Beyond Inherent Powers: A Constitutional Basis for *In re Tutu Wells Contamination Litigation*

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Abusive discovery practices have taken a severe toll on the justice system's ability to adjudicate disputes. In response, some courts have stepped up their efforts to sanction litigants for such misconduct. This Note critiques a recent federal appellate decision that reversed a district court's imposition of creative and unprecedented sanctions for discovery abuse. Although this Note supports the appellate court's reliance on the federal law of inherent powers as a basis for its decision, the Note goes on to argue that the U.S. Constitution's Case or Controversy Clause provides a more satisfying rationale.

I. INTRODUCTION

The discovery provisions of the Federal Rules of Civil Procedure[1] (the Rules) were adopted in an effort to reduce the element of surprise at trial.[2] The legal community believed that the fact-finding process would be enhanced, and the potential for "ambush" at trial reduced, if all parties had access to each other's evidence.[3] This decision to increase the scope of pretrial procedure came at a price; the efficiency and speed of litigation were reduced in return for increased accuracy.[4]

In recent years, the burden of extensive and unnecessary discovery has taken a severe toll on the justice system's ability to adjudicate disputes.[5] Discovery abuse in major cases can add years to the time between complaint and judgment, even if all parties obey the letter of the Rules.[6] When a party

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[1] *See* FED. R. CIV. P. 26–36 (setting forth the rules governing the procedure for obtaining and using depositions, interrogatories, physical and mental examinations, requests for admission, and the production of documents).

[2] *See generally* Alexander Holtzoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576, 577 (1954) (discussing the desire to change litigation from a contest of lawyers to a means of deciding controversies on their merits). For an opposing view, see *Margeson v. Boston & Me. R.R.*, 16 F.R.D. 200, 201 (D. Mass. 1954) (arguing that the element of surprise can be effective in exposing perjury and preventing witnesses from tailoring their testimony to that of other witnesses).

[3] *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 507 (1947) (stating that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation"). For a theoretical analysis of the ability of discovery to produce more economically rational out-of-court settlements, see Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEG. STUD. 55, 57–58 (1982).

[4] *See, e.g.*, Robert Araujo, *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMU L. REV. 433, 435 (1997) (discussing the ability of modern discovery practice to introduce extended delays into litigation).

[5] *See generally* Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371, 386–89 (1991) (discussing the decline in the performance of the judiciary due to delays caused by discovery abuse).

[6] Conduct that is abusive can still be, technically, legal. *See id.* at 387 (reporting that

intentionally violates the Rules in an effort to abuse the discovery system, litigation can easily grind to a halt or culminate in a manifestly unjust resolution.[7]

The judicial response to discovery abuse has been ineffective.[8] Because the discovery system was designed to be implemented with minimal involvement by the court,[9] and because judicial resources are already stretched thin,[10] the judiciary has been mostly unable or unwilling to take a central role in curbing discovery abuse.[11] Some courts, though, have taken strong positions against discovery abuse.[12] These judges use the resources available to them—the sanction provisions of the Rules[13] and their inherent power to sanction litigant misconduct[14]—in an attempt to curb abusive

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the self-implementing scheme of the Rules enables lawyers to use discovery "as a weapon rather than an information gathering mechanism" while remaining within the letter of the law).

[7] *See* Araujo, *supra* note 4, at 435–36 (discussing the pressure to accept an unjust case settlement when a litigant's scarce resources are being consumed by unnecessary discovery requests).

[8] *See* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?,"* 46 HASTINGS L.J. 679, 681–97 (1995) (detailing the current dissatisfaction with the judicial system's response to discovery abuse).

[9] Judges normally intervene in discovery only upon the motion of a party. *See* FED. R. CIV. P. 26(c) (providing that "[u]pon motion by a party or by the person from whom discovery is sought . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . "); *id.* at 37(a) (providing that "[a] party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery . . . "). For a comparative analysis of the German judicial system—which provides for active judicial involvement in the discovery phase of litigation—see John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

[10] *See* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 606 (1997) (identifying a lack of judicial resources as the primary reason for the "excess cost and delay" in the federal courts).

[11] *See* Meade W. Mitchell, *Discovery Abuse and a Proposed Reform: Mandatory Disclosure*, 62 MISS. L.J. 743, 753 (1993) (discussing how previous attempts to increase judicial supervision of discovery practice have been unsuccessful).

[12] The District Court of the Virgin Islands, Stanley S. Brotman, Judge, demonstrated this commitment to controlling discovery in the Tutu litigation itself. *See In re* Tutu Wells Contamination Litig., 162 F.R.D. 46 (D.V.I. 1995) [hereinafter Tutu I]. Although this Note agrees with the Third Circuit that Judge Brotman's remedy was improper, this author also agrees with the Third Circuit's approval of Judge Brotman's strong stance against abusive litigation practices. *See infra* text accompanying note 25 (discussing the Third Circuit's praise for Judge Brotman's conscientious response to discovery abuse).

[13] *See* FED. R. CIV. P. 37(b) (authorizing sanctions for failure to comply with an order); *id.* at 37(c) (authorizing sanctions for failure to disclose, false or misleading disclosure, or refusal to admit); *id.* at 37(d) (authorizing sanctions for the failure of a party to attend its own deposition, serve answers to interrogatories, or respond to requests for inspection); *id.* at 37(g) (authorizing sanctions for the failure of a party to participate in the framing of a discovery plan). The authorized sanctions include the most severe—outright dismissal of the action or a default judgment, *see id.* at 37(b)(2)(C), and a contempt order, *see id.* at 37(b)(2)(D).

[14] *See infra* Part III.A (discussing a federal court's inherent power to sanction litigant misconduct).

discovery practices that undermine the search for the truth.

In re Tutu Wells Contamination Litigation[15] is the latest federal appellate decision addressing the scope of a federal court's inherent power to sanction litigants for misconduct. The decision strikes down a district court's imposition of a $1,000,000 sanction for discovery abuse payable to a "Community Service Sanction Account" earmarked for the renovation of a correctional facility. The Third Circuit Court of Appeals ruled that the district court exceeded its inherent power to sanction by making the sanction payable to a nonparty to the Tutu litigation.

Parts II and III of this Note explain the *Tutu* decision in detail and place it in context within the federal law of inherent powers. Parts IV and V construct an alternative rationale for the Third Circuit's decision by applying general principles gleaned from the United States Supreme Court's interpretations of the Constitution's Case or Controversy Clause.[16] Although this constitutional analysis is not offered as a critique of the Third Circuit's decision, it does shed new light on the opinion by demonstrating that the Case or Controversy Clause provides a more satisfying rationale than the law of inherent powers.

II. BACKGROUND—FACTS AND PROCEDURAL HISTORY

In 1987—twelve years ago—a well owner in the Virgin Islands noticed the smell of gasoline in his well water.[17] Investigation by local and federal officials revealed that the Tutu aquifer, which supplies much of the drinking water to the Estate Tutu area on the eastern end of St. Thomas, was contaminated with gasoline and chlorinated organic compounds.[18] Numerous private lawsuits ensued, with many landowners and businesses attempting either to recover damages, escape liability, or both.[19] The key

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[15] 120 F.3d 368 (3d Cir. 1997) [hereinafter Tutu IV].

[16] Article III, section 2 of the United States Constitution—the Case or Controversy Clause—provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

[17] *See Tutu* IV, 120 F.3d at 373.

[18] *See id.* at 371, 373; U.S. Department of Health and Human Services, 43 MORBIDITY & MORTALITY WKLY. REP. 89, 90 (1994) (reporting that 22 commercial, residential, and public wells were contaminated with petrochemicals and volatile organic compounds, thus exposing 11,000 people to cancer-causing poisons for approximately twenty years before the contamination was discovered).

[19] *See Tutu* IV, 120 F.3d at 373.

players for the purposes of this Note are Esso Standard Oil S.A. Ltd., Esso Virgin Islands, Inc., Esso Standard Oil Co. (Puerto Rico) (collectively referred to as the "Esso Defendants"), and their former law firm of Goldman, Antonetti, Ferraiuoli & Axtmayer (referred to as "Goldman Antonetti").[20] The Esso Defendants brought an action for contribution from other defendants under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[21] Goldman Antonetti represented the Esso Defendants in the discovery stage of this phase of the litigation and participated in the conduct that led to sanctions against the Esso Defendants and Goldman Antonetti.

The District Court of the Virgin Islands, Stanley S. Brotman, Judge, sanctioned the Esso Defendants and Goldman Antonetti for three main groups of discovery abuses. First, the court found that the Esso Defendants and Goldman Antonetti willfully abused the discovery process by employing tactics designed to delay, oppress, or harass their opponents.[22] Second, the court found that the Esso Defendants and Goldman Antonetti intentionally suppressed a vitally important piece of scientific evidence and lied to the court in the process.[23] Third, the court found that the Esso Defendants and their counsel purposely failed to comply with a magistrate judge's order for an inspection of the contaminated site.[24] Judge Brotman's anger at this conduct is apparent in his three written opinions pertaining to the sanction proceedings; he begins his third and final opinion with the lamentation that "[d]uring the past twenty years as a United States District Judge, I cannot recall being involved with a more disturbing proceeding."[25]

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[20] The Esso Defendants were no longer represented by Goldman Antonetti at the commencement of the sanction proceedings. *See* Tutu I, 162 F.R.D. 46, 51 (D.V.I. 1995). Goldman Antonetti has since changed its name to Goldman, Antonetti & Cordova. *See Tutu* IV, 120 F.3d at 374 n.2.

[21] *See Tutu* IV, 120 F.3d at 373. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or the "Superfund Act") imposes strict joint and several liability on those who create Superfund clean-up sites. *See* CERCLA § 107(a)(1)–(4), 42 U.S.C. § 9607(a)(1)–(4) (1994).

[22] *See Tutu* I, 162 F.R.D. at 71. The court stated:

> The evidence establishes that the tactics engaged in by . . . both counsel and client, for several years in the litigation of this case, were calculated to frustrate and exhaust the opposition. . . . [The Esso Defendants' and Goldman Antonetti's] campaign in this litigation was one of misdirection, delay, oppressive pleadings, expense and harassment.

Id.

[23] *See id.* at 70–71 ("[P]rejudice to all parties derives, in the first instance, from the . . . concealment of the documents. . . . The importance of these documents cannot be argued. It was vital if not critical evidence that was withheld from both the parties and the local and federal agencies for more than two years. . . .").

[24] *See id.* at 53 ("[T]his court finds that counsel's disregard of the [inspection order] was willful and in bad faith and cannot be excused as 'zealous' advocacy.").

[25] *In re* Tutu Wells Contamination Litig., 166 F.R.D. 331, 334 (D.V.I. 1996) [hereinafter Tutu III]. Despite disagreeing with his choice of sanction, this author agrees with Judge Brotman's disgust with the unprofessional and unethical tactics of the Esso Defendants and Goldman Antonetti. This Note critiques Judge Brotman's method, but

A. *The Formulation of the Community Service Sanction Account*

Judge Brotman began the task of formulating appropriate sanctions by identifying his goals: to deter future litigants from abusing the discovery process and "to impose a sanction which would result in a positive benefit to the Virgin Islands."[26] Although deterrence is a common objective of discovery sanctions,[27] benefiting a nonparty to the litigation is not.[28] Perhaps not surprisingly, therefore, Judge Brotman held that "the [Federal] Rules [of Civil Procedure] and statutes do not provide explicitly for sanctions which redress the harm to the St. Thomas community."[29] Furthermore, the Rules and statutes did not provide a mechanism for increasing the penalty due to the egregious bad faith of the violators.[30] His response was "to travel a novel path in [his] approach to the imposition of sanctions"[31] and rely solely on the creative use of the court's inherent powers.[32]

Judge Brotman first noted that nonmonetary sanctions against the Esso Defendants and Goldman Antonetti would be inappropriate if they affected the outcome of the underlying litigation.[33] He could have stricken the Esso Defendants' pleadings and dismissed the contribution action or any part of it,[34] but to do so would have "reward[ed] other parties who are themselves

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fully supports the imposition of severe sanctions.

The Third Circuit also expressed its respect for Judge Brotman by referring to him as an "extraordinarily able district judge," *Tutu* IV, 120 F.3d at 373, and noting that "[w]e appreciate the sense of outrage that motivated the district court's decision." *Id.* at 385. The Third Circuit went on to explain that "a court does not always do well by doing good. Though we applaud the district court's motives, we are constrained to find fault with its remedy." *Id.*

[26] *Tutu* III, 166 F.R.D. at 334.

[27] *See, e.g.*, FED. R. CIV. P. 26 advisory committee's notes of 1983 (stating that "Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions"); *id.* at 37 advisory committee's notes of 1993 (stating that the automatic exclusion sanction called for by Rule 37(c) "provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence").

[28] *See infra* note 81 and accompanying text (discussing the lack of precedent for civil sanctions that directly benefit nonparties).

[29] *Tutu* III, 166 F.R.D. at 339. As the Third Circuit noted, it is unlikely that any such grant of authority to the judiciary would be constitutional. *See Tutu* IV, 120 F.3d at 385 n.18 ("In order to provide such power [to benefit nonparties] . . . this must be a power that Congress can constitutionally delegate to a coordinate branch. . . . [This] criter[ion] is [not] satisfied here.").

[30] As Judge Brotman phrased it, "neither the Rules nor the applicable statutes address the issue of increasing the sanctions where, as here, the conduct shows a pattern of conduct designed to delay or impede the development of the environmental science of the case." *Tutu* III, 166 F.R.D. at 339 n.9.

[31] *Id.* at 334.

[32] *See infra* notes 68–73 and accompanying text (discussing a district court's ability to properly ignore the sanctions provided for in the Rules and statutes).

[33] *See Tutu* III, 166 F.R.D. at 339.

[34] *See* FED. R. CIV. P. 37(b)(2)(C) (authorizing a district court to issue "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a

violators of our environmental laws."[35] Optimal deterrence of environmental violations was only possible if all violators were made to pay. Thus, having determined that some other sanction (*i.e.*, one that would operate without regard to the underlying litigation in *Tutu*) was necessary, Judge Brotman "canvassed the literature . . . concerning sanctions [and] identified few alternatives to the routine [and, to Judge Brotman, unsatisfactory] monetary sanction of fee shifting."[36] After reviewing the relative merits of two of these alternatives—fines payable to the court[37] and community service—Judge Brotman found that each of these sanctions, alone, would be inadequate.[38] Judge Brotman's solution was to combine fines with community service and "require the Esso Defendants and their former counsel to fund a community service project which will benefit the St. Thomas community—the party perhaps most aggrieved by their sanctionable conduct."[39] Judge Brotman then ordered that the Esso Defendants pay $750,000 and Goldman Antonetti pay $250,000 toward a "Community Service Sanction Account" for the "correction of the unconstitutional conditions and practices existing at the Criminal Justice Complex in St. Thomas."[40]

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judgment by default against the disobedient party. . . ."). Federal courts have these options available to them even when relying solely upon their inherent power to sanction. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764–65 (1980) (holding that federal courts have the inherent power to dismiss a case outright or impose any lesser sanction).

[35] *Tutu* III, 166 F.R.D. at 340. Judge Brotman also wished "to separate the merits of the underlying litigation from these sanction proceedings," *id.* at 339, in order to comply with the Third Circuit's "preference that cases be disposed of on the merits whenever practicable," Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984).

[36] *Tutu* III, 166 F.R.D. at 345.

[37] Fines made "payable into the court" for discovery violations are deposited by the court into the United States Treasury. *See* 28 U.S.C. § 751(e) (1994) (requiring the Clerk of Court to transfer "all fees, costs and other moneys collected by him" to the United States Treasury); *see also Tutu* III, 166 F.R.D. at 346 (describing the imposition of fines payable to the court as a method of "generat[ing] funds for the United States Treasury").

[38] *See Tutu* III, 166 F.R.D. at 346–47 (rejecting a fine because "[i]n addition to their potential to underdeter sanctionable conduct, fines fail to benefit the parties and community affronted by the sanctionable conduct because the sanctioned parties ordinarily pay such fines directly to the federal government"); *id.* at 348–49 (rejecting community service because "the court could conceivably be required to oversee the efforts of tens, if not hundreds, of individuals over an extended period of time").

[39] *Id.* at 345. According to Judge Brotman, "the true harm arising from the sanctionable conduct in this matter is one which has rarely been addressed by any of the parties: the impact on the community for the contamination to its most precious resource—naturally occurring fresh water." *Id.* at 349. During a 1992 inspection, local and federal authorities found that some of the contaminated wells had been illegally reopened for use due to water shortages on St. Thomas and the general economic hardship brought about by the contamination. *See* U.S. Department of Health and Human Services, *supra* note 18, at 89.

[40] *Tutu* III, 166 F.R.D. at 350–52. Judge Brotman chose the Criminal Justice Complex partly because he was "thoroughly conversant" with its unconstitutional conditions—he had previously presided over class-action litigation that resulted in a settlement agreement between the government of the Virgin Islands and the inmates of the Criminal Justice Complex. *See id.* at 350 n.21. In the two years between this settlement and Judge Brotman's creation of the Community Service Sanction Account,

B. *The Third Circuit's Review of the Community Service Sanction Account*

The Third Circuit Court of Appeals reversed Judge Brotman's order directing the Esso Defendants and Goldman Antonetti to fund the Community Service Sanction Account.[41] The Court of Appeals decided that Judge Brotman's "actions [were] essentially legislative in nature" and "ventured well beyond the case and controversy before it."[42] The court did not discuss or cite to the "case or controversy" jurisdictional requirement in the United States Constitution,[43] though, and instead based its decision on the conclusion that Judge Brotman had exceeded his inherent powers.[44] Thus, the decision does not place a constitutional limit on a district court's inherent powers; it merely holds that the Community Service Sanction Account was so "legislative" in nature that it exceeded whatever amorphous boundaries do exist on the district court's inherent power to sanction.[45] Further discussion of the Third Circuit's opinion requires a brief introduction to the federal law of inherent powers.

III. INHERENT POWERS OF THE FEDERAL COURTS

A. *Overview of Inherent Powers*

A court's inherent powers, as the term implies, spring from the very existence of the court itself.[46] A court cannot administer justice without control over the conduct of the proceedings before it. This inherent power does not require legislative grace for its existence: "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'"[47] Thus, inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[48]

"[p]rimarily as a result of a complete lack of funding, the Virgin Island officials have failed to comply with the terms of the agreement; thus, the inmates continue to suffer these extreme conditions which constitute violations of their civil rights." *Id.* at 351.

41 *See* Tutu IV, 120 F.3d 368, 385 (3d Cir. 1997). Of course, not all litigants appeal this type of community service sanction. *See* Milo Geyelin, *DuPont, Atlanta Law Firm Agree to Pay Nearly $11.3 Million in Benlate Matter*, WALL ST. J., Jan. 4, 1999, at A18 (reporting a discovery sanction requiring that the defendant and its law firm establish ethics programs at all four of Georgia's law schools).

42 *Tutu* IV, 120 F.3d at 384.

43 *See supra* note 16 for the full text of the Case or Controversy Clause.

44 *See Tutu* IV, 120 F.3d at 383.

45 *See id.* at 883–85.

46 *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (stating that inherent powers derive from the very nature of courts of justice).

47 *Id.* (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

48 Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962) (holding that a federal district court did not abuse its discretion when it dismissed a suit as an inherent power

The impossibility of legislatively regulating the federal courts' inherent powers—combined with an unelected judiciary and life appointment[49]—makes a court's use of inherent powers a rather momentous event. In one sense, inherent powers are not unlike the power of judicial review. In both instances an unelected and almost unaccountable federal official (an Article III judge) is making a decision that can only be reviewed by other unelected and almost unaccountable officials (Article III appellate courts); if these unelected officials abuse their power, the only way to stop them is by constitutional amendment or impeachment. Thus, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion."[50]

The United States Supreme Court has found the following powers necessary for a federal court to achieve "the orderly and expeditious disposition of [its] cases"[51]: the power to punish for contempt,[52] the power to control admission to its bar,[53] the power to discipline the attorneys appearing before it,[54] the power to vacate its own judgment if that judgment was fraudulently obtained,[55] the power to investigate independently any such fraud,[56] the power to bar disruptive defendants from the courtroom,[57]

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sanction for the failure of plaintiff's counsel to appear at a pretrial conference).

[49] *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.").

[50] *Chambers*, 501 U.S. at 44.

[51] *Link*, 370 U.S. at 630–31.

[52] *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 217–27 (1821) (discussing the English common law roots of an American court's inherent power to punish for contempt, in the context of whether the House of Representatives holds a similar power to punish for contempt); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510–12 (1874) (upholding an attorney's disbarment and punishment for contempt, after the attorney refused to answer the court's questions regarding whether he had counseled a client to avoid being served with a grand jury subpoena).

[53] *See Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866) (holding that district courts have the inherent authority to allow ex-Confederate officers to regain their membership in the federal bar).

[54] *See Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) ("The power [to discipline attorneys] is one which ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession."); *see also* ABA, MODEL FEDERAL RULES OF DISCIPLINARY ENFORCEMENT pmbl. (1978) (providing that "[court name here], in furtherance of its inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it . . . promulgates the following Rules of Disciplinary Enforcement).

[55] *See* Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946) (upholding a district court's *sua sponte* investigation into another court's decision that would potentially have *res judicata* effect in the investigating court, after allegations of judicial bribery were made in reference to the other court's decision); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (holding that equitable relief against fraudulent judgments is an inherent power remedy devised by courts to alleviate hardships arising from the general court-made rule that judgments should not be disturbed after the expiration of the term at which they were entered).

[56] *See Universal Oil Prods.*, 328 U.S. at 580.

[57] *See* Illinois v. Allen, 397 U.S. 337 (1970) (holding that a prisoner who was repeatedly warned to restrain his behavior, and who was advised that he could return to the courtroom as soon as he behaved properly, lost his constitutional right to be present at his trial when he persisted in disrupting the proceedings).

the power to dismiss a complaint on grounds of *forum non conveniens*,[58] the power to dismiss a complaint *sua sponte* for failure to prosecute,[59] and the power to assess attorney's fees against an opposing attorney.[60]

Lower federal courts have expanded this list and added some powers that have yet to receive Supreme Court review.[61] These powers include: the power to levy fines against an attorney payable into court,[62] the power to preclude claims or defenses,[63] the power to limit a litigant's future access to the courts,[64] the power to assess the costs of needlessly impaneling a jury,[65] the power to set counsel fees for attorneys appointed by the court,[66] and the power to appoint a special master to assist the court in hearing complex cases.[67]

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[58] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504–08 (1947) (discussing the policy reasons supporting a federal district court's inherent power to refuse to exercise jurisdiction even if that jurisdiction is expressly granted by the Constitution or an act of Congress).

[59] *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam) (upholding the district court's dismissal of the case after the plaintiff's counsel willfully refused to answer interrogatories or otherwise proceed with the pretrial phase of the litigation); Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962).

[60] *See* Roadway Express, Inc. v. Piper, 447 U.S. 765 (1980).

[61] *See generally* ABA, SANCTIONS: RULE 11 AND OTHER POWERS 36–37, 56, 78, 96–97, 121–24, 145–47, 169–70, 183–84, 206–07, 220–21, 236, 251 (Melissa L. Nelken ed., 3d ed. 1992) (discussing the inherent powers jurisprudence of each of the federal courts of appeals).

[62] *See, e.g.*, Kleiner v. First Nat. Bank, 751 F.2d 1193 (11th Cir. 1985) (upholding a district court's fine against a defense attorney who secretly solicited exclusion requests from potential members of the plaintiff class).

[63] *See supra* note 34 (discussing a federal court's ability to impose sanctions under Rule 37(b)(2)(C).

[64] *See* Lysiak v. Commissioner, 816 F.2d 311, 313 (7th Cir. 1987) (per curiam) (upholding access limitations in the case of a tax protester who repeatedly sued the federal government claiming that the Sixteenth Amendment was never ratified); Urban v. United Nations, 768 F.2d 1497, 1500 (D.C. Cir. 1985) (upholding access limitations in the case of a *pro se* litigator who filed dozens of actions against imaginary governmental units and sought to have them heard in a nationally televised jury trial before the Supreme Court); *In re* Martin-Trigona, 737 F.2d 1254, 1258–59, 1262–64 (2d Cir. 1984) (upholding access limitations in the case of a law school graduate who had been refused admission to the bar for character reasons and, in retaliation, filed hundreds of lawsuits against anyone associated with the legal profession, including an action to have himself appointed guardian ad litem of the district judge's children).

[65] *See* Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985) (upholding an order requiring an attorney to reimburse the government for impaneling a jury after that attorney ignored all offers to settle before accepting an offer on the day of the trial); Nesco Design Group, Inc. v. Grace, 577 F. Supp. 414 (W.D. Pa. 1983) (requiring attorneys to reimburse the government for the cost of impaneling a jury after the attorneys did not notify the court that the case had been settled until one hour before jury selection was to commence).

[66] *See* Schlesinger v. Teitelbaum, 475 F.2d 137, 142 (3d Cir. 1973) (holding that a district court has the inherent power to adopt a rule establishing a guideline schedule of contingent fees for use in personal injury actions brought by seamen).

[67] *See In re* Peterson, 253 U.S. 300 (1920) (upholding the appointment of an auditor

Many of the inherent powers listed above overlap with statutory or rule-based sources of authority.[68] The overlapping sources of sanctioning authority have operated in tandem since 1991, when the Supreme Court decided that statutory or rule-based sources of sanctioning authority did not supplant a court's inherent power to sanction.[69] Thus, a court need not exhaust its statutory or rule-based remedies before turning to its inherent powers so long as the statutes or rules are not "up to the task" of effectively responding to all of the sanctionable conduct before the court.[70] Of particular relevance here, a court need not exhaust the sanctions provided by Rule 37 of the Federal Rules of Civil Procedure 37[71] before invoking its inherent power to sanction discovery abuse.[72] All that is necessary is a finding of bad faith;[73] because Rule 37 does not provide a means of enhancing the sanction in cases where a litigant exhibits bad faith, Rule 37 is not "up to the task," and the sanctioning court may rely solely on its inherent powers to fashion an appropriate sanction.[74]

B. *Why the Third Circuit Held the Community Service Sanction Account To Be an Impermissible Departure from the Court's Inherent Powers*

In *Tutu* I, Judge Brotman was faced with litigants and counsel who

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to assist the court in analyzing the voluminous evidence presented in a complex contract dispute); Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982) (upholding the appointment of a special master to assist the court in monitoring a state's efforts to comply with an order to correct unconstitutional prison conditions); Schwimmer v. United States, 232 F.2d 855, 864–65 (8th Cir. 1956) (upholding the appointment of a special master to assist the court in determining which of an attorney's subpoenaed records were privileged and which were not). The inherent power to appoint a special master has been codified in Rule 53 of the Federal Rules of Civil Procedure.

[68] *See, e.g.*, FED. R. CIV. P. 11(c), 16(f), 26(g), 30(g), 37, 41(b) & 56(g); 28 U.S.C. §§ 1912, 1927 (1994); FED. R. APP. P. 38. Much of this overlap is of relatively recent origin: the foundations of a court's inherent powers extend back far beyond the current age of statutes and rules. Not all of a federal court's inherent powers are of such ancient origin, however. It was not until 1980 that the Supreme Court held that one party's attorney's fees could be taxed specifically to the opposing party's counsel. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) (holding that the American rule does not necessarily apply in the presence of bad faith, and that bad faith on the part of counsel can expose them to personal liability for the opponent's attorney's fees).

[69] *See* Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (finding no conflict between Rule 37 and a federal court's inherent power to sanction discovery abuse when the abuse is perpetrated in bad faith).

[70] *See id.* at 49–50.

[71] *See* FED. R. CIV. P. 37 (providing sanctions for failing to make or cooperate in discovery).

[72] *See id.*

[73] *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 25(A)(1) (1989 & Supp. 1992) (discussing the necessity of finding bad faith before eschewing Rule-based sources of sanctioning authority).

[74] *See id.*

willfully abused the discovery process;[75] therefore he eschewed Rule 37 sanctions in favor of inherent power sanctions that could address bad faith.[76] Unfortunately, his chosen remedy represented an extraordinary departure from the current understanding of a federal court's inherent powers.

Judge Brotman relied on two premises when formulating the community service fund sanction. First, he noted that "[p]ursuant to its inherent powers, this court has the power to sanction the Esso Defendants and their former counsel by requiring them to pay a monetary fine [into court]."[77] Second, Judge Brotman decided that he had the inherent power to sanction the Esso Defendants and Goldman Antonetti by ordering them to physically perform community service of his choosing.[78] Armed with those two premises, Judge Brotman combined them to conclude that he could order the Esso Defendants and Goldman Antonetti to pay someone else to perform community service of his choosing.[79] The first premise—that a district court may impose a fine payable into court—is well-supported by case law.[80] The second premise—that a district court may sanction discovery abuse by ordering community service pursuant to its inherent powers—is extraordinary. As the Third Circuit noted, there is absolutely no precedent or other authority that would permit Judge Brotman to order community service as a sanction for discovery abuse.[81]

Having determined that Judge Brotman's sanction was novel and unique because one of its premises was unprecedented, the Third Circuit then had to decide if Judge Brotman's sanction was within the scope of his inherent powers. The court properly concluded that it was not, but the reasoning set forth in the opinion is conclusory and unsupported by informative citation to authority. In other words, the Third Circuit apparently reached the correct decision by gut reaction—the Community Service Sanction Account just did not pass their "smell test."[82] Although this author agrees with the court's

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[75] *See supra* notes 22–24 and accompanying text (discussing the willfulness of the discovery abuse).

[76] *See supra* notes 68–73 and accompanying text (discussing a district court's ability to properly ignore the sanctions provided for in the Rules and statutes).

[77] Tutu III, 166 F.R.D. 331, 345 (D.V.I. 1996).

[78] *See id.* at 347–48.

[79] *See id.* at 349.

[80] *See supra* note 62.

[81] *See* Tutu IV, 120 F.3d 368, 385 n.17 (3d Cir. 1997). Judge Brotman cited Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1226–29 (1983), to support the conclusion that he could impose a community service sanction for discovery abuse. *See Tutu* III, 166 F.R.D. at 348. As the Third Circuit pointed out, though, the two criminal cases cited by that article as authority for the imposition of monetary sanctions earmarked for community service are not relevant to this case. *See Tutu* IV, 120 F.3d at 385 n.17 ("We find no support in those cases for imposing such a sanction here. The opinions themselves do not discuss the sanctions at all, though the law review article claims that the monetary sanctions were imposed as conditions for probation or nonprosecution.").

[82] A "smell test" is an imprecise, vague assessment of the validity of an action without express reliance on a specified legal theory. One court has noted in connection with "smell tests" that "the most important item in the courtroom and all too seldom used is the judge's nose. Any trial [or appellate] judge will inevitably come to the conclusion

conclusion, a more exhaustive analysis of the issues involved seems to be in order.

C. *Searching Beyond the "Smell Test" for a More Principled Approach*

The Third Circuit began its analysis by briefly tracing the origins and character of a federal court's inherent powers.[83] The court then briefly explained why it was reversing Judge Brotman's decision; because this second part of the opinion is so critical to this Note's analysis, it is worth exhibiting in its entirety:

> No matter where one places their origin, it is clear that the power exercised in this case cannot be derived from a court's inherent powers. The district court's actions are essentially legislative in nature. Although we recognize that the line between a judicial act and a legislative act is difficult to fix with certainty, the district court's sanction here falls on the legislative side of whatever line we may draw. The court ordered the reallocation of resources from private entities to an agency of the public sector not a party to the case. It chose from whom the resources would be taken and to whom the resources would redound, without regard to the anatomy of the case before it[84]. In so doing, the court ventured well beyond the case and controversy[85] before it.
>
> We do not find persuasive the argument that a court's inherent powers include the wielding of what is essentially a legislative power. We believe that it is not in the nature of courts of justice normally to engage in the redistribution of wealth to parties outside of the litigation. We find nothing in Article III that allows for such a power.[86]

The court's conclusion is seemingly obvious—there is little doubt that federal courts should not legislate[87]—and the Criminal Justice Complex in

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on occasion that a certain case or claim or defense has a bad odor. Simply put, a matter smells. Some smell so bad they stink." Morgan Fiduciary, Ltd. v. Citizens & Southern Int'l Bank, 95 B.R. 232, 234 (S.D. Fla. 1988).

[83] *See Tutu* IV, 120 F.3d at 383–84.

[84] This is not exactly correct. Judge Brotman did choose "from whom the resources would be taken" with regard to the Tutu litigation; parties to that litigation were sanctioned for their conduct in the course of that litigation. Judge Brotman also chose "to whom the resources would redound" with regard to the Tutu litigation, albeit loosely. He decided to direct the money to the criminal justice system because doing so would confer "a direct benefit on the parties and/or others affected by [the] sanctionable conduct"—namely, the people of the Virgin Islands. *Tutu* III, 166 F.R.D. at 349.

[85] This would appear to be an indirect citation to the Case or Controversy Clause of Article III, section 2 of the United States Constitution. Although the Third Circuit did not directly cite that Clause or any decisions interpreting it, the court appears to use the ideas behind the Case or Controversy Clause to decide this case. *See supra* Part II.B.

[86] *Tutu* IV, 120 F.3d at 384 (citations and footnotes omitted).

[87] *See, e.g.*, U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."); United States v. National Treasury Employees Union, 513 U.S. 454, 456 (1995) (discussing Supreme Court's obligation to avoid judicial legislation).

St. Thomas was clearly not involved in the present case or controversy.[88] It would seem that the Community Service Sanction Account should plainly run afoul of the Case or Controversy Clause in Article III. Why, then, did the court not cite to the Case or Controversy Clause or to any decision interpreting that clause? The answer is that, surprisingly, there is no decision in Case or Controversy Clause jurisprudence that directly supports the Third Circuit's decision. Although it would seem obvious that Judge Brotman impermissibly departed from the "case or controversy" before him, there is no precedent that even tangentially addresses the unusual facts of this case.

Thus, the Third Circuit faced a dilemma; it could create an entirely new branch of Case or Controversy Clause jurisprudence when deciding this case, or it could take intuitive guidance from the Case or Controversy Clause (*i.e.*, apply a "smell test") and decide the case as a simple matter of the law of inherent powers. The court wisely chose to avoid a constitutional decision,[89] but in so doing rendered an opinion lacking the detailed analysis that such a constitutional decision would provide. What follows is an analytical framework that supports the Third Circuit's decision on constitutional grounds. This analysis is not offered as a criticism of the Third Circuit's opinion; rather, it is a more detailed explication of why the Community Service Sanction Account failed the court's "smell test."

IV. THE CASE OR CONTROVERSY CLAUSE

As noted above, extant Case or Controversy Clause jurisprudence fails completely to address the facts of this case.[90] All is not lost, though. By examining the goals that are served by Case or Controversy Clause jurisprudence and the specific doctrines used to achieve those goals, one can give substance to the Third Circuit's gut feeling that Judge Brotman's sanction went too far. In other words, the result in this case is entirely consistent with Case or Controversy Clause jurisprudence despite the absence of a specific precedent on point.

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[88] *But see supra* note 40 (discussing Judge Brotman's familiarity with the Criminal Justice Complex's problems through other litigation).

[89] The desire to avoid constitutional decisions usually arises in statutory interpretation cases. *See* NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (construing a statute so as to avoid a constitutional decision); International Ass'n of Machinists v. Street, 367 U.S. 740, 749–50 (1961) ("'When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)). Nevertheless, the problems with deciding issues on constitutional grounds are just as acute in nonstatutory interpretation cases. *See generally* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987) (stating there is a necessary distinction between the Constitution and constitutional law and "[t]o confuse the Constitution with judicial pronouncements allows no standard by which to criticize and to seek the overruling . . . [of] cases such as *Dred Scott* and *Plessy v. Ferguson*").

[90] *See supra* Part III.C.

A. *Goals of Case or Controversy Clause Jurisprudence: Interbranch Harmony, Adjudicative Decisionmaking, and the Preservation of Individual Autonomy*

There are three primary goals underlying Case or Controversy Clause jurisprudence. These goals are not explicitly enumerated in Article III of the Constitution; the Supreme Court has extracted them from its philosophical understanding of the Case or Controversy Clause and the structure of the Constitution in general.

The first goal is interbranch harmony within the three branches of the federal government.[91] This judicial restraint is necessary in order to preserve the separation of powers that lies at the heart of our Constitution's system of government.[92] By limiting the federal courts' jurisdiction to actual disputes, the Founders attempted to ensure that federal courts would remain reactive institutions and not usurp the proactive functions of the other two branches of government.

The second goal is adjudicative, as opposed to legislative, decisionmaking by the courts.[93] Courts function best, and reach the most just results, when they confine their deliberations to the facts before them.[94] Unlike legislators and administrative agencies, courts are formally presented with a very narrow range of information when making decisions; therefore, courts function best when they exercise their power only over the narrow issues that can be properly explored in litigation.

The third goal is the preservation of the individual autonomy of parties.[95] "[C]onstitutional decisions are [best] rendered at the behest of

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[91] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 737 (1984) ("[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.").

[92] *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."); *Id.* at art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *Id.* at art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[93] *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 89 (3d ed. 1996) ("[T]he case or controversy requirement might ensure that constitutional issues will be resolved only in the context of concrete disputes rather than in response to problems that may be hypothetical, abstract, or speculative. This consequence . . . distinguishes legislative and judicial decisionmaking. . . .").

[94] *See, e.g.*, Penson v. Ohio, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'") (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975)); Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

[95] *See* Hoohuli v. Ariyoshi, 741 F.2d 1169, 1182 (9th Cir. 1984) (dissenting opinion) ("Article III of the Constitution imposes on federal courts the jurisdictional hurdle of the 'case or controversy' requirement because they 'are not commissioned to roam at large, gratuitously righting perceived wrongs and vindicating claimed rights.'")

those actually injured rather than at the behest of bystanders attempting to disrupt mutually advantageous accommodations or to impose their own views of public policy on government."[96] The two parties to a bilateral relationship are usually the only parties who should be able to use the justice system to alter that relationship; outsiders rarely have the knowledge necessary to properly advocate an insider's position in litigation and may not have the insider's best interests in mind.[97]

B. *The Implementing Doctrines of Case or Controversy Clause Jurisprudence*

There are three specific Case or Controversy Clause doctrines that the Supreme Court has developed to achieve the three goals underlying Case or Controversy Clause jurisprudence. These doctrines limit the jurisdiction of federal courts so as to achieve the goals of interbranch harmony, adjudicative decisionmaking, and individual autonomy that Case or Controversy Clause jurisprudence seeks. These three doctrines do not correspond directly to the three goals; in other words, each doctrine serves more than one goal, and no doctrine is the sole means of achieving a given goal. Imagine these doctrines as pillars standing together to support the goals of Case or Controversy Clause jurisprudence; the doctrines are the functional structures that serve Case or Controversy Clause goals in specific cases.

1. *The Ban on Advisory Opinions*

The first doctrine is the ban on advisory opinions. This doctrine basically prohibits federal courts from issuing opinions on abstract or hypothetical actions that have not yet occurred.[98] The goals served by this

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(quoting Orr v. Orr, 440 U.S. 268, 290 (1979) (Rehnquist, J., dissenting)); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310–15 (1979) (characterizing one function of the "case or controversy" requirement as the protection of the self-determination interests of nonlitigants).

[96] STONE ET AL., *supra* note 93, at 89.

[97] Note that this is a qualified statement—the words "usually" and "rarely" are used to acknowledge the exceptions to the rule. For example, in some situations the lack of a lawsuit may stem more from poverty or ignorance than from satisfaction with the status quo. *See generally* Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981).

[98] The Framers of the Constitution considered and rejected a proposal that would have allowed the President and Congress obtain advisory opinions from the Supreme Court. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION at 1787, 340–41 (Max Farrand ed., 1911). The Supreme Court has consistently resisted efforts to extract advisory opinions from it. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 96 n.14 (1968) (observing that the ban on advisory opinions was established as early as 1793, and has been followed without deviation since then); Muskrat v. United States, 219 U.S. 346 (1911) (striking down a jurisdictional act of Congress as an attempt to circumvent the Case or Controversy Clause and obtain an advisory opinion).

doctrine are interbranch harmony and adjudicative decisionmaking. Interbranch harmony is preserved by limiting the number of opportunities that the federal courts will have to interfere with the desires of the other two branches of government.[99] Adjudicative decisionmaking is promoted by eliminating the federal courts' ability to issue pure legislation, which—in an informal sense—is what an advisory opinion actually is.[100]

2. *The Requirement of Standing*

The second doctrine is the requirement of standing. This doctrine basically requires that a litigant have a meaningful interest in the outcome of the litigation; the details of the law of standing attempt to describe what constitutes a "meaningful interest" in a given case.[101] The goals served by this doctrine are individual autonomy and interbranch harmony. Individual autonomy is directly served by preventing third parties from using the courts to interfere with mutually advantageous relationships between others.[102] Interbranch harmony is promoted, again, by limiting the opportunities for the judiciary to interfere with the other two branches.[103]

3. *The Requirement of Proper Timing*

The third doctrine concerns timing; that is, whether the question being litigated is ripe for review or whether it is moot. The central question is whether the interests of the parties are sufficiently aroused so as to ensure

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[99] *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12(b) (4th ed. 1991) ("[T]he power to render . . . an advisory opinion is really a greater power than . . . judicial review . . . because it increases the situations where the Court can exercise this significant power of judicial review.").

[100] Legislation is distinguished from a judicial decision in that legislation is not aimed at resolving an existing dispute between specific parties, but instead is aimed at establishing a rule for future parties. *See* Oklahoma City v. Dolese, 48 F.2d 734, 738 (10th Cir. 1931) ("Legislation consists of formulating a rule for the future. A judgment applies the law to past or present facts."). To the extent that an advisory opinion is based on hypothetical facts and inchoate wrongs, it too is aimed at the future and not at resolving an existing dispute between specific parties.

[101] "Generalizations about standing to sue are largely worthless as such." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970). Things have not improved much in the twenty-nine years since the Supreme Court acknowledged the disarray in standing jurisprudence. *See generally* Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968); NOWAK & ROTUNDA, *supra* note 99, at 82–83 ("[T]he reluctance of the Court to find standing in some cases as opposed to others supports the view that the law of standing, as a practical matter, is used as a decisional tool by the Court to avoid disposing of certain cases on the merits."); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 132 (2d ed. 1986) (1962) (extolling the tactical use of the standing doctrine to avoid "the ultimates of legitimation and invalidation" associated with a ruling on the merits).

[102] *See supra* notes 95–97 and accompanying text (discussing the goal of individual autonomy).

[103] *See supra* notes 91–92 and accompanying text (discussing the goal of interbranch harmony).

the proper functioning of the adversarial system.[104] This doctrine is closely related to the prohibition on advisory opinions and the requirement of standing. In essence, a judicial decision on a moot issue—an issue in which a litigant no longer has a "meaningful interest"—would constitute an illegal advisory opinion. Like legislation, the decision would only be meaningful to future parties. Similarly, a judicial decision on an issue that was not yet ripe for review—that is, an issue that is not sufficiently concrete to warrant adjudication—would also constitute an illegal advisory opinion, and the inchoate nature of the wrong would deprive the plaintiff of standing.

The timing doctrine promotes both interbranch harmony and adjudicative decisionmaking. Interbranch harmony is promoted, again, by limiting the number of cases in which a federal court may interfere with the other two branches of government.[105] Adjudicative decisionmaking is enhanced by limiting federal jurisdiction to concrete cases in which there are clearly developed facts and—if warranted—clearly appropriate relief.[106]

V. THE RELATIONSHIP BETWEEN CASE OR CONTROVERSY CLAUSE GOALS AND THE COMMUNITY SERVICE SANCTION ACCOUNT

The two goals that appear to be threatened by the Community Service Sanction Account are interbranch harmony and adjudicative decisionmaking. Interbranch harmony is threatened by Judge Brotman's decision to transfer $1,000,000 from private parties to an agency of the executive branch of the government of the Virgin Islands for a specified use. Although the Virgin Islands' elected officials may welcome the additional money in this case,[107] the precedent set by Judge Brotman's decision would

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[104] Imagine a standard bell curve, with the horizontal axis representing time and the vertical axis measuring litigant interest. An issue is properly timed for judicial decision at the moment when litigant interest is at its peak; that is, when the litigants are sufficiently motivated to do their part in our adversarial system of justice. An issue is not yet ripe for review when litigant interest is to the left of the peak on the bell curve; that is, when the case or controversy has not yet become concrete enough for proper adjudication. *See* Fritz Scharph, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 531–32 (1966) (discussing how the Supreme Court is more likely to require a well-developed record in close constitutional cases because an unenforced statute sheds no light on that statute's real-world impact). An issue is moot when litigant interest is to the right of the peak on the bell curve; that is, when the litigants no longer have a sufficient interest in the case to justify judicial action. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1972) (dismissing a challenge to a law school's preferential admission policy because the plaintiff, who was admitted pursuant to a lower court's order and was now in his final term of classes, would be allowed to graduate regardless of the outcome of the appeal).

[105] *See supra* notes 91–92 and accompanying text (discussing the goal of interbranch harmony).

[106] *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (stating that legal questions should be resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

[107] Not surprisingly, the Attorney General of the Virgin Islands filed an *amicus curiae* brief with the Third Circuit supporting the decision below. *See* Tutu IV, 120 F.3d 368, 371 (3d Cir. 1997).

facilitate future judicial interference that could easily lead to conflict. The legislative and executive branches of government implement their policy choices, in part, by spending more money on some endeavors than on others; interbranch conflict would arise as soon as a judge ordered money spent on a cause that the elected politicians would rather not fund.[108]

In addition to the threat to interbranch harmony, the goal of adjudicative decisionmaking is obviously threatened by the fact that none of the parties to this case so much as mentioned the Criminal Justice Complex on St. Thomas in their advocacy;[109] Judge Brotman decided to bestow the $1,000,000 on it without the benefit of any representation by the parties. The third goal, individual autonomy, is not implicated because no outside party here is seeking to interfere with an established, mutually advantageous relationship.

Thus, two of the three goals of Case or Controversy Clause jurisprudence appear to be threatened. In order to determine if the Community Service Sanction Account actually harms these two goals, it is necessary to distill from the implementing doctrines—which do not directly address the facts of *Tutu*[110]—a set of common features that are used to achieve the two goals that are threatened by the creation of the Community Service Sanction Account. In other words, we are discerning common features of the existing implementation doctrines in order to see if the Third Circuit's decision in *Tutu* is consistent with those features. If *Tutu* is consistent with those features, then the Third Circuit's decision supports the goals of Case or Controversy Clause jurisprudence, and *Tutu* could have been decided on Case or Controversy Clause grounds.

A. *Extraction, from Case or Controversy Clause Implementing Doctrines, of Features Used to Achieve Case or Controversy Clause Goals*

The first threatened goal is the goal of interbranch harmony. Examination of the three Case or Controversy Clause implementing doctrines reveals that the primary feature used to curb judicial encroachment on the other branches of government and achieve the goal of interbranch harmony is the requirement that the judiciary be the last resort.[111] The

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[108] Imagine the uproar if a federal judge decided to establish a community service sanction account for the benefit of the National Endowment for the Arts (NEA). *See* Eric Pianin, *Interior, NEA Bill Approved But May Face Clinton Veto*, WASH. POST, Oct. 29, 1997, at A21 (reporting "a crusade by Sen. Jesse Helms (R-N.C.) and other Senate and House conservatives to eliminate all spending for the NEA").

[109] Judge Brotman did have knowledge of the Criminal Justice Complex's problems—he just obtained it outside of the *Tutu* "case or controversy." *See supra* note 40 (discussing Judge Brotman's familiarity with the Criminal Justice Complex's problems through other litigation).

[110] *See supra* Part III.C (discussing the inapplicability of extant Case or Controversy Clause jurisprudence to the facts of *Tutu*).

[111] *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) ("The power to declare the rights of individuals . . . is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.").

advisory opinion ban prohibits the judiciary from commenting on hypothetical situations and, therefore, reserves judicial power for use only when there is no other alternative for the litigants.[112] The standing doctrine keeps the judiciary from ruling in cases in which the plaintiff is not personally at risk and, therefore, reserves judicial action for those situations in which the plaintiff will certainly suffer if the court does not act.[113] Finally, the timing doctrine prevents the judiciary from deciding cases in which the concerns of the parties are not at their peak; that is, cases in which the parties are not hanging on the edge of their seats waiting for the court's action.[114] Only when judicial action is the last resort will a case be properly timed. In summary, then, all three implementing doctrines feature the "last resort" principle as a way to restrain the judiciary and keep it in its proper reactive role. Courts of justice should not be proactive; they should respond only to situations that arise in which the judiciary is the parties' last chance for justice.

The second threatened goal is the goal of adjudicative decisionmaking. Examination of the three "case or controversy" implementing doctrines reveals that the primary feature used to achieve the goal of adjudicative decisionmaking is the requirement that courts decide only actual controversies that are litigated by the persons who have the most acute interest in the outcome of the case. In other words, adjudicative decisionmaking is promoted by limiting the courts' power to real controversies in which all aspects of the situation are presented, and the court decides only the actual problem between the parties. This feature of all three implementing doctrines is readily discerned. The ban on advisory opinions limits the judiciary to actual, concrete controversies;[115] the standing requirement limits the judiciary to hearing only cases litigated by the most interested parties;[116] and the timing doctrines limit the judiciary to hearing only those cases in which the litigants' interests are at their peak.[117]

Thus, to recap, the Constitution's Case or Controversy Clause has historically been interpreted to promote two goals that are relevant to this analysis: interbranch harmony and adjudicative decisionmaking. Three doctrines have been implemented to achieve these goals: the ban on advisory opinions, the standing requirement, and the timing requirement. Although none of these three implementing doctrines is directly applicable to the facts of *Tutu*, it is possible to recognize in these implementing doctrines two features that can be used to determine if the Community Service Sanction Account threatens the goals of the Case or Controversy Clause. These two features are the requirement that the judiciary be the last resort, and the requirement that courts decide only actual controversies that are litigated by the persons who have the most acute interest in the outcome of the case. If the Community Service Sanction Account is not to defeat the goals of Case

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112 *See supra* Part IV.B.1 (discussing the ban on advisory opinions).

113 *See supra* Part IV.B.2 (discussing the standing requirement).

114 *See supra* Part IV.B.3 (discussing the timing doctrines).

115 *See supra* Part IV.B.1 (discussing the ban on advisory opinions).

116 *See supra* Part IV.B.2 (discussing the standing requirement).

117 *See supra* Part IV.B.3 (discussing the timing doctrines).

or Controversy Clause jurisprudence, then Judge Brotman's sanction must be compatible with these two features. On the other hand, if the Third Circuit's decision to reverse contains these features, then the decision fits well within extant Case or Controversy Clause jurisprudence.

B. *Analysis of the Community Service Sanction Account in Light of These Extracted Principles*

The Community Service Sanction Account is incompatible with both of these features. As for the feature that courts only exercise their power as a last resort, the creation of a Community Service Sanction Account simply was not the last resort in this case. In fact, none of the parties in the Tutu litigation even had a direct interest in the Criminal Justice Complex or asked for a remedy addressed to it; thus, there is no plausible argument that any party to the Tutu litigation felt that the Community Service Sanction Account was its last chance for judicial relief.

As for the feature that courts only decide actual controversies litigated by sufficiently interested parties, no one argued the merits of giving the money to the jail instead of some other cause.[118] There was no actual controversy—other than the one Judge Brotman created, of course—over whether the sanction money should go to the court, the Criminal Justice Complex, or some other recipient. Judge Brotman's decision to award $1,000,000 to the Criminal Justice Complex apparently came as a complete surprise to the parties in the Tutu litigation.[119] He created his own opportunity to decide how to allocate the money and then made that decision without any adversarial representation. It is hard to imagine an action less in keeping with the feature that courts only decide actual controversies litigated by sufficiently interested parties; it is hard to imagine a less adjudicative decision.

In conclusion, then, the Community Service Sanction Account failed the Third Circuit's "smell test" because it did not match the common features found in the doctrines that implement the goals of the Case or Controversy Clause. Although nothing in Case or Controversy Clause jurisprudence directly addresses the unique facts of *Tutu*, the Third Circuit properly concluded that the creation of the Community Service Sanction Account was not within the "case or controversy" before the court.

VI. CONCLUSION

Judge Brotman clearly exceeded his authority when he created the Community Service Sanction Account and ordered the Esso Defendants and Goldman Antonetti to fund it. Although the Third Circuit's reliance on the

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[118] Thank goodness—the last thing an already overburdened federal judiciary needs is a system of "litigative grants" in which competing interests litigate the question of which needy cause is to reap the bounty of a sanction proceeding.

[119] Nothing in Tutu I, 162 F.R.D. 46 (D.V.I. 1995), or Tutu II, 162 F.R.D. 81 (D.V.I. 1995),—the two decisions that preceded the establishment of the Community Service Sanction Account in Tutu III, 166 F.R.D. 331 (D.V.I. 1996)—gave any clue that Judge Brotman was contemplating an unusual sanction.

law of inherent powers provides an adequate and reasonable rationale for its decision, a more structured approach can be taken by applying the Constitution's Case or Controversy Clause. This alternative approach demonstrates that the common features of extant Case or Controversy Clause jurisprudence are entirely consistent with the Third Circuit's disposition of this case, and in so doing it helps to clarify the limits of an Article III court's inherent power to sanction for discovery abuse.