389–390, 109 S.Ct. 647, 663–664, 102 L.Ed.2d 714 (1989); see also *id.*, at 417, 109 S.Ct., at 678 (SCALIA, J., dissenting).

III

The leading case on vacatur is *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), in which the United States sought injunctive and monetary relief for violation of a price control regulation. The damages claim was held in abeyance pending a decision on the injunction. The District Court held that the respondent's prices complied with the regulations and dismissed the complaint. While the United States' appeal was pending, the commodity at issue was decontrolled; at the respondent's request, the case was dismissed as moot, a disposition in which the United States acquiesced. The respondent then obtained dismissal of the damages action on the ground of res judicata, and we took the case to review that ruling. The United States protested the unfairness of according preclusive effect to a decision that it had tried to appeal but could not. We saw no such unfairness, reasoning that the United States should have asked the Court of Appeals to vacate the District Court's decision before the appeal was dismissed. We stated that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.*, at 39, 71 S.Ct., at 106. We explained that vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.*, at 40, 71 S.Ct., at 107. Finding that the United States had "slept on its rights," *id.*, at 41, 71 S.Ct., at 107, we affirmed.

[6] The parties in the present case agree that vacatur must be decreed for those judgments whose review is, in the words of *Munsingwear*, "'prevented through happenstance'"—that is to say, where a controversy presented for review has "become moot due to circumstances unattributable to any of the parties." *Karcher v. May*, 484 U.S. 72, 82, 83, 108 S.Ct. 388, 391, 98 L.Ed.2d 327 (1987). They also agree that vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court. The contested question is whether courts should vacate where mootness results from a settlement. The centerpiece of petitioner's argument is that the *Munsingwear* procedure has already been held to apply in such cases. *Munsingwear*'s description of the "established practice" (the argument runs) drew no distinctions between categories of moot cases; opinions in later cases granting vacatur have reiterated the breadth of the rule, see, *e.g.*, *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93, 99 S.Ct. 2149, 2150, 60 L.Ed.2d 735 (1979) (*per curiam*); and at least some of those cases specifically involved mootness by reason of settlement, see, *e.g.*, *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120, 106 S.Ct. 553, 88 L.Ed.2d 418 (1985) (*per curiam*).

[7] But *Munsingwear*, and the post-*Munsingwear* practice, cannot bear the

weight of the present case. To begin with, the portion of Justice Douglas' opinion in *Munsingwear* describing the "established practice" for vacatur was dictum; all that was needful for the decision was (at most) the proposition that vacatur should have been sought, not that it necessarily would have been granted. Moreover, as *Munsingwear* itself acknowledged, see 340 U.S., at 40, n. 2, 71 S.Ct., at 107, n. 2, the "established practice" (in addition to being unconsidered) was not entirely uniform, at least three cases having been dismissed for mootness without vacatur within the four Terms preceding *Munsingwear*. See, *e.g.*, *Schenley Distilling Corp. v. Anderson*, 333 U.S. 878, 68 S.Ct. 914, 92 L.Ed. 1154 (1948) (*per curiam*). Nor has the post-*Munsingwear* practice been as uniform as petitioner claims. See, *e.g.*, *Allen & Co. v. Pacific Dunlop Holdings, Inc.*, 510 U.S. ——, 114 S.Ct. 1146, 127 L.Ed.2d 454 (1994); *Minnesota Newspaper Assn., Inc. v. Postmaster General*, 488 U.S. 998, 109 S.Ct. 632, 102 L.Ed.2d 766 (1989); *St. Luke's Federation of Nurses and Health Professionals v. Presbyterian/St. Luke's Medical Center*, 459 U.S. 1025, 103 S.Ct. 433, 74 L.Ed.2d 522 (1982).[2] Of course all of those decisions, both granting vacatur and denying it, were *per curiam*, with the single exception of *Karcher v. May*, *supra*, in which we declined to vacate. This seems to us a prime occasion for invoking our customary refusal to be bound by dicta, *e.g.*, *McCray v. Illinois*, 386 U.S. 300, 312, n. 11, 87 S.Ct. 1056, 1063, n. 11, 18 L.Ed.2d 62 (1967), and our customary skepticism towards *per curiam* dispositions that lack the reasoned consideration of a full opinion, see *Edelman v. Jordan*, 415 U.S. 651, 670–671, 94 S.Ct. 1347, 1359–1360, 39 L.Ed.2d 662 (1974). Today we examine vacatur once more in the light shed by adversary presentation.

The principles that have always been implicit in our treatment of moot cases counsel against extending *Munsingwear* to settlement. From the beginning we have disposed of moot cases in the manner "'most consonant to justice' ... in view of the nature and character of the conditions which have caused the case to become moot." *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477–478, 36 S.Ct. 212, 216–217, 60 L.Ed. 387 (1916) (quoting *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 302, 12 S.Ct. 921, 921, 36 L.Ed. 712 (1892)). The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action. See *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, *supra*, 239 U.S., at 478, 36 S.Ct., at 217 (remanding a moot case for dismissal because "the ends of justice exact that the judgment below should not be permitted to stand when without any fault of the [petitioner] there is no power to review it upon the merits"); *Heitmuller v. Stokes*, 256 U.S., at 362, 41 S.Ct., at 523–524 (remanding for dismissal because "without fault of the plaintiff in error, the defendant in error, after the proceedings below, ... caus[ed] the case to become moot").

[8, 9] The reference to "happenstance" in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.[3] See *Hamburg-Amerikanische Packetfahrt-Ac-*

2. The Solicitor General, who has filed an *amicus* brief in support of petitioner, would apparently distinguish these unvacated cases on the ground that the dismissal was pursuant to this Court's Rule 46.1 (or its predecessor), which provides for dismissal when "all parties ... agre[e]." But such an exception to vacatur for mootness is not mentioned in *Munsingwear*; nor, we may add, do we see any reason of policy to commend it.

3. We thus stand by *Munsingwear*'s dictum that mootness by happenstance provides sufficient reason to vacate. Whether that principle was correctly applied to the circumstances of that case is another matter. The suit for injunctive relief in *Munsingwear* became moot on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order. See *Fleming v. Munsingwear, Inc.*, 162 F.2d 125, 127 (C.A.8 1947). We express no view on *Munsingwear*'s implicit conclusion that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates in the name of the United States.

tien Gesellschaft, supra, 239 U.S., at 477–478, 36 S.Ct., at 216–217. The same is true when mootness results from unilateral action of the party who prevailed below. See *Walling,* 321 U.S., at 675, 64 S.Ct., at 828; *Heitmuller, supra,* 256 U.S., at 362, 41 S.Ct., at 523–524. Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice. The denial of vacatur is merely one application of the principle that "[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Sanders v. United States,* 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963) (citing *Fay v. Noia,* 372 U.S. 391, 438, 83 S.Ct. 822, 848, 9 L.Ed.2d 837 (1963)).

[10] In these respects the case stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all. In *Karcher v. May,* 484 U.S. 72, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987), two state legislators, acting in their capacities as presiding officers of the legislature, appealed from a federal judgment that invalidated a state statute on constitutional grounds. After the jurisdictional statement was filed the legislators lost their posts, and their successors in office withdrew the appeal. Holding that we lacked jurisdiction for want of a proper appellant, we dismissed. The legislators then argued that the judgments should be vacated under *Munsingwear.* But we denied the request, noting that "[t]his controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the [State] Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case." *Karcher,* 484 U.S., at 83, 108 S.Ct., at 391. So too here.

[11] It is true, of course, that respondent agreed to the settlement that caused the mootness. Petitioner argues that vacatur is therefore fair to respondent, and seeks to distinguish our prior cases on that ground. But that misconceives the emphasis on fault in our decisions. That the parties are jointly responsible for settling may in some sense put them on even footing, but petitioner's case needs more than that. Respondent won below. It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur. Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been.

[12] As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,* 510 U.S. ——, ——, 114 S.Ct. 425, 428, 126 L.Ed.2d 396 (1993) (STEVENS, J., dissenting). Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system. *Munsingwear* establishes that the public interest is best served by granting relief when the demands of "orderly procedure," 340 U.S., at 41, 71 S.Ct., at 107, cannot be honored; we think conversely that the public interest requires those demands to be honored when they can.

Petitioner advances two arguments meant to justify vacatur on systemic grounds. The first is that appellate judgments in cases that we have consented to review by writ of certiorari are reversed more often than they are affirmed, are therefore suspect, and should be vacated as a sort of prophylactic against legal error. It seems to us inappropriate, however, to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits. Second, petitioner suggests that "[v]acating a moot decision, and thereby leaving an issue ... temporarily unresolved in a Circuit, can facilitate the ultimate resolution of the issue by encouraging its continued examination and debate." Brief for Petitioner 33. We have found, however, that debate *among* the courts of appeal sufficiently illuminates the questions that come before us for review. The value of additional intra-circuit debate seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions.

A final policy justification urged by petitioner is the facilitation of settlement, with the resulting economies for the federal courts. But while the availability of vacatur may facilitate settlement after the judgment under review has been rendered and certiorari granted (or appeal filed), it may *deter* settlement at an earlier stage. Some litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur. And the judicial economies achieved by settlement at the district-court level are ordinarily much more extensive than those achieved by settlement on appeal. We find it quite impossible to assess the effect of our holding, either way, upon the frequency or systemic value of settlement.

Although the case before us involves only a motion to vacate, by reason of settlement, the judgment of a court of appeals (with, of course, the consequential vacation of the underlying judgment of the district court), it is appropriate to discuss the relevance of our holding to motions at the court of appeals level for vacatur of district-court judgments. Some opinions have suggested that vacatur motions at that level should be more freely granted, since district-court judgments are subject to review as of right. See, *e.g., Manufacturers Hanover Trust Co. v. Yanakas,* 11 F.3d 381, 384 (C.A.2 1993). Obviously, this factor does not affect the primary basis for our denying vacatur. Whether the appellate court's seizure of the case is the consequence of an appellant's right or of a petitioner's good luck has no bearing upon the lack of equity of a litigant who has voluntarily abandoned review. If the point of the proposed distinction is that district-court judgments, being subject to review as of right, are more likely to be overturned and hence presumptively less valid: We again assert the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits. Moreover, as petitioner's own argument described two paragraphs above points out, the reversal rate for cases in which this Court grants certiorari (a precondition for our vacatur) is over 50%—more than double the reversal rate for appeals to the courts of appeal. See Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur,* 76 Cornell L.Rev. 589, 595, n. 25 (1991) (citing studies).

[13] We hold that mootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur—which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed. Of course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b).

* * *

Petitioner's motion to vacate the judgment of the Court of Appeals for the Ninth Circuit

is denied. The case is dismissed as moot. See this Court's Rule 46.

It is so ordered.

Albert HESS and Charles F. Walsh, Petitioners

v.

PORT AUTHORITY TRANS–HUDSON CORPORATION.

No. 93–1197.

Argued Oct. 3, 1994.

Decided Nov. 14, 1994.

Injured railroad workers brought separate actions against employer Port Authority Trans-Hudson Corporation (PATH), seeking recovery under Federal Employers' Liability Act (FELA). The United States District Court for the District of New Jersey, 809 F.Supp. 1172, dismissed based on Eleventh Amendment. The United States Court of Appeals for the Third Circuit, 8 F.3d 811, consolidated cases and affirmed. On certiorari, the Supreme Court, Justice Ginsburg, held that PATH, as bistate railway created pursuant to Constitution's *Interstate Compact* Clause, was not cloaked with states' Eleventh Amendment immunity from suit.

Reversed and remanded.

Justice Stevens filed concurring opinion. Justice O'Connor filed dissenting opinion, in which Chief Justice Rehnquist, Justices Scalia and Thomas joined.

1. States ⇐6, 193

Judgment against Port Authority Trans-Hudson Corporation (PATH), a wholly owned subsidiary of the Port Authority of New York and New Jersey, would not be enforceable against either New York or New Jersey. N.J.S.A. 32:1–18; N.Y.McK.Unconsol.Laws § 6418.

2. Federal Courts ⇐265

Eleventh Amendment largely shields states from suit in federal court without their consent, leaving parties with claims against state to present them, *if state permits, in* state's own tribunals. U.S.C.A. Const. Amend. 11.

3. Federal Courts ⇐265

Adoption of Eleventh Amendment responded most immediately to states' fears that federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin, although, more pervasively, current Eleventh Amendment jurisprudence emphasizes integrity retained by each state in federal system. U.S.C.A. Const.Amend. 11.

4. States ⇐6

If creation of bistate entity does not implicate federal concerns, federal consent is not required under interstate compact clause. U.S.C.A. Const. Art. 1, § 10, cl. 3.

5. States ⇐6

States, as separate sovereigns, are constituent elements of the Union, whereas bistate entities typically are creations of three discrete sovereigns, in form of two states and federal government, and their mission is to address interests and problems that do not coincide nicely either with national boundaries or with state lines, and which may be badly served or not served at all by ordinary channels of national or state political action. U.S.C.A. Const. Art. 1, § 10, cl. 3.

6. States ⇐6

Bistate compact accorded congressional consent is more than supple device for dealing with interests confined within region, but is also means of safeguarding national interest. U.S.C.A. Const. Art. 1, § 10, cl. 3.

7. Federal Courts ⇐268.1
States ⇐6

Suit in federal court is not affront to dignity of entity created under interstate compact clause, since federal court, in relation to such enterprise, is not instrument of distant, disconnected sovereign, but rather federal court is ordained by one of entity's founders. U.S.C.A. Const. Art. 1, § 10, cl. 3; U.S.C.A. Const.Amend. 11.

8. Federal Courts ⇐268.1
States ⇐6

Integrity of compacting states is not compromised when entity created under interstate compact clause is sued in federal court, since, as part of federal plan prescribed by Constitution, states agreed to power sharing, coordination, and unified action typifying compact clause creation. U.S.C.A. Const. Art. 1, § 10, cl. 3; U.S.C.A. Const.Amend. 11.

9. States ⇐6

Bistate entities created by compact are not subject to unilateral control of any one of *states that compose federal system.* U.S.C.A. Const. Art. 1, § 10, cl. 3.

10. Federal Courts ⇐270
States ⇐6

Once determined that there was no genuine threat to dignity of compacting states in allowing railroad workers to pursue FELA claims in federal court against Port Authority Trans-Hudson Corporation (PATH), as wholly owned subsidiary of the Port Authority of New York and New Jersey, it was necessary to determine whether there was good reason to believe states and Congress designed Port Authority to enjoy Eleventh Amendment immunity. U.S.C.A. Const. Art. 1, § 10, cl. 3; U.S.C.A. Const.Amend. 11; Federal Employers' Liability Act, § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.; N.J.S.A. 32:1–1; N.Y.McK.Unconsol.Laws § 6401.

11. Federal Courts ⇐270

Cities and counties do not enjoy Eleventh Amendment immunity from suit in federal court. U.S.C.A. Const.Amend. 11.

12. Federal Courts ⇐265

Impetus for Eleventh Amendment is prevention of federal court judgments that must be paid out of state's treasury. U.S.C.A. Const.Amend. 11.

13. Federal Courts ⇐269

Where agency is so structured that, as practical matter, if agency is to survive, judgment must expend itself against state treasuries, common sense and rationale of Eleventh Amendment require that sovereign immunity attach to agency, but there is no such requirement when agency is structured to be self-sustaining. U.S.C.A. Const.Amend. 11.

14. Federal Courts ⇐268.1

There is no per se rule precluding application of Eleventh Amendment when states act in concert. U.S.C.A. Const. Art. 1, § 10, cl. 3; U.S.C.A. Const.Amend. 11.

15. Federal Courts ⇐269

In determining whether agency is entitled to state's Eleventh Amendment immunity, proper focus is not on use of profits or surplus, but rather on losses and debts, and if state is not obligated to bear and pay any indebtedness of enterprise, then Eleventh Amendment's core concern is not implicated. U.S.C.A. Const.Amend. 11.

16. Federal Courts ⇐270
States ⇐6

Port Authority Trans-Hudson Corporation (PATH), a subsidiary of the Port Authority of New York and New Jersey, was not cloaked with states' Eleventh Amendment immunity from railroad workers' FELA suit in federal court; as discrete entity created by constitutional compact among two states and federal government, Port Authority was financially self-sufficient, it generated its own revenues, and it paid its own debts, and requiring Port Authority to answer in federal court to injured railroad workers asserting federal statutory right to recover damages did not touch concerns, namely states' solvency and dignity, underpinning Eleventh Amendment. U.S.C.A. *Const. Art. 1, § 10, cl. 3;* U.S.C.A. *Const.* Amend. 11; Federal Employers' Liability Act, § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.; N.J.S.A. 32:1–1; N.Y.McK.Unconsol.Laws § 6401.

Syllabus *

Petitioners, two railroad workers, were injured in unrelated incidents while em-

* NOTE: The syllabus constitutes no part of the opinion of the Court but has been prepared by