

## ARTICLES

COUEY V. ATKINS: A REEVALUATION OF STATE  
JUSTICIABILITY DOCTRINE*Jack L. Landau\**

Federal justiciability doctrine is a mess, as it is well-known.<sup>1</sup> State justiciability doctrine often fares not much better, especially to the extent that courts draw on federal justiciability doctrine in recognizing constitutional constraints on their authority to exercise judicial power.<sup>2</sup>

The Oregon Supreme Court was among those courts. In fact, the court went beyond federal justiciability doctrine in not only holding that the state's courts lacked authority to hear moot cases, but also concluding that the court cannot hear such cases even when they are capable of repetition, yet evading review—an exception to mootness that had been recognized by the federal courts and the courts of every other state in the country.<sup>3</sup>

In *Couey v. Atkins*, the Oregon Supreme Court reconsidered. In that case, the court observed that its own justiciability case law, like that of the federal courts, had become incoherent.<sup>4</sup> So it took the opportunity to reassess the matter from scratch, ultimately concluding that it had erred in following federal justiciability

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<sup>1</sup> See, e.g., Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 696 (1990) (“The law in the area of justiciability is a mess.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (“The structure of standing law in the federal courts has long been criticized as incoherent.”); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996) (discussing how the federal mootness doctrine is incomprehensible).

<sup>2</sup> See, e.g., Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834 (2001) (“Many state courts draw heavily from federal justiciability principles . . .”).

<sup>3</sup> *Couey v. Atkins*, 355 P.3d 866, 878, 902 (Or. 2015).

<sup>4</sup> *Id.* at 883, 884 (quoting *Kellas v. Dep’t of Corr.*, 145 P.3d 139, 142 (2006)); see, e.g., Chemerinsky, *supra* note 1, at 677, 678. In the full disclosure department, I was the author of the court’s opinion in *Couey*.

doctrine.<sup>5</sup> The court conducted a lengthy analysis of the historical roots of justiciability doctrine, concluding that constitutional conceptions of standing and mootness are constructs of the twentieth century, which state courts might appropriately adopt as a matter of policy, but are not required to follow as a matter of state constitutional law.<sup>6</sup>

### I. BACKGROUND

A bit of background concerning preexisting Oregon justiciability doctrine provides a useful context for discussing *Couey* and its implications. As I said, Oregon's modern justiciability case law was not a thing of beauty. Beginning in the 1930s, the court began to borrow from federal justiciability case law in developing the doctrine that the state constitution imposes certain jurisdictional barriers to entertaining declaratory judgment actions.<sup>7</sup> The court held that it was "not a judicial function" to decide abstract or hypothetical questions posed by plaintiffs who did not have a concrete stake in the outcome of a case.<sup>8</sup>

For a while, the court flirted with recognizing certain exceptions to those constitutional justiciability barriers. It recognized, for example, the capable-of-repetition exception to the general rule that courts cannot decide moot cases.<sup>9</sup>

But then in the 1960s, the court reverted to the federal-style justiciability doctrine to which it had previously adhered, holding

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<sup>5</sup> *Couey*, 355 P.3d at 884, 901, 902.

<sup>6</sup> *See id.* at 886, 888, 891, 892, 895; Hershkoff, *supra* note 2, at 1836–37.

<sup>7</sup> *See, e.g.*, *Or. Creamery Mfrs. Ass'n v. White*, 78 P.2d 572, 573, 577 (Or. 1938).

<sup>8</sup> *Or. Creamery Mfrs. Ass'n.*, 78 P.2d at 576 ("Deciding hypothetical cases is not a judicial function.")

<sup>9</sup> The leading decision in that regard is *Perry v. Oregon Liquor Commission*, 177 P.2d 406 (Or. 1947), in which the plaintiff challenged the temporary suspension of her license to serve liquor. *Id.* at 407. By the time that her claim reached the state supreme court, the period of suspension had expired, thus mooting her appeal. *Id.* The court noted that "courts ordinarily do not determine moot questions." *Id.* The court added that, nevertheless, "[w]here the question is one involving the public welfare, and there is a likelihood of it being raised again in the future, a court in the exercise of its discretion may decide it for the guidance of an official administrative agency." *Id.* at 408 (citing *Southern Pacific Terminal Co. v. Interstate Comm. Comm.*, 219 U.S. 498, 514 (1911); *McCanless v. Klein*, 188 S.W.2d 745, 747 (Tenn. 1945); *Fox v. Holman*, 184 N.E. 194, 195 (Ind. 1933); *Payne, County Treas., v. Jones*, 146 P.2d 113, 116 (Okla. 1944); *Brown v. Baumer*, 191 S.W.2d 235, 238 (Ky. 1945); *Drozdowski v. Sayreville*, 47 A.2d 476, 477–78 (N.J. 1946)). *Perry* was followed in a number of cases over the course of the next decade and a half. *See, e.g.*, *Stowe v. Sch. Dist. No. 8-C*, 402 P.2d 740, 741 (Or. 1965); *Linklater v. Nyberg*, 380 P.2d 631, 633 (Or. 1963); *State ex rel. Smith v. Smith*, 252 P.2d 550, 563 (Or. 1953); *State ex rel. Stadter v. Newbry*, 248 P.2d 840, 843 (Or. 1952).

that Oregon courts are simply without constitutional authority to entertain any actions that are not justiciable.<sup>10</sup> In the 1980s and 1990s, the court emphasized the constitutional nature of its justiciability doctrine and borrowed freely from federal case law concerning standing, mootness, ripeness, and advisory opinions.<sup>11</sup>

The capstone to that doctrinal work was the court's decision in *Yancy v. Shatzer*,<sup>12</sup> a case in which the court explicitly rooted its justiciability doctrine in the "judicial power" clause of Article VII (Amended) of the Oregon Constitution.<sup>13</sup> According to *Yancy*, although nothing in the text of the constitution explicitly imposes any justiciability constraints on the exercise of judicial power, the framers of the constitution would have understood there to be just such a restriction.<sup>14</sup> And because those same framers would not

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<sup>10</sup> In *Gortmaker v. Seaton*, 450 P.2d 547 (Or. 1969), for example, the court declined to entertain an action brought by a local district attorney who had requested an interpretation of a newly enacted statute concerning the regulation of certain controlled substances. *Id.* at 548. The court explained that, although "[i]t can be argued that the public interest in the suppression of illegal drugs is so strong that the court should brush aside questions of standing and justiciable controversy[.]" doing so would go beyond the judicial power conferred by the state constitution. *Id.* 548, 549. The court cited *Oregon Creamery Manufacturers Ass'n. Id.* at 549.

<sup>11</sup> See, e.g., *State ex rel. Oregonian Publ'g Co. v. Sams*, 692 P.2d 116, 117 (Or. 1984) ("[Notwithstanding *Perry*] this court has not in recent years accepted the view that it is a proper judicial function to render a legal opinion 'in the public interest' when there is no concrete underlying dispute to be decided." (citing *Or. Med. Ass'n v. Rawls*, 574 P.2d 1103, 1107 (1978))).

<sup>12</sup> *Yancy v. Shatzer*, 97 P.3d 1161 (Or. 2004). In *Yancy*, the petitioner challenged the constitutionality of a police order excluding him from a public park for a period of thirty days. *Id.* at 1162. By the time the challenge came to a hearing before the circuit court, however, the thirty-day exclusion period had run. *Id.* The lower court dismissed the challenge as moot, and the Court of Appeals affirmed. *Yancy v. Shatzer*, 60 P.3d 1156, 1156 (Or. Ct. App. 2003). Petitioner sought review in the Oregon Supreme Court, arguing that the court should recognize an exception for cases that are capable of repetition, yet evade review. *Yancy*, 97 P.3d at 1162. Petitioner relied on, among other things, the court's earlier decision in *Perry. Id.* at 1164.

<sup>13</sup> *Id.* at 1164–65. Article VII was originally adopted as part of Oregon's 1857 Constitution. *Id.* at 1163. It vested in the state supreme court, circuit courts, and county courts "all judicial power." *Id.* at 1164. In 1910, the voters amended the constitution, adopting a new version of Article VII, but without repealing the original version. *Id.* To distinguish the two, the current amended version is usually referred to as "Article VII (Amended)." See *id.* Section 1 of Article VII (Amended) provides that "the judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law." *Id.*

<sup>14</sup> See *id.* at 1165–66. The Oregon courts follow a method of constitutional analysis that requires an examination of the text of the provision at issue, in light of its historical context and relevant case law. See *Priest v. Pearce*, 840 P.2d 65, 67 (Or. 1992). For a time, the Oregon Supreme Court tended to apply that method of analysis in a more or less originalist fashion, interpreting the state Constitution to mean what it was most likely understood to mean at the time of its adoption in 1857. See, e.g., *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 470 (Or. 1999) ("[W]hatever the right to 'Trial by Jury' meant in 1857, it means precisely the same thing today."). *Yancy* represents one of those instances in which the court took an originalist approach to interpreting the constitution. The court reviewed the historical

have recognized a capable-of-repetition exception to the rule against deciding moot cases, the court concluded, the court lacked constitutional authority to recognize it as well.<sup>15</sup>

In the process, the court relied on federal justiciability doctrine, as well as certain historical sources that are commonly cited in support of that federal doctrine, such as *Hayburn's Case* and Chief Justice John Jay's refusal to accept President George Washington's request for an advisory opinion.<sup>16</sup> The court acknowledged that federal courts nevertheless recognize an exception to the constitutional mootness doctrine in cases that are capable of repetition, yet evading review. But, citing a concurring opinion of Chief Justice Rehnquist in a more recent opinion, the court suggested that, if the judicial power really is constitutionally constrained, there can be no basis for recognizing such an exception.<sup>17</sup>

Following *Yancy*, two additional events set the stage for *Couey*. First, two years after *Yancy*, the Oregon Supreme Court decided *Kellas v. Dept. of Corrections*, in which the court adopted a view of

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development of justiciability doctrines and concluded that “the prevailing view throughout the American legal landscape in 1857 was that the constitutional grant of judicial power did not include the power to decide cases that had become moot at some stage of the proceedings.” *Yancy*, 97 P.3d at 1170. The court then explained that, although the original conferral of judicial power in Article VII was amended in 1910, there was no evidence that the framers of that amendment intended to intend the meaning of the “judicial power” that the amended Article VII authorized. *Id.* at 1165–66.

<sup>15</sup> The court noted that the United States Supreme Court did not recognize the capable-of-repetition exception until after Article VII was amended, in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911). See *Yancy*, 97 P.3d at 1169 (citing *Southern Pacific*, 219 U.S. at 514).

<sup>16</sup> *Hayburn's Case*, 2 U.S. 409 (1792), involved a statute that authorized federal courts to determine veteran's disability benefits, subject to review first by the Secretary of War and then by Congress. See *id.* at 410 n.2. Three justices of the United States Supreme Court, citing as circuit court judges, concluded that the statute was unconstitutional, because it authorized executive and legislative branch officials to review judicial determinations. *Id.* Chief Justice Jay's refusal to deliver an advisory opinion was sent in response to a letter from the President setting out twenty-nine questions concerning the propriety of a policy of neutrality toward France. See William R. Castro, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U. L. REV. 173, 180 (2002); F. Thornton Miller, *Jay Court, On Advisory Opinions*, DOCUMENTS IN EARLY AMERICAN HISTORY, <http://courses.missouristate.edu/ftmiller/letteradvisoryopin.htm> (last visited Mar. 23, 2016). Jay declined to answer on separation-of-powers grounds, explaining that judges cannot deliver “extrajudicial” opinions. III JOHN JAY, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 488 (Henry P. Johnson ed. 1891). *Yancy* noted that some—including the United States Supreme Court, in *United States v. Ferreira*—later read those instances as illustrations of broader understandings concerning the nature of “judicial power.” See *Yancy*, 97 P.3d at 1168 (citing *United States v. Ferreira*, 54 U.S. 40, 49 (1852)).

<sup>17</sup> *Yancy*, 97 P.3d at 1169–70 (citing *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring)).

justiciability very much at odds with the view adopted in *Yancy*.<sup>18</sup> At issue in that case was the constitutionality of legislation conferring standing on “any person” to challenge the validity of an administrative rule, regardless of that person’s personal interest in the application of the rule.<sup>19</sup> The Court of Appeals had held that, because the constitution imposed certain minimum justiciability requirements, the legislature could not waive them off by statute.<sup>20</sup> The Supreme Court reversed, concluding: “We are aware of no qualification on the legislature’s authority in the Oregon Constitution that would restrict the legislature from authorizing any member of the public to initiate litigation concerning the validity of administrative rules . . . .”<sup>21</sup> The court noted that the Oregon Constitution contains no “cases” or “controversies” clause, the source of federal court justiciability doctrine, and said that it was disinclined to “import federal law regarding justiciability into our analysis” of the state constitution.<sup>22</sup> *Yancy* was mentioned, but in reference to the broader proposition that the judicial power “is not unlimited.”<sup>23</sup>

Second, several months after *Kellas*, the Oregon legislature enacted a law that purported to recognize the very capable-of-repetition standard that *Yancy* had held the constitution would not abide. The new statute provided that, in any action in which a party challenges the lawfulness of an act, practice, or policy of a public body, “the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act” if, among other requirements, the challenged act is “capable of repetition” and is “likely to evade judicial review in the future.”<sup>24</sup>

As matters stood at that point, then, there was on the one hand *Yancy*, which held that justiciability was a constitutional doctrine rooted in the “judicial power” clause as understood by its nineteenth-century framers and informed by federal justiciability case law.<sup>25</sup> And there was on the other hand *Kellas*, which held that

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<sup>18</sup> See *Kellas v. Dep’t of Corr.*, 145 P.3d 139, 143 (Or. 2006).

<sup>19</sup> OR. REV. STAT. § 183.400(1) (West 2016) (“The validity of any rule may be determined upon a petition by any person to the Court of Appeals.”). In *Kellas*, the father of a convicted criminal defendant challenged the validity of certain administrative rules that governed his son’s sentencing. *Kellas*, 145 P.3d at 140.

<sup>20</sup> *Kellas v. Dep’t of Corr.*, 78 P.3d 1250, 1251 (Or. Ct. App. 2003).

<sup>21</sup> *Kellas*, 145 P.3d at 142.

<sup>22</sup> *Id.* at 143.

<sup>23</sup> *Id.* (citing *Yancy v. Shatzer*, 97 P.3d 1161, 1170–71 (Or. 2004)).

<sup>24</sup> OR. REV. STAT. § 14.175 (2016).

<sup>25</sup> *Yancy*, 97 P.3d at 1165–66, 1167.

the constitution contained no explicit justiciability limitations and that the courts should be loath to import them from federal court decisions.<sup>26</sup> In the meantime the legislature had enacted a statute the constitutionality of which appeared to depend on which of the two cases controlled.<sup>27</sup>

## II. *COUEY V. ATKINS*

Marquis Couey worked as a registered, paid signature collector for two initiative petitions during the 2010 election cycle.<sup>28</sup> He wanted to work as a volunteer on a third initiative measure.<sup>29</sup> But Oregon law provides that “[a] person registered [to be a paid collector] may not obtain signatures on a petition or prospective petition for which the person is being paid and, at the same time, obtain signatures on a petition or prospective petition for which the person is not being paid.”<sup>30</sup> Couey, worried about running afoul of that law, filed an action for a declaration that the statute violated his state and federal rights of free expression and association.<sup>31</sup>

“During the pendency of the litigation, however,” the 2010 election cycle ran out, and Couey’s registration as a signature collector expired.<sup>32</sup> The defendant secretary of state “moved for summary judgment on the ground” that Couey’s “claims had become moot.”<sup>33</sup> Couey responded that (among other things), even if his claim had become moot, he was entitled to pursue his claim under

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<sup>26</sup> *Kellas*, 145 P.3d at 143 (quoting *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989)).

<sup>27</sup> The tension between *Yancy* and *Kellas* did not go unnoticed. *See, e.g.*, *LaForge v. Dep’t of Human Servs.*, 241 P.3d 313, 314 n.1 (Or. Ct. App. 2010) (noting that *Yancy* held that the Oregon Constitution extends “judicial power” only to justiciable cases, while *Kellas* held that there was no such requirement); *Couey v. Atkins*, 355 P.3d 866, 884 (Or. 2015).

<sup>28</sup> *Couey*, 355 P.3d at 870–71. Oregon is one of some two-dozen states whose constitutions authorize legislation by direct democracy—initiative or referendum. Proposed measures may appear on the ballot, however, only if they first garner a minimum level of support in the form of initiative or referendum petition signatures from registered voters, usually a percentage of votes cast in a previous election. In Oregon, for example, the number of signatures required to qualify a statutory initiative is six percent of the votes cast for the office of governor at the last general election. OR. CONST., art. IV, § 1(2)(b). State law authorizes paid employees to collect those signatures. OR. REV. STAT. § 250.045(2) (2016). But the paid signature collectors must register with the Secretary of State, specify the measures for which signatures will be collected, and complete a training program. *Id.* § 250.048(3)(a). The registration remains in effect until the deadline for submission of initiative petition signatures, usually four months before the next general election. *Id.* § 250.048(3)(c).

<sup>29</sup> *Couey*, 355 P.3d at 871.

<sup>30</sup> OR. REV. STAT. § 250.048(10).

<sup>31</sup> *Couey*, 355 P.3d at 871.

<sup>32</sup> *Id.* at 869.

<sup>33</sup> *Id.*

Oregon Revised Statute section 14.175 because, given the short election cycle, it was unlikely that he would ever be able to obtain judicial review before his claim became moot.<sup>34</sup> The trial court granted the secretary's summary judgment motion and dismissed the case as moot, the Court of Appeals affirmed, and the Oregon Supreme Court granted Couey's petition for review.<sup>35</sup>

The case thus presented the court with a perfect opportunity to address the tension in its case law. The first order of business, though, was to determine whether Couey's case had become moot, and if so, whether the new statute applied. The court answered both questions in the affirmative. Starting with mootness, the court noted that Couey's registration had expired, and, even assuming that he were to re-register, whether there would be another measure for which he might want to volunteer was a matter of speculation.<sup>36</sup> Turning to the applicability of Oregon Revised Statute section 14.175, the court observed that the short election season made it unlikely that any such challenge could be concluded before becoming moot.<sup>37</sup> That left the question of whether the statute was constitutional.

The Oregon Supreme Court began by observing that the answer to that question depended on whether *Yancy* or *Kellas* controlled. If *Yancy* had been correctly decided, the court said, it would seem to follow that the legislature lacked authority to confer on the courts power that *Yancy* concluded the courts were constitutionally incapable of exercising. But if *Kellas* had been correctly decided, there would seem to be no constitutional impediment to the legislature's enactment of the capable-of-repetition statute.<sup>38</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* at 874. Couey had attempted to counter the secretary's mootness argument with an affidavit stating that he "fully intended" to work as a paid initiative petition signature collector "in the future" and that, if another measure that interested him started to circulate, he would "like to support it" with volunteer work. *Id.* The court concluded that the affidavit was insufficient to establish that his claims were not moot because the likelihood of his actually volunteering to support a measure while working as a paid collector on another was subject to too many hypothetical contingencies. *Id.*

<sup>37</sup> *See id.* at 877–78. The court rejected the secretary's argument that, because Couey could have asked for expedited consideration of his claims, he had not established that those claims were likely to evade judicial review. *Id.* at 877, 878. The court reasoned that Oregon Revised Statute § 14.175 applied when "[t]he challenged policy or practice, or similar acts, are likely to evade judicial review in the future." *Id.* at 877. That wording, the court explained, suggests that the focus is on whether the type of claim involved is likely to evade review, not whether a single plaintiff's claim possibly could have avoided becoming moot. *See id.* at 878.

<sup>38</sup> The court observed that "[t]he problem lies in the fact that *Yancy* and *Kellas* reflect two starkly different—and irreconcilable—views of the power conferred" on the courts by the state constitution. *Id.* at 882.

Noting the apparent conflict, the Oregon Supreme Court set about reconsidering its justiciability case law.<sup>39</sup> The court began with the text of the Oregon Constitution, Article VII (Amended), which vested in the courts “judicial power.”<sup>40</sup> The court observed that nothing in that provision either defines the nature of the “judicial power” that it conferred or limited its exercise. In particular, the court noted, the Oregon Constitution imposed no “cases” or “controversies” limitation of the sort that appears in Article III of the federal Constitution.<sup>41</sup>

The court followed that with an examination of the historical context for the constitutional provision, beginning with the early English common law, to nineteenth-century American state court cases concerning mootness and prerogative writs, to the development of the federal court justiciability doctrine.<sup>42</sup> In a nutshell, the court concluded that its examination of the historical context of the state constitution supplied no support for a constitutionally-based justiciability requirement. According to the Oregon Supreme Court, English common law and early American judicial decisions that *Yancy* had not examined “reveal scant, if any, evidence of concerns about what we would now term ‘justiciability.’”<sup>43</sup> To the contrary, the court explained, English courts recognized the right of “strangers” with no personal interest in the outcome to enforce public rights by prerogative writs, and early American case law followed suit.<sup>44</sup> The court also surveyed

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<sup>39</sup> *See id.* at 881–82. The court explained that while principles of *stare decisis* certainly do not permit reconsideration of prior precedents merely because current members may disagree with them, the existence of irreconcilable conflicts among those precedents may justify a reexamination of those cases. *See id.*

<sup>40</sup> *See id.* at 885.

<sup>41</sup> *See id.*

<sup>42</sup> The court cited its usual interpretive approach set out in *Priest*, but explained that, more recently, it has shifted away from an originalist emphasis, explaining that the purpose of its constitutional analysis “is not to freeze the meaning of the state constitution” in the mid-nineteenth century. *Id.* at 884. Rather, it is “to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances.” *Id.* at 884 (quoting *State v. Davis*, 256 P.3d 1075, 1078 (Or. 2011)).

<sup>43</sup> *Couey*, 355 P.3d at 886.

<sup>44</sup> The court explained that as far back as the seventeenth century, English law recognized the right of individuals who had no personal stake in the outcome to obtain a writ of prohibition. *See id.* at 887 (citing 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 602 (1797)). In a similar vein, the court cited Blackstone, who had noted the existence of “popular actions,” which could be brought by any person. *Couey*, 355 P.3d at 887 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 161 (1803)). As for early American courts, the court said that nineteenth-century case law widely recognized that individuals with no particular personal interest could bring actions to vindicate public rights. *Couey*, 355 P.3d at 888.

early Oregon case law, finding that early to mid-nineteenth century cases were perfectly consistent with the English and early American decisions that imposed no limitations on the constitutional authority of courts to adjudicate matters of public interest or public right.<sup>45</sup> To be sure, the court acknowledged, courts long exercised the authority to dismiss cases for want of standing, mootness, or ripeness. But they did so as a matter of policy, not of constitutional command.<sup>46</sup>

The Oregon Supreme Court also addressed the federal case law on which *Yancy* had relied. To begin with, the court observed, that federal case law was based on the text of Article III, which expressly limits the exercise of federal judicial power to the resolution of “cases” or “controversies.”<sup>47</sup> In contrast, the court explained, Oregon’s constitution—like most state constitutions—contains no such limitation and instead confers on the courts “plenary” judicial power.<sup>48</sup>

Moreover, the court noted, the notion that such limitations on the exercise of judicial power as standing and mootness actually are a relatively recent doctrinal development.<sup>49</sup> In fact, it was not until the latter half of the twentieth century that the United States Supreme Court constitutionalized justiciability, which before that had—like state courts—recognized that justiciability was a matter of “economy and good sense in judicial administration.”<sup>50</sup>

The Oregon Supreme Court also addressed *Yancy’s* reliance on the historical sources commonly cited in support of modern federal justiciability doctrine, in particular, *Hayburn’s Case* and the first Chief Justice’s refusal to deliver advisory opinions.<sup>51</sup> The court explained that modern scholarship tends to view those as instances in which the United States Supreme Court declined to exercise judicial power on separation of powers grounds, not on some broad

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<sup>45</sup> See *id.* at 894, 895.

<sup>46</sup> *Id.* at 891, 895.

<sup>47</sup> *Id.* at 891.

<sup>48</sup> See *id.*

<sup>49</sup> *Id.* (citing *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-11, at 82 n.1 (2d ed. 1988)).

<sup>50</sup> *Couey*, 355 P.3d at 891 (quoting TRIBE, *supra* note 50, § 3-11, at 82 n.1). The court noted that, for example, it was not until 1964 that the United States Supreme Court first suggested that it lacked constitutional authority to decide moot cases. *Couey*, 355 P.3d at 891 (citing *Liner*, 375 U.S. at 306 n.3).

<sup>51</sup> See *Couey*, 355 P.3d at 893–94 (citing *United States v. Ferreira*, 54 U.S. 40, 49 (1852); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 646 (1992)).

and anachronistic view of justiciability.<sup>52</sup>

In the end, the Oregon Supreme Court determined that it had erred in deciding *Yancy* and disavowed it, embracing instead a broader conception of the judicial power that imposes no limits on the authority of courts to entertain actions involving issues of public interest.<sup>53</sup> The court cautioned that, in so concluding, it did not intend to suggest that it would no longer dismiss moot cases.<sup>54</sup> Rather, in the future, it would determine whether to do so as a matter of prudence and policy, but not of constitutional requirement.<sup>55</sup>

Because the constitution imposed no limit on the authority of courts to entertain actions involving issues of public interest, the court concluded that it necessarily follows that there is no constitutional impediment to the legislature authorizing the courts to do exactly that—exercise judicial power in moot cases that are otherwise capable of repetition, yet evading review.<sup>56</sup> The court upheld the validity of Oregon Revised Statute section 14.175, reversed the lower court judgment and remanded for further proceedings.<sup>57</sup>

### III. POTENTIAL SIGNIFICANCE OF *COUEY*

Every state Constitution includes a provision authorizing, in one form or another, state courts to exercise judicial power.<sup>58</sup> And every state supreme court, at one time or another, has faced the task of determining whether that constitutional authority is limited by considerations of justiciability.<sup>59</sup> A number of those courts conclude that their authority is so limited, relying on federal case law.<sup>60</sup>

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<sup>52</sup> The court explained that *Hayburn's Case*, for example, involved a statute that required federal courts to render decisions that were subject to review by the Secretary of War and, ultimately, Congress, which the three-judge panel of justices sitting as a circuit court rejected on separation-of-powers grounds. *Couey*, 355 P.3d at 893–94 (citing *Ferreira*, 54 U.S. at 49). The court noted that it was not until much later—1926, in fact—that *Hayburn's Case* was cited for a broader “case or controversy” rule. *Couey*, 355 P.3d at 894 n. 27 (citing *Tutun v. United States*, 270 U.S. 568, 576 (1926)).

<sup>53</sup> See *Couey*, 355 P.3d at 900–01.

<sup>54</sup> *Id.* at 901.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> *Id.* at 902.

<sup>58</sup> See, e.g., Hershkoff, *supra* note 2, at 1874 (stating that the New Jersey Constitution provides that the “Supreme Court shall make rules governing the administration of all courts in the State”).

<sup>59</sup> See, e.g., *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 226 P.3d 567, 569 (Mont. 2010).

<sup>60</sup> Hershkoff, *supra* note 2, at 1834 (“Many state courts draw heavily from federal

*Couey* provides an example of one court that departed from that sort of lockstep consistency with federal doctrine.<sup>61</sup> State constitutions, after all, are documents of independent legal significance, apart from the federal constitution.<sup>62</sup> Indeed, as *Couey* observed, few state constitutions include the sort of “case” or “controversy” wording that supplies the textual basis for federal justiciability doctrine.<sup>63</sup> And the United States Supreme Court itself has declared that federal justiciability rules bind only federal courts, leaving state courts to develop their own justiciability doctrines.<sup>64</sup>

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justiciability principles.”); *see, e.g.*, *Noh v. Cenarrusa*, 53 P.3d 1217, 1220 (Idaho 2002) (“Idaho has adopted the federal justiciability requirement.” (citing *Harris v. Cassia County*, 681 P.2d 988, 991 (Idaho 1984)); *Jones v. Sullivan*, 703 N.E.2d 1102, 1106 (Ind. 1998) (“draw[ing] upon federal decisions for instruction”); *Harrison v. Long*, 734 P.2d 1155, 1158 (Kan. 1987) (relying on United States Supreme Court case law on standing); *Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762, 768 (Ky. 2005) (relying on United States Supreme Court standing case law); *B.S. v. Missouri*, 966 S.W.2d 343, 344–45 (Mo. 1998) (relying on federal mootness case law); *Plan Helena*, 226 P.3d at 569 (“This court has stated that the ‘cases at law and in equity’ language [in the Montana state constitution] embodies the same limitations as are imposed on federal courts by the ‘case or controversy’ language of Article III.”).

<sup>61</sup> A number of state courts also have declined to follow the United States Supreme Court’s justiciability doctrine and have instead applied their own doctrines of justiciability, principally as a discretionary, prudential matter. *See, e.g.*, *Bowers Office Prod., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1096 (Alaska 1988) (“[‘C]ase or controversy’ is a term of art used to describe a constitutional limitation on federal court jurisdiction. But . . . [o]ur mootness doctrine . . . is a matter of judicial policy, not constitutional law.” (quoting *RLR v. State*, 487 P.2d 27, 45 (Alaska 1971)); *Hotboxxx, LLC v. City of Gulfport*, 154 So.3d 21, 27 (Miss. 2015) (“[W]hile standing in federal court requires an ‘injury in fact,’ standing in Mississippi courts is more liberal . . . .”); *Salorio v. Glaser*, 414 A.2d 943, 947 (N.J. 1980) (“This court remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration.”).

<sup>62</sup> *See* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984) (“The right question is what the state’s [constitutional] guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state’s law may prove to be more protective than federal law.”).

<sup>63</sup> *See* Sharon M. Barnes, *Judicial Restraint or Activism? The Transformation of the Doctrine of Standing in Michigan*, 86 U. DET. MERCY L. REV. 325, 328 (2009) (stating that the “cases” or “controversies” formula that provides the textual foundation for federal court justiciability doctrine does not appear in most state constitutions). *Couey* pointed out that, in light of the historical analysis that it had relied on, it could be argued that even those textual differences provide little support for federal justiciability analysis. *See* *Couey v. Atkins*, 355 P.3d 866, 899 (Or. 2015). Others, in fact, have made just that argument. *See, e.g.*, Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 512 (1994) (“The foregoing analysis of eighteenth and nineteenth century sources reveals that . . . no contemporary American legal figure ever suggested that Article III’s reference to ‘Cases’ and ‘Controversies’ was intended as a constitutional limitation on federal jurisdiction.”); Bruce J. Terris, *Ex Nihilo—The Supreme Court’s Invention of Constitutional Standing*, 45 ENVTL. L. 849, 856 (2015) (“[T]he language of the Constitution itself provides little, if any, support for the doctrine of standing.”).

<sup>64</sup> *See* *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . .”); *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (“[T]he special limitations that Article III of the

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*Couey*, with its analysis of the historical development of state and federal justiciability doctrines, may prove a useful resource for other state courts that are interested in charting their own courses in developing state constitutional doctrines related to the judicial power.

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Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The states are thus left free . . . to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution." (citing *Pennell v. San Jose*, 485 U.S. 1, 8 (1988)).