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THE PARTIALLY PRUDENTIAL DOCTRINE OF MOOTNESS

Matthew I. Hall*

ABSTRACT

The conventional understanding of mootness doctrine is that it operates as a mandatory bar to federal court jurisdiction, derived from the "cases or controversies" clause of the United States Constitution, Article III. In two crucial respects, however, this Constitutional model—which was first adopted by the Supreme Court less than 45 years ago—fails to account for the manner in which courts actually address contentions of mootness. First, the commonly-applied exceptions to the mootness bar are not derived from the "cases or controversies" clause and cannot be reconciled with the Constitutional account of mootness. Second, courts regularly consider and resolve mootness issues based on practical considerations having nothing to do with the text of Article III, revealing an implicit understanding that federal courts have authority to decide moot cases independent of Article III considerations.

Despite growing recognition that mootness doctrine is in a state of confusion, no one has yet articulated a theoretically coherent alternative, much less an alternative that also explains the manner in which federal courts actually apply mootness in close cases. The author argues that federal courts should—and in the most pertinent subset of cases, already do—apply mootness as a largely discretionary doctrine, and he offers the first sustained account of how this prudential doctrine of mootness operates in practice. Principally, courts apply two distinct doctrines of mootness—the first ("issue mootness") in circumstances where post-filing events moot the issue raised by the action, and the second ("personal stake mootness") in circumstances where post-filing events have mooted only the plaintiff's personal stake in that issue. Courts treat issue mootness as precluding federal jurisdiction, but treat personal stake mootness as supporting, but not requiring, dismissal. The ultimate decision whether to dismiss is driven by a number of prudential considerations largely independent of Article III. This partially prudential model of mootness has three advantages over the flawed Constitutional model: It is more theoretically consistent, it fits better with existing case law in the most important subset of mootness cases, and it is a step in the direction of a unified theoretical approach to questions of justiciability.

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* Visiting Assistant Professor of Law, University of the Pacific, McGeorge School of Law. J.D. *Cum Laude*, University of Michigan, 1999. The author is indebted to Brian Landsberg, Dean David F. Levi, Thomas Main, Ben Means, Nicole Porter, John Sims, and Jarrod Wong for support and helpful comments. The author also wishes to thank Andrew Bernick and Olga Serafimova for superb research assistance.

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INTRODUCTION

The law of mootness lacks a coherent theoretical foundation. On the one hand, mootness has been regarded – at least since 1964 – as a limitation on federal court jurisdiction, mandated by Article III of the United States Constitution.[1] Under this account, because mootness is a Constitutional, and not merely a prudential, limitation on federal court jurisdiction, it is not waivable,[2] may be raised at any point in the litigation,[3] and must be raised by the Court *sua sponte* where circumstances suggest a possible mootness issue.[4]

On the other hand, courts routinely hear moot cases where strong prudential reasons exist to do so—a practice that cannot be reconciled with the belief that mootness is a mandatory jurisdictional bar. So-called "exceptions" to the doctrine of mootness endow courts with extensive discretion about which moot claims they will dismiss and which they will choose to hear. For example:

- There is a longstanding practice among courts of hearing moot claims, so long as the claim is inherently short-lived and the party asserting the claim also has a reasonable expectation that the asserted wrong could recur.[5]
- Under certain circumstances, federal courts allow plaintiffs with moot claims to avoid dismissal by asserting the rights of non-parties, under

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[1] *See* Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964) (stating in dictum that federal courts lack jurisdiction to hear moot cases because moot cases do not present cases or controversies). Just fifteen years earlier, the same view had been urged in dissent by a lone Justice, protesting the Court's decision to hear an arguably moot case. *See* Eisler v. United States, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting) ("We can only decide only cases or controversies. A moot case is not a 'case' within the meaning of Art. III").

[2] *See, e.g.*, Honig v. Doe, 484 U.S. 305, 317-18 & n.5 (1988) (considering mootness argument not raised by any party but only by *amicus curiae* the United States); Muhammad v. City of N.Y. Dep't of Corrs., 126 F.3d 119, 122-24 (2d Cir. 1997); Fox v. Bd. of Trs. of State Univ. of N.Y., 42 F.3d 136, 139-40 (2d Cir. 1994); Bishop v. Comm. on Prof'l Ethics & Conduct, 686 F.2d 1278, 1284 n.12 (8th Cir. 1982). *See also* 13A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.1 at n.35 (2d ed. 1984 & Supp. 2008).

[3] *See Honig*, 484 U.S. at 317-19 (considering mootness argument raised for the first time at oral argument in the Supreme Court); Arizonans for Official English v. Arizona, 520 U.S. 43, 66 n.23, (1997); Seven Words LLC v. Network Solutions, 260 F.3d 1089, 1094 (9th Cir. 2001); *In re* Smith, 921 F.2d 136 (8th Cir. 1990); Barilla v. Ervin, 886 F.2d 1514, 1519 (9th Cir. 1989). *See also* WRIGHT ET AL, *supra* note 2 § 3533.1 at n.37; Sidney A. Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Penn. L. Rev. 125, 126 (1946).

[4] *See, e.g.*, Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 216 (3d Cir. 2003); Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1347 n.1 (10th Cir. 1994); United States v. Johnson, 801 F.2d 597, 600-01 (2d Cir. 1986). *See also* WRIGHT ET AL, *supra* note 2 § 3533.1 at n.33 &n.35; Diamond, *supra* note 3 at 126 (citing cases).

[5] *See infra*, Part II.A.1.

several ostensibly distinct doctrines that I will refer to collectively as the doctrine of "third party non-mootness."[6]

- Federal courts have repeatedly declined to dismiss apparently moot claims based on discretionary factors having to do with judicial administration or authority, such as sunk costs on the part of courts, or evidence of gamesmanship on the part of a party in taking action that appears calculated to moot the case.[7]

Courts and scholars refer to the doctrines under which courts elect to hear moot cases as "exceptions" to the mootness bar, but these exceptions do not "prove the rule" – they debunk it. The exceptions to mootness do not appear to be based on any interpretation of Article III's cases or controversies clause[8] – as they would be if mootness were actually applied as a Constitutionally-mandated limit on federal court jurisdiction.[9] Rather, as articulated and applied, they are based on prudential considerations, such as protection of judicial efficiency and authority, the preference for sufficiently-motivated parties, and avoidance of party gamesmanship. The frequent invocation of these exceptions by federal courts is thus hard to reconcile with the conventional understanding of mootness as a Constitutionally-mandated jurisdictional bar.

All of this is symptomatic of a deep confusion at the core of the modern understanding of mootness. Mootness doctrine, as currently constituted, does not provide the analytic tools necessary to explain or predict the results in a large number of mootness cases. The doctrine that ostensibly governs mootness decisions does not appear to be driving the analysis, or the results, in the most important subset of mootness cases—those where the result may

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[6] *See infra*, Part III.C.

[7] *See infra*, Part II.B.4.

[8] U.S. CONST. art. III, § 2, cl. 1 (extending federal jurisdiction 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").

[9] For an early argument that the mootness exceptions undermine the common understanding of mootness as a jurisdictional bar, *see Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (arguing that:

> Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review." If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are "moot" but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions.

depend on whether the mootness bar is understood as a prudential or a Constitutionally-mandated doctrine.[10] Without waiting for theoretical justification for abandoning the Constitutional account, many courts already treat mootness as discretionary in the subset of cases in which there are strong prudential arguments for hearing a case, notwithstanding its mootness.

Scholarly criticism of the mootness doctrine has recognized some of the flaws in the Constitutional model,[11] but it has misdiagnosed the illness, and so has offered the wrong cure: a purely prudential model of mootness that treats dismissal of any moot case as a matter within the Court's discretion.[12] Moreover, neither scholars nor the Court have yet articulated a comprehensive vision of a prudential mootness doctrine that both is theoretically coherent and accords with the manner in which mootness is regularly applied by courts.[13]

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[10] In a large set of cases, of course, the same result would be reached under either a prudential or a Constitutional model of mootness, because the case is apparently moot and there exist no compelling prudential reasons to hear it. We are primarily concerned here with a subset of arguably moot cases: those in which there are good prudential reasons for a court to exercise whatever discretion it may have to hear the case despite its mootness. It is this subset of cases that is pertinent to determining whether courts are applying mootness as a Constitutionally-mandatory or merely a discretionary doctrine. In such cases, the Constitutional account of mootness, even including the established exceptions, would dictate a different result than would a prudential doctrine of mootness. My argument is that in that crucial subset of mootness cases, the treatment of mootness by federal courts is inconsistent with the conventional understanding of mootness as a Constitutionally-mandated jurisdictional bar. *See infra*, Part II.

[11] Fragments of my arguments have appeared in the cases and scholarship, but this is the first sustained defense of the partially prudential paradigm of mootness that I develop herein. For arguments that the Constitutional model of mootness is difficult to reconcile with the mootness exceptions, *see Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring) (arguing that the exception for cases capable of repetition yet evading review disproves notion of mootness as a mandatory jurisdictional doctrine); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers; A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996) (stating that the "exceptions" to mootness doctrine are "incomprehensible" if federal courts lack Article III jurisdiction to resolve moot cases); Kristen M. Shults, *Friends of the Earth v. Laidlaw Environmental Services: A Resounding Victory for Environmentalists, Its Implications or Future Justiciability Decisions, and Resolutions of Issues on Remand*, 89 GEO. L.J. 1001, 1035 (2001) ("[E]xceptions to the personal stake requirement are difficult to understand if mootness is constitutionally required and suggest that the doctrine has been applied more as a matter of discretion."); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 623-25 (1992) (arguing that the Supreme Court "suspended" personal stake requirement in two mootness cases).

[12] Several scholars have argued that mootness either always has been, or should be reformulated as, a purely prudential doctrine. *See, e.g.*, Shults, *supra* note 11 at 1030-36; Pushaw, *supra* note 11 at 489-91; Lee, *supra* note 11 at 654 (proposing that mootness be "plucked of its constitutional plumage").

[13] As noted above, several scholars and commentators have taken issue with the notion that mootness is mandated by Article III, but none has articulated a compelling alternative theoretical basis for mootness, much less one that is derived from the policy concerns addressed in existing mootness case law. *See, e.g.*, 13A WRIGHT, ET AL., *supra* note 2 § 3533.1 ("there is reason to wonder whether much reliance should be placed on Constitutional concepts of mootness when these concepts

This article addresses both the descriptive and normative gaps in the mootness scholarship. I introduce an analytical framework for understanding mootness doctrine that improves on both the Constitutional model and prior scholarly reform proposals. Principally, the nature of the mootness bar as Constitutional or prudential depends on whether the issue raised by plaintiff's claim—as opposed to merely the plaintiff's personal stake in that issue—has been rendered moot. I argue that federal courts apply two very different sets of mootness rules in those two kinds of cases. Where the issue itself is moot—that is, where the alleged wrongful conduct is neither ongoing nor reasonably likely to recur as to anyone—the "cases or controversies" clause requires dismissal and prudential concerns have no application. In contrast, when it is only the plaintiff's personal stake that is moot—because the harm is reasonably likely to recur only as to someone other than plaintiff—the textual Article III argument for dismissal is far weaker, and consideration of discretionary factors becomes appropriate. I then derive from the case law a number of prudential factors that should—and do—guide courts in the exercise of their discretion whether to dismiss moot claims.

This model offers three principal advantages over both the Constitutional model of mootness and prior reform efforts by scholars: (1) it is more theoretically coherent, (2) it better explains current judicial practice in a wider range of mootness cases, and (3) it moves mootness doctrine into closer alignment with related justiciability doctrines, and thus is a step in the direction of a unified theoretical approach to justiciability.

The argument proceeds in three parts:

Part I describes the conventional understanding of mootness—as a jurisdictional doctrine mandated by Article III. Part II addresses the theoretical and descriptive shortcomings in the prevailing Constitutional model of mootness, and shows the pressing need for a new model adequate to the task of both explaining the results in past cases and providing guidance for future cases. Part III then introduces and defends a new model of mootness, the elements of which are implicit in much of the mootness case law, but which has never been explicitly developed. This new model

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are as flexible as they are and all ordinary needs can be met by the discretionary doctrines. The Article III approach is nonetheless firmly entrenched, and must be reckoned the major foundation of current doctrine."); Lee, *supra* note 11 at 654-68 (attacking Constitutional model, and describing a proposal for a fully prudential paradigm of mootness); *see also* Shults, *supra* note 11 at 1031; Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677 (1990). Further, although the Supreme Court has acknowledged that practical and prudential concerns may warrant hearing a case that would otherwise be considered moot, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189 (2000); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398-401 (1980), the Court has not yet offered a theory of mootness that can be harmonized with such judicial discretion.

rests on a critical, but underappreciated, distinction between two types of mootness—the first involving issues that have become moot, and the second involving live issues raised by parties whose personal stake in the issue has become moot. This Part demonstrates that courts often treat issue mootness and personal stake mootness quite differently—invariably dismissing "issue moot" cases while treating as discretionary the decision whether to dismiss "personal stake moot" cases. Part III.B identifies and explains the factors that ought to—and in many cases already do—guide courts' exercise of their discretion. Part III.C defends this prudential model of personal stake mootness by analogy to the doctrine of third party standing—which has always treated as entirely prudential the Courts' decision whether to permit plaintiffs to establish the justiciability of their claim by reference to the rights of third parties. Part III.D then defends the proposed model of mootness against the charge that it does not go far enough—that issue mootness, too, should be regarded as prudential rather than Constitutional.

I. THE CONVENTIONAL ACCOUNT OF MOOTNESS

A. The Basic Doctrine and the Constitutionalization of Mootness

Federal courts have long recognized that it is generally undesirable to expend judicial resources hearing cases that cannot alter the affairs of the parties,[14] or that otherwise have been deprived of vitality by circumstances occurring out of court.[15] Cases where the litigation concerns an object that has been destroyed,[16] for instance, or otherwise seeks relief that cannot be

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[14] State courts, whose jurisdiction is not, of course, governed by Article III, are similarly reluctant to hear moot cases, but generally treat their mootness doctrines as prudential, and will hear moot cases when the public interest warrants. *See, e.g.*, Cobb v. State Canvassing Bd. of the State of New Mexico, 140 P.3d 498, 504 (N.M. 2006) (New Mexico state courts will review moot cases that present issues of substantial public interest or which are capable of repetition yet evading review); City of Yakima v. Mollett, 63 P.3d 177, 179 (Wash. Ct. App. 2003) (Washington state courts will review moot cases that present "matters of continuing and substantial public interest"); Gerstein v. Allen, 630 N.W.2d 672, 674 (Neb. Ct. App. 2001) (Nebraska courts will review moot cases that involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination); McBain v. Hamilton County, 744 N.E.2d 984, 988 (Ind. Ct. App. 2001) (Indiana state courts will review moot cases when they present questions of "great public interest" that contain issues likely to recur); County of Fresno v. Shelton, 78 Cal. Rptr. 2d 272, 277 (Cal. Ct. App. 1998) (California state courts have discretion to hear moot cases that pose issues of broad public interest that are likely to recur).

[15] *See, e.g.*, United States *ex rel.* Norwegian Nitrogen Prods. Co. v. U.S. Tariff Comm'n, 274 U.S. 106 (1927) (dispute over request for information becomes moot when hearing for which information needed happens); Atherton Mills v. Johnston, 259 U.S. 13 (1922) (action contesting validity of child labor statute becomes moot when child at issue reaches age when no longer affected by statute); Berry v. Davis, 242 U.S. 468 (1917) (action to enjoin enforcement of statute becomes moot when statute repealed).

[16] *See, e.g.*, Nat'l Ass'n of Sec. Dealers v. SEC, 143 F.2d 62 (3d Cir. 1944) (applicability of regulatory statute to sale of bonds becomes moot when bonds redeemed by obligor); Brownlow v. Schwartz, 261 U.S. 216 (1923) (controversy over building becomes moot when building sold to

granted,[17] have routinely been dismissed as "moot" since the early days of the American republic.[18]

The doctrine of mootness espoused in federal courts today, however, bears very little resemblance to the doctrine as it existed in the 19th century. The early doctrine of mootness was generally applied as though it were a discretionary, or prudential doctrine.[19] It was not until 1964 that the Court held for the first time that mootness was a doctrine of Constitutional significance.[20] To understand the flaws in this Constitutional model of the mootness doctrine, as well as how that doctrine came into vogue, it will be useful briefly to trace the origins of the doctrine of mootness.

1. The Original (Non-Mandatory) Doctrine of Mootness

The 19th century doctrine of mootness differed in significant respects from the doctrine familiar to modern lawyers. For example, the primary meaning of the term "moot" in American legal usage has undergone significant evolution over the last 100 years. Whereas its early primary meaning was to denote an abstract, hypothetical, or fabricated case—a meaning that endures in our modern use of the term "moot court"—its primary usage today is to refer to a case that has expired, or otherwise has been deprived of vitality by events occurring after the commencement of the action. [21] Thus, when 19th century courts said that they ordinarily

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uninvolved third party); California v. San Pablo & T.R. Co., 149 U.S. 308 (1893) (action to recover taxes owed by railroad becomes moot when taxes paid).

[17] *See, e.g.,* Cheong Ah Moy v. United States, 113 U.S. 216 (1885) (dismissing as moot a habeas petition when petitioner had been deported).

[18] Diamond, *supra* note 3 at 132-34 (citing cases).

[19] Honig v. Doe*,* 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring); *see also* Mills v. Green, 189 U.S. 651, 653 (1895); *but see* Eisler v. United States, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting) ("We can only decide only cases or controversies. A moot case is not a 'case' within the meaning of Art. III").

[20] Liner v. Jafco, Inc., 375 U.S. 301 (1964).

[21] There is a long line of authority for the notion that courts should not resolve fabricated cases—that is, cases in which the parties have colluded to present an issue for resolution without the existence of facts raising the issue. *See, e.g.*, United States v. Johnson, 319 U.S. 302 (1943) (dismissing case upon discovery that plaintiff's counsel was selected by Defendant, and had never met his client); Lord v. Veazie, 49 U.S. 251, 253 (1850) (holding that "a fictitious suit, or a feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on motion"); *see also* Coxe v. Phillips, 95 Eng. Rep. R. 152 (1736) (holding that attempt to conduct fictitious action was contempt of court). Although some scholars have found in these cases support for the notion that moot cases are outside the traditional judicial role, *see, e.g.,* Diamond, *supra* note 3 at 125-26, such reliance is misplaced. First, these historical cases have *not* held that the resolution of fabricated cases lies beyond the courts' jurisdiction; they have treated the issue as one of wise use of judicial resources and counsel's duty of candor to the tribunal. Second, a fabricated case is not a "moot" case in the modern sense, as it was never a "live" dispute in the first place. Moreover, there is ample authority for the federal courts' authority to hear and decide collusive cases. *See, e.g.*, Hylton v. United States, 3 U.S. 171 (1796);

would not hear moot cases, they were referring to a broad spectrum of cases in which "there was not at the time a bona fide controversy pending"[22]—either because one had not yet arisen, or, as we think of it today, because one had arisen and later gone away.

Only this latter meaning remains part of the common modern understanding of mootness. In contrast, the former would include a range of other circumstances outside the scope of modern mootness doctrine, such as collusive or fabricated cases, in which the parties colluded to bring the case "for the purpose of obtaining the opinion of the court on important Constitutional questions without the actual existence of the facts on which such questions can alone arise,"[23] and cases that today would be termed "unripe"—that is, cases challenging an action that had not yet occurred and was not reasonably certain to occur.[24]

Additionally, 19th Century decisions generally do not indicate that the court lacked *authority* to hear moot cases. Rather, courts dismissed moot cases using language suggesting an exercise of discretion.[25] The explanations given for declining to hear moot cases tended to focus—not on Constitutional text, but on instrumental concerns, such as conservation of judicial resources,[26] preservation of judicial authority,[27] the desire to ensure

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Fletcher v. Peck, 10 U.S. 87 (1810).

[22] Allen v. Georgia, 166 U.S. 138, 140 (1897); *see also Ex parte* Steele, 162 F. 694 (N.D. Ala. 1908) (defining a moot case as:

> [O]ne which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.

Id. at 701.

[23] Bartemeyer v. Iowa, 85 U.S. 129, 134-35 (1873); *Steele*, 162 F. at 701.

[24] For instance, in Tregea v. Bd. of Dirs. of Modesto Irrigation Dist., 164 U.S. 179 (1896), the court faced a challenge to a statute authorizing an irrigation district to issue bonds. The Court found that the district had not yet decided to issue bonds, and held that a determination of the district's authority to issue bonds prior to any attempt by the district to do so would be purely advisory in nature. The Court thus dismissed the case as "moot," although in modern parlance we might call the case unripe. *Id.* at 185; *see also* Waite v. Dowley, 94 U.S. 527, 534 (1876) (describing case as "moot" where plaintiff asserted claim of third party which was unripe and "may never be raised by any party entitled to raise it"); Smith v. United States, 94 U.S. 97, 97 (1876) ("we are not inclined to hear and decide what *may prove to be* only a moot case") (emphasis added).

[25] *See, e.g.*, *Allen*, 166 U.S. at 140 ("We have repeatedly held that *we would not* hear and determine moot cases") (emphasis added); *Smith,* 94 U.S. at 97 ("we are not *inclined* to hear . . .") (emphasis added).

[26] *See, e.g.,* United States v. Johnson, 319 U.S. 302 (1943); Mills v. Green, 159 U.S. 651, 653 (1895) ("The defendant moved to dismiss the appeal … [arguing] 'there is no actual controversy involving real and substantial rights between the parties on record' …. We are of the opinion that the appeal must be dismissed upon this ground, without considering any other question appearing on the record"); *Waite*, 94 U.S. at 534.

[27] *See, e.g., Johnson*, 319 U.S. at 305; Smith v. United States, 94 U.S. at 97 (holding that

that issues are litigated by properly motivated parties,[28] and the desire to prevent collusive cases.[29]

By the same token, when federal courts in the 19th and early 20th centuries decided to hear apparently moot cases, they also justified those decisions based on practical considerations.[30] Thus, courts articulated both a general rule that moot cases should be dismissed, and a series of exceptions to that general rule, to permit consideration of moot cases where compelling reasons existed to hear them. These exceptions, like the rule itself, were justified based on practical considerations of judicial economy,[31] avoidance of party gamesmanship,[32] and the desirability of resolving issues that were both substantively important and likely to recur.[33]

Court will dismiss criminal defendant's appeal from conviction where defendant has refused to subject himself to Court's judgment by escaping from prison); *see also, e.g.*, Coxe v. Phillips, 95 Eng. Rep. R. 152 (K.B. 1736) (holding that attempt to conduct fictitious action was contempt of court); Walling v. Reuter Co., 321 U.S. 671 (1944) (defendant's decision to cease business activities will not deprive court of jurisdiction).

[28] Lord v. Veazie, 49 U.S. 251, 253 (1850) (holding that "a fictitious suit, or a feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on motion"); *Waite*, 94 U.S. at 534 ("This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it"); South Spring Hill Gold-Mining Co. v. Amador Medean Gold-Mining Co., 145 U.S. 300, 301, (1892) (on appeal of action between two corporations that came under control of same person after judgment was rendered in lower court, "litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one").

[29] *See, e.g.,* Bartemeyer v. Iowa, 85 U.S. 129, 134-35 (1873).

[30] *See, e.g*., Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 501 (1911); Mills v. Green, 159 U.S. 651, 654 (1895).

[31] *See, e.g.*, Smith v. United States, 94 U.S. at 97.

[32] *See, e.g.*, *Mills*, 159 U.S. at 653-54 (noting that "if the intervening event is owing either to the plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand");. Despite Liner's nominal Constitutionalization of mootness, modern courts often focus on the same prudential concerns. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000) (Court's interest "in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here."); Khouzam v. Ashcroft, 361 F.3d 161, 168 (2007) (Petition for review by alien not moot after petitioner and government agreed to vacate Board of Immigration Appeals decision that would have deported alien to Egypt; "At oral argument, we expressed doubts as to the soundness of the Attorney General's definition of torture . . . For the government to agree to a *vacatur* two weeks *after* oral argument suggests that it is trying to avoid having this court rule on that issue."). *See also infra*, Part III.B.

[33] *See, e.g.*, *Southern Pac. Terminal Co.*, 219 U.S. at 501; *see also, e.g.,* Grossberg v. DeEusebio, 380 F. Supp. 285, 292 (N.D. Va. 1975) (declining to dismiss claim as moot despite fact that plaintiffs "will never again be subjected to the conduct of which they complained," because hearing claim "is the only effective means to insure full and deliberate adjudication of the Establishment clause issues").

2. The Late-20th Century Recharacterization of Mootness as a Mandatory Jurisdictional Bar

After well over a century of consistent application as a discretionary doctrine, mootness was abruptly transfigured, in early January 1964, into a Constitutionally-mandated jurisdictional doctrine. The first Supreme Court case explicitly to link Article III with the century-old doctrine under which courts had frequently dismissed moot claims was *Liner v. Jafco*.[34] In *Liner*, a contractor sought an injunction prohibiting a labor union from picketing at a construction site. The state court granted the requested injunction and that decision was affirmed on appeal. While the union's state court appeal was pending, the construction project was completed. The state court of appeal affirmed the entry of the injunction on the merits, and also opined that the case was moot because construction had been completed. On further appeal to the U.S. Supreme Court, the respondent contractor contended that the case should be dismissed as moot, and alternatively that the injunction should be affirmed on the merits.

The Supreme Court rejected the argument that the completion of construction mooted the case. The claim was still live, the Court held, because the union sought payment under a bond for the alleged wrongful entry of the injunction. Thus, the Court held, a decision on the merits would "affect the rights of the litigants,"[35] and the claim was therefore not moot. The Court then opined—in a 34-word footnote—that the mootness bar was a jurisdictional rule derived from Article III's "cases or controversies" clause. The relevant footnote reads, in its entirety:

> Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy. [36]

The Court offered no explanation for this novel pronouncement, and cited no case authority in support of its transformation of mootness doctrine into a Constitutional requirement derived from Article III's cases or controversies clause—and none existed. The sole authority cited consisted of two lightly-reasoned scholarly works that had been published eighteen[37]

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[34] Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964); *see also* Eisler v. United States, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting) ("We can only decide only cases or controversies. A moot case is not a 'case' within the meaning of Art. III"). This grafting of an Article III rationale onto an existing doctrine may be seen as part of a larger trend in the mid-20th century. *See* Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 Mich. L.Rev., 163, 169 (1992) (noting that there appear to have been only eight references to "standing" in Supreme Court cases prior to 1965—and none before 1944.

[35] *Liner*, 375 U.S. at 306 (*citing* St. Pierre v. United States, 319 U.S. 41, 42 (1943).)

[36] *Id.* at 306 n.3 (citations omitted).

[37] *See* Diamond, supra note 3 at 127 (stating, without explanation, that moot cases are not "cases or controversies" within the meaning of Article III). Apart from the conclusory assertion that

and nine[38] years earlier in the Pennsylvania Law Review. Yet the Constitutional basis of mootness was far from self-evident.[39]

Had the Court thoroughly considered the rule that it was adopting, it might have pondered whether the putative Constitutional linkage would cast doubt on the viability of the longstanding "exceptions" to mootness. The exceptions had been articulated as defining circumstances in which courts would hear cases that were moot—and, as noted above, courts had justified the exceptions based on practical considerations primarily related to efficient judicial administration. But if the mootness bar were mandatory and jurisdictional, as *Liner* stated, then courts would have no power to hear moot cases, regardless of the benefits of doing so.[40]

Furthermore, *Liner*'s statement that Article III requires dismissal of moot claims was *dicta*, given that *Liner* found the claims at issue in that case not to be moot, and declined to dismiss them. Subsequent cases, however, authored by Justices at all points on the political spectrum, followed without question *Liner*'s rationale in holding claims moot and asserting that dismissal of moot claims was constitutionally-mandated,[41]

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moot cases are outside of the jurisdictional grant of Article III, the Diamond article simply catalogues different types of cases that have been termed "moot"—such as collusive cases and cases seeking an advisory opinion on a fictitious controversy. *See id.* at 127-136. Diamond does not explain the basis for the assertion that dismissal of moot cases is mandated by the Constitution, and does not appear to recognize—much less resolve—the tension between the Constitutional model and the longstanding prudential exceptions.

[38] *See* Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. of Pa. L. Rev. 772, 772-73 (1955) (asserting, without historical or textual analysis, that the "cases or controversies" clause deprives federal courts of jurisdiction over moot claims). The Note then proceeds to enumerate various policy reasons why courts *should not* hear moot cases—none of which has any bearing on the mootness bar's nature as constitutional or prudential. *Id.* at 773-75. This confusion is evident from the Note's assertion, on the very same page, that on the one hand, "a court is *deprived of jurisdiction* when a case becomes moot," and on the other that any such limitation is "self imposed," because the cases or controversies clause was "probably not intended to set forth jurisdictional limits rigidly." *Id.* at 772 & n.4.

[39] The notion that the cases or controversies clause of Article III requires the plaintiff personally to have suffered injury has itself been questioned. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229-34 (1988) (arguing that: "[p]roperly understood, standing doctrine should not require that a plaintiff have suffered 'injury in fact.'"); Steven L. Winter, *The Metaphor of Standing and The Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1420 (1988) (arguing that pre-20th century courts did not view "standing" as a requirement of the cases or controversies clause); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1969); Louis Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269-92 (1961). For further arguments that the "cases or controversies" clause will not bear the weight placed on it by modern justiciability doctrines, *see, e.g.*, Shults, *supra* note 11 at 1035; Lee, *supra* note 11 at 623-25.

[40] *See infra*, Part II.A. It was not until 24 years later, in Chief Justice Rehnquist's concurrence in *Honig*, that any member of the Supreme Court acknowledged this tension between the Constitutional model of mootness and the discretionary exceptions. Honig v. Doe, 484 U.S. 305, 329-32 (1988) (Rehnquist, C.J., concurring).

[41] *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (opinion by Justice

and the Constitutional basis of the mootness bar swiftly acquired the patina of settled doctrine.

B. The Implications of a Constitutionally Mandated Mootness Doctrine

Proponents of the Constitutional model of mootness long described mootness as being closely related to the doctrine of standing, defining mootness as "the doctrine of standing set in a time frame."[42] Under that formulation, moot cases do not present "cases or controversies" within the meaning of Article III, and thus *must* be dismissed,[43] just as the claim of a plaintiff who lacked standing has been held not to present a case or controversy.[44]

The corollary to this Constitutional understanding of mootness is that courts lack power to create exceptions to the mootness bar. Because the doctrine is a jurisdictional bar mandated by the Constitution, the Constitutional text must determine the bounds of the doctrine.[45]

Stevens); Lewis v. Cont'l Bank Corp., 494 U.S. 472 (1990) (opinion by Justice Scalia); *Honig*, 484 U.S. at 305 (opinion by Justice Brennan); Preiser v. Newkirk, 422 U.S. 395 (1975) (opinion by Chief Justice Burger); O'Shea v. Littleton, 414 U.S. 488 (1974) (opinion by Justice Blackmun); SEC v. Medical Comm'n for Human Rights, 404 U.S. 403 (1972) (opinion by Justice Marshall); North Carolina v. Rice, 404 U.S. 244 (1971) (opinion by Justice Douglas).

[42] The quotation is from Professor Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363 (1973). The Supreme Court has repeatedly cited this formulation with approval, *see, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980), but has more recently recognized that the relationship between mootness and standing is more complicated. *See* Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs., 528 U.S. 167, 189-90 (2000) (noting that the "standing in a time frame" formulation does not provide a "comprehensive" explanation of mootness).

[43] *See* Liner v. Jafco, Inc., 375 U.S. 301, 306 (1964); *see also* Spencer v. Kemna, 523 U.S. 1, 7 (1998) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate .... The parties must continue to have a "personal stake in the outcome" of the lawsuit); Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed"); Allen v. Likins, 517 F.2d 532, 534 (8th Cir. 1975) ("It is axiomatic that a 'case' or 'controversy' must exist at all stages of the litigation and not merely at the time the complaint is filed"); *Honig*, 484 U.S. at 317 ("That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires."); *id.* at 332-33 (Scalia, J., dissenting).

[44] Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (holding that "Article III requires [the] party who invokes court's authority to 'show that he personally has suffered some actual or threatened injury'… and that injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by favorable decision'") (citations omitted); *see also* City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1982) (holding that plaintiff "must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions.").

[45] A rule that is mandated by the Constitution may not be made subject to discretionary exceptions. *See, e.g.*, *Geraghty*, 445 U.S. at 411 (Powell, J., dissenting) ("Since the question is one

More recently, however, the Supreme Court has begun to distance itself from Professor Monaghan's "standing set in a time frame" formulation, noting that the exceptions to mootness reveal significant differences between that doctrine and standing,[46] including most notably that, in ruling on mootness, courts may consider a number of factors not derived from the cases or controversies clause.[47] This appears to reflect a growing awareness on the Court's part that the Constitutional model of mootness fails to account for the full array of relevant considerations. Nonetheless, the Court still regards mootness as being "derived from" Article III, and as reflecting Article III concerns.[48]

II. THE CONSTITUTIONAL MODEL OF MOOTNESS IS FUNDAMENTALLY FLAWED

The Constitutional model of mootness suffers from two related flaws, one theoretical—the doctrine is internally inconsistent—and the other descriptive—it fails to account for the results in many actual mootness cases. The Constitutional model of mootness doctrine posits a

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of power, the practical importance of review cannot control."). *Cf. also* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491 (1983) ("This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution."); WRIGHT, ET AL., *supra* note 2 § 3521.

The Supreme Court's holding that courts need not always apply the exclusionary rule to statements obtained in violation of a suspect's Miranda rights, *see* United States v. Patane, 542 U.S. 630 (2004), is not to the contrary. *Patane* held that the exclusionary rule is not mandated by the Constitution, but is only prophylactic—meaning, it is a remedy designed to deter violations of the Constitutional rights of criminal suspects. *Id.* at 638-40. Because it is merely a prophylactic remedy, it is subject to discretionary exceptions where, for instance, as in *Patane*, the Court determines that the exception will not undermine the deterrent effect of the rule. *Id.* Prophylactic rules differ from Constitutionally-mandated rules in this respect. *Id.* at 641.

[46] *See, e.g.*, *Friends of the Earth*, 528 U.S. at 189-90 (stating that:

> careful reflection on the long-recognized exceptions to mootness, however, reveals that the description of mootness as 'standing set in a time frame" is not comprehensive. . . The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.).

Id. at 190-91.

[47] *Id.* at 191. Among the discretionary factors that courts may consider are judicial resources expended in consideration of the matter, *id.* at 191-92, the effect of the decision on third parties, Trachtman v. Anker, 563 F.2d 512, 514 n.1 (2d Cir. 1977), and whether dismissal would undermine judicial authority, *Schaefer v. Townsend*, 215 F.3d 1031, 1032 (9th Cir. 1990); City of Erie v. Pap's A.M., 529 U.S. 277, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here").

[48] *Friends of the Earth*, 528 U.S. at 180 (stating that the cases or controversies clause "underpins" mootness doctrine).

Constitutionally-mandated rule requiring dismissal of moot cases. Yet current doctrine subjects that rule to numerous discretionary exceptions, that cannot be derived from the Constitutional text, and that existed long before the Constitutional model came into fashion. This presents a serious problem, because a jurisdictional limitation imposed by the Constitution cannot be made subordinate to judge-made common law exceptions, no matter how sensible or necessary those exceptions may appear. This Part argues that if the mootness bar were truly a mandatory, jurisdictional rule, imposed by the Constitution, then the exceptions for cases capable of repetition yet evading review, for class actions, and for voluntary cessation, could not exist.

This theoretical flaw is compounded by the descriptive problem, because in practice, courts routinely stretch the exceptions beyond their doctrinal limits, and thereby expand the set of moot cases that can be heard in federal court. Subpart A argues that the established exceptions to mootness cannot be reconciled with the Constitutional model of mootness. Subpart B argues that, without regard for the nominal requirements of mootness doctrine, and despite the prevalence of Constitutional rhetoric in mootness decisions, federal courts addressing contentions of mootness in the most pertinent category of cases frequently treat mootness as a discretionary matter, and are guided by prudential factors, rather than by any understanding of Article III's cases or controversies clause.

A. The Constitutional Model of Mootness Is Internally Inconsistent

The premise at the core of post-1964 mootness jurisprudence is that dismissal of moot cases is mandated by Article III's cases or controversies clause.[49] And yet several well-established components of modern mootness doctrine are fundamentally inconsistent with that proposition. These include the three principal "exceptions" to mootness, which permit courts to hear moot claims where (i) the claim raises issues that are capable of repetition yet evading review, (ii) the mootness was effected by defendant's voluntary cessation of the challenged activity, or (iii) the moot claim is asserted by someone purporting to represent a Rule 23 class, some members of which have non-moot claims. These exceptions generally long predate

[49] DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) ("The inability of the federal judiciary to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.") (internal citation omitted); *see also* WRIGHT ET AL., *supra* note 2, § 3533.1 ("There is reason to wonder whether much reliance should be placed on constitutional concepts of mootness when these concepts are as flexible as they are and all ordinary needs can be met by the discretionary doctrines. The Article III approach is nonetheless firmly entrenched, and must be reckoned the major foundation of current doctrine.").

Liner's statement that Article III mandates the dismissal of moot cases, and they cannot readily be reconciled with it.

1. The Prudential Nature of the Mootness Exceptions

The strict application of a rule that federal courts should not hear or decide moot cases would entail certain inefficiencies and other costs. The three most frequently-applied exceptions to mootness doctrine—those applying to (1) claims "capable of repetition yet evading review"—that is, claims that raise issues that are of inherently short duration, and are likely to recur;[50] (2) cases mooted by the defendant's voluntary cessation of the challenged activity;[51] and (3) class actions in which the named plaintiff's claim has become moot[52]—each evolved to accommodate a specific concern or set of concerns that would be raised by a uniform policy requiring dismissal of all moot claims.[53] The exceptions, in other words, evolved in accordance with a set of prudential concerns that are implicit—and occasionally explicit—in the case law.

Notably absent from the seminal cases for each exception is any evidence of concern for the court's authority to create such an exception.[54] Rather, courts appear simply to have assumed that they had jurisdiction to create prudential exceptions to the mootness bar, which belies the view that mootness has jurisdictional significance or is mandated by the cases or controversies clause. The exceptions are explicitly based on prudential concerns, most of which bear no relation to the cases or controversies

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[50] *See, e.g.*, Honig v. Doe, 484 U.S. 305, 329-32 (1988); Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911).

[51] *See, e.g.,* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189 (2000); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); Mills v. Green, 189 U.S. 651, 654 (1895).

[52] *See, e.g.*, *Geraghty*, 445 U.S. at 388; Gerstein v. Pugh, 420 U.S. 103 (1975); Sosna v. Iowa, 419 U.S. 393 (1975).

[53] I do not discuss here the fourth recognized "exception" to the mootness bar, which is qualitatively different from the three discussed herein. The collateral consequences exception holds that an appeal from a criminal conviction is not mooted by the defendant's completion of incarceration or probation, because the fact of the conviction will have ongoing collateral consequences on other aspects of the plaintiff's life – such as his or her ability to register to vote, or to secure employment. *See, e.g.*, Fiswick v. United States, 329 U.S. 211, 222 (1946) (holding that where collateral consequences exist, the defendant "has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.") Strictly speaking, then, the collateral consequences exception is not an exception at all. Rather than permitting courts to hear a moot claim, as the other exceptions do, it rests on the fact that the defendant's claim of wrongful conviction is not moot at all, because the defendant is still suffering harm, and the Court's judgment could therefore benefit the defendant. *See id.*

[54] *See, e.g.*, *Southern Pacific*, 219 U.S. at 514-16; Sosna v. Iowa, 419 U.S. 393, 401 (1975); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); Mills v. Green, 189 U.S. 651, 654 (1895).

clause.[55] It bears emphasis that courts make no effort to justify the exceptions by reference to the cases or controversies clause. Rather, as discussed below, the exceptions have been justified only on prudential grounds.

a. The Problem of Inherently Short-Lived Cases

One problem that would arise from the strict application of a rule that courts should dismiss cases that have become moot is that certain claims—those that are ordinarily of very short duration—would thereby be immunized from judicial review entirely. Plainly, this result would be undesirable,[56] and the exception for claims that are capable of repetition yet evading review responds to this problem by permitting review of moot cases that raise issues that are likely to recur and are so inherently short-lived that each occurrence is likely to be rendered moot before review can be completed.[57]

The capable of repetition exception arose very early in the history of the mootness doctrine, in the 1913 case of *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*.[58] *Southern Pacific* involved a challenge to an order of the Interstate Commerce Commission ("ICC") requiring the

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[55] *See infra*, Part II.A.1 (discussing prudential origins of the mootness exceptions). Few of the prudential factors that courts consider are arguably relevant to or derived from the cases or controversies clause. *See infra*, Part III.B.1 (discussing "justiciability factors"). Thus, although the policies embodied in Article III's cases or controversies clause may be relevant even to the analysis of personal stake mootness, they are but one of several factors, and their relevance is attenuated and may yield to the other factors. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring) ("[W]hile an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.").

[56] *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973):

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.

Id. at 125; *see also, e.g.*, Corrigan v. City of Newaygo, 55 F.3d 1211, 1214 (6th Cir. 1995) ("to hold this case moot would require the absurd result that a court would never be able to rule on the [city] ordinance…The town could repeatedly apply the ordinance to different candidates, none of whom could ever challenge it in court"). Of course, if the dismissal of moot cases were truly mandated by the "cases or controversies" clause, then undesirable results would present no basis for disregarding the Constitutional limitation on federal court authority. *See, e.g.,* Honig v. Doe, 484 U.S. 305, 329-32 (1988) (Rehnquist, C.J., concurring); *Geraghty*, 445 U.S. at 411 (1980) (Powell, J., dissenting) ("Since the question is one of power, the practical importance of review cannot control.").

[57] *See, e.g.*, *Geraghty*, 445 U.S. at 398 (1980).

[58] 219 U.S. 498 (1911). Although the doctrine had been applied in earlier cases, *Southern Pacific* coined the phrase "capable of repetition yet evading review." *See* 13A WRIGHT, ET AL., *supra* note 3 § 3533.8.

owner of a shipping terminal to cease providing a particular shipper with preferential rates that were not conferred upon others.[59] By its own terms, the ICC order was to expire after two years, and it had expired before the railroad's appeal reached the Supreme Court.[60]

The ICC contended that the action had therefore become moot, but the Court denied a motion to dismiss, for two reasons. First, the Court stated that "the order of the commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings."[61] Second, the court stated that there was a "broader consideration":

> The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.[62]

Southern Pacific has been cited frequently and followed consistently in the 95 years since it was decided. As commonly articulated in modern decisions, the capable of repetition yet evading review exception applies in circumstances where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."[63]

The classic modern application of the capable of repetition exception is in an abortion case, such as *Roe v. Wade*.[64] A plaintiff's challenge to a restriction on her right to obtain an abortion is inherently short-lived, and

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[59] *Southern Pacific*, 219 U.S. at 514.

[60] *Id.*

[61] *Id.* at 515.

[62] *Id.*

[63] Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Wisconsin Dept. of Indus v. Gould, Inc., 475 U.S. 282, 285 (expiration of three-year order debarring plaintiff from contracting with the state did not moot appeal); SEC v. Sloan, 436 U.S. 103, 109 (1978) (expiration of SEC orders suspending trading of corporation's common stock did not moot case); Cerro Wire & Cable Co. v. Federal Energy Reg. Comm'n, 677 F.2d 124, 127 (D.C. Cir. 1982) (expiration of certificates to transport natural gas issued by F.E.R.C. did not moot claim). *See also* 13A WRIGHT, ET AL., *supra* note 2 § 3533.8 ("Courts confronting discontinued or expired official acts frequently refuse to dismiss on grounds of mootness, finding that the acts are 'capable of repetition, yet evading review.").

Although *Southern Pacific* spoke of short term regulatory orders of an administrative agency, and many cases applying the exception involve challenges to administrative orders of short duration, the exception has been applied in a far broader range of circumstances. *See* People for the Ethical Treatment of Animals, Inc. v. Gittens 396 F.3d 416, 422 (D.C. Cir. 2005) ("later cases speak not of orders, but of repetition of the controversy"); *see also, e.g.,* SEC v. Okin, 132 F.2d 784 (2d Cir. 1943).

[64] 410 U.S. 113 (1973).

will always be rendered moot by events – either by birth or by termination of the pregnancy – prior to completion of appellate review.[65] Thus, unless an exception were applied, the conventional doctrine would require that a court dismiss the case as moot.[66] As discussed more fully below, however, courts in such cases routinely ignore the second requirement, that there be a reasonable expectation that the same complaining party will again be subjected to the same action. Courts simply apply the capable of repetition exception without inquiring as to any expectation of recurrence on the part of the plaintiff.[67] Indeed, federal courts, including the Supreme Court, have repeatedly applied the exception where likely recurrence was shown only as to "other members of the public at large."[68]

b. The Problem of Insincere Reform

Another problem that would follow from the uniform application of a rule requiring dismissal of moot claims is that it would empower defendants unilaterally to eliminate federal jurisdiction by temporary reform. Where defendant's own actions have mooted the plaintiff's claim for relief, courts have naturally been quite reluctant to deny judicial review, in part because of the concern that defendant's "reform" may be fleeting or insincere, and that the challenged behavior will resume after the action has been dismissed.[69] Thus, federal courts have long greeted with skepticism

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[65] *See, e.g., Roe*, 410 U.S. at 125 ("the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete").

[66] *See, e.g.*, *Weinstein*, 423 U.S. at 149; Van Wie v. Pataki, 267 F.3d 109, 113-14 (2d Cir. 2001) (holding that capable of repetition yet evading review exception applies only where likelihood of recurrence is shown as to plaintiff).

[67] *See infra*, Part II.B.2. *See also, e.g.*, *Roe*, 410 U.S. at 125 ("the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete"); Honig v. Doe, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting) (stating that Roe and some election law cases dispense with the same party requirement "entirely" and focus instead on recurrence as to the "public at large"); Cruz v. Farquharson, 252 F.3d 530, 534 n.4 (1st Cir. 2001) (noting that the Court in Roe arguably diluted the same party requirement since it never inquired as to whether there was an expectation that Roe herself might become pregnant again; "[i]n the abstract, this might be an interesting subject for a law review article").

[68] *See infra*, Part II.B.2. *See also, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (declining to dismiss moot case because of likelihood of recurrence as to "other voters"); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973) (same); *Roe*, 410 U.S. at 125 (declining to dismiss moot claim, based on certainty of recurrence as to others); Doe v. Bolton, 410 U.S. 179, 187 (1973) (same); *Honig*, 484 U.S. at 335-36 (Scalia, J., dissenting) (conceding that *Roe* and some election law cases dispense with the same party requirement "entirely" and focus instead on recurrence as to the "public at large").

[69] *See, e.g.,* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189 (2000) (defendant's voluntary compliance with mercury discharge limits did not moot action injunction absent showing that violations could not reasonably be expected to recur); *see also*, *e.g.*, United States v. W.T. Grant, 345 U.S. 629, 632 (1953) (If courts are deprived of jurisdiction from defendant's own actions, "[t]he defendant is free to return to his old ways. This, together with a

assertions of mootness based on Defendant's voluntary discontinuance of the challenged conduct.[70]

Although this doctrine has been a part of mootness case law since the 19th Century,[71] the 1953 case of *United States v. W.T. Grant Co*. provides a classic, and oft-cited, formulation of what has come to be called the "voluntary cessation" exception to mootness.[72] In *Grant*, the United States sued to enforce the Clayton Act's prohibition on interlocking corporate directorates against a Mr. Hancock, who served on the boards of several corporations that were competitors in the retail industry.[73] Soon after the action was filed, Hancock resigned from the relevant corporate boards. The district court then granted motions for summary judgment by all defendants, finding that "there is not the slightest threat that the defendants will attempt any future activity in violation of § 8 (if they have violated it already)."[74]

The Supreme Court rejected the argument that Defendants' voluntary cessation of the challenged action rendered the case moot, and held that "a controversy may remain to be settled"[75] in circumstances where the Defendant has voluntarily ceased allegedly illegal conduct, in part because "the defendant is free to return to his old ways," and in part because there may be a "public interest in having the legality of the practices settled."[76]

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public interest in having the legality of the practices settled, militates against a mootness conclusion.").

[70] *See, e.g.*, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"); *W.T. Grant Co.*, 345 U.S. at 632 ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot"); Wallig v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944) ("Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power). *See also* WRIGHT ET AL., *supra* note 2 § 3533.8.

[71] *See, e.g.*, Mills v. Green, 189 U.S. 651, 654 (1895).

[72] 345 U.S. 629 (1953).

[73] The applicable section of the Clayton Act is section 8, which prohibits any person from serving as a director of two or more corporations "if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." 15 U.S.C. § 19 (2000).

[74] *W.T. Grant Co.*, 345 U.S. at 630-31.

[75] *Id.* at 632; *see also id.* ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.") (*citing United States v. Oregon State Med. Soc'y*, 343 U.S. 326 (1952)).

[76] *Id.* Federal courts have occasionally relied on the public interest in the relief sought as a basis for retaining jurisdiction over an arguably moot case. *See, e.g.*, Southern Pac. Terminal Co. v. Interstate Comm. Comm'n, 219 U.S. 498, 516 (1911); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 309 (1897); Walling v. Haile Gold Mines, 136 F.2d 102, 106 (4th Cir. 1943); Otis & Co. v. Securities & Exch. Comm'n, 106 F.2d 579 (6th Cir. 1939); Boise City Irr. & Land Co. v. Clark, 131 F. 415, 419 (9th Cir. 1904). Some scholarly advocates of the Constitutional model of mootness

Following this rationale, federal courts routinely have declined to dismiss as moot cases in which the mootness was the result of defendant's discontinuance of the challenged conduct.[77] The rule is that "[a] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,"[78] because of the likelihood of recurrence of the challenged conduct.[79] These policy concerns have led the Court to lay out a "stringent" standard that places a "heavy burden [on the party claiming mootness] of persuading the court that the challenged conduct cannot reasonably be expected to start up again."[80] Yet the Court could only do so if mootness was a matter of prudential concern, rather than a jurisdictional bar.

c. The Problem of Third Party Recurrence

Alone among the major exceptions to mootness doctrine, the class action exception was first created after *Liner v. Jafco*'s reframing of

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have recognized the obvious tension between these holdings and the conception of mootness as jurisdictional, *see* Diamond, *supra* note 3 at 138 ("this principle should have no bearing on the jurisdictional issue"), but have made no effort to harmonize their conception of mootness with the contradictory case law. *See id.*

[77] 13A WRIGHT, ET AL., *supra* note 2, § 3533.8.

[78] *Friends of the Earth*, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S 167, 189 (2000) (*citing* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982).)

[79] Any evidence supporting an inference of likely resumption of the challenged activity has historically disinclined courts to dismiss the case as moot. *See, e.g.*, *W.T. Grant Co.*, 345 U.S. at 632 (rejecting contention of mootness where Defendant had ceased challenged activity, because "the defendant [would be] free to return to his old ways"); Walling v. Helmerich & Payne, 323 U.S. 37, 43 (1944) (Defendant's assertion that challenged, but discontinued, conduct was legal held to support refusal to dismiss injunctive relief claim as moot); Goshen Mfg. Co. v. Myers Mfg. Co., 242 U.S. 202, 207-08 (1916) (same); *Walling*, 323 U.S. at 42-43 (timing of defendant's voluntary cessation after threat of litigation held to support court's refusal to dismiss as moot); FTC v. Goodyear Tire & Rubber Co., 304 U.S. 257, 260 (1938) (same). This history does not fit well with the Constitutional model, however. The relevance of evidence supporting a likelihood of recurrence is clear under a prudential model of mootness—the more likely the claim is to recur and be litigated again, the more sensible it is to hear it now, for reasons including judicial economy, the public interest in resolution of important legal questions, etc. *See infra,* Part III.B (identifying various prudential factors). But the relevance of such evidence is less obvious under a Constitutional model of mootness.

[80] *Friends of the Earth*, 528 U.S. at 189. Before dismissing a claim on mootness grounds based on defendant's voluntary cessation of the challenged conduct, a federal court must be "absolutely certain" that the challenged conduct is not reasonably likely to recur. *Id.* Unlike the class action and capable of repetition yet evading review exceptions, which simply permit courts to hear certain moot cases in spite of their mootness, one could argue that application of the voluntary cessation "exception" amounts to a determination that the case is not moot at all—based on the idea that the object of most injunction actions is to secure not merely defendant's cessation of the challenged action, but also a court order enjoining its resumption. *See, e.g.*, *Trans-Missouri*, 266 U.S. at 309 (holding case not moot despite defendant's voluntary cessation of challenged activity because relief sought included court order enjoining resumption); *see also supra*, note 54 (discussing collateral consequences exception). The role of likely recurrence of an expired wrong in the mootness analysis is discussed *infra*, in Part II.B.

mootness as a mandatory jurisdictional doctrine. The class action exception attempts to fill a gap in the capable of repetition yet evading review exception—namely, that certain inherently short-lived claims are unlikely to recur as to the named plaintiff, but likely, or even certain, to recur as to others.

The exception was first articulated by the Supreme Court in 1975 in *Sosna v. Iowa*.[81] *Sosna* arose out of a divorce action filed by an Iowa resident just one month after she moved to Iowa.[82] Iowa law contained a one-year durational residency requirement for invoking its divorce jurisdiction.[83] After her divorce action was dismissed, the plaintiff filed a federal class action challenging the durational residency requirement as unconstitutional. By the time the case reached the Supreme Court, she had satisfied the one-year residency requirement and had obtained a divorce in a different state—both of which plainly rendered her personal claim moot.[84]

Despite the fact that the named plaintiff's personal claim had become moot, the Supreme Court declined to dismiss the action, holding that strict application of the mootness bar to inherently short-lived claims would be inappropriate because it would prevent such claims from ever being adjudicated:

> [a] blanket rule under which a class action challenge to a short durational residency requirement would be dismissed upon the intervening mootness of the named representative's dispute would permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation.[85]

The claim would, in other words, evade review. If this rationale sounds familiar, it is because it is nearly identical to the rationale offered in cases applying the "capable of repetition yet evading review" exception. The class action exception, as articulated in *Sosna*, might best be understood as an expansion of the capable of repetition exception to permit federal court review of claims that are capable of repetition as to other class members, irrespective of whether they are also capable of repetition as to the named plaintiff.[86]

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[81] 419 U.S. 393 (1975).

[82] *Id.* at 395.

[83] *Id.*

[84] *Id.* at 399.

[85] *Id.* at 401 n.9.

[86] *Id.* at 402; *see also infra*, Part III.C (discussing these doctrines under the rubric of "third party non-mootness"). *But see Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) ("nothing in [Sosna] . . . holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition yet evading review.'").

The Court then held that the "live controversy" required by Article III need not exist between plaintiff and defendant, but may exist between defendant and a member of the class.[87] The Supreme Court has justified the class action exception in terms of the desirability of ensuring that judicial review is available for claims that raise issues of importance,[88] and the policy against empowering defendants to procure mootness in order to avoid adjudication.[89] Thus, the concerns that underlie the class action exception to the mootness doctrine appear to mirror those that underlay the exceptions for capable of repetition yet evading review and voluntary cessation.

Notably, the cases that created each of the three exceptions discussed above—as well as later cases applying them—reveal little or no concern with whether the courts had authority to create exceptions to the general rule favoring dismissal of moot cases. Rather, they all appear simply to assume that courts have authority to decide moot cases where persuasive reasons exist to do so. The courts' continuing treatment of mootness as "flexible" where personal stake is concerned reveals that this attitude has survived the Court's formal Constitutionalization of mootness doctrine. Moreover, as discussed *infra*, in Part II.B, the "exceptions" are applied far more broadly than their doctrine would indicate, and in a manner which is entirely inconsistent with the notion that mootness is a Constitutionally-mandated limitation on federal court jurisdiction.

2. The Existence of Prudential Exceptions Disproves the Constitutional Model

Application of any of the mootness exceptions discussed above entails a determination that, although the case is moot, the court may hear it nonetheless.[90] But if the mootness bar were really jurisdictional in nature, courts would have no authority to hear moot cases, even where prudential factors favored hearing the case. A jurisdictional rule, in other words, may not be made subordinate to prudential exceptions that are not derived from

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[87] *Sosna*, 419 U.S. at 402.

[88] *Sosna*, 419 U.S. at 401 n.9 (stating that to require dismissal of class actions where plaintiff's claim becomes moot "would permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation. Such a consideration would not itself justify any relaxation of the provision of Art. III which limits our jurisdiction to 'cases and controversies,' but it is a factor supporting the result we reach if consistent with Art. III.").

[89] United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400-02 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 (1980); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Susman v. Lincoln Am. Corp., 587 F.2d 866, 870 (7th Cir. 1978).

[90] See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.3 at 131 (4th ed. 2003).

the relevant Constitutional text.[91]

Of course many Constitutional rules have "exceptions," which do not disprove the Constitutional nature of the underlying rule. The critical distinction is between exceptions that are derived from the pertinent Constitutional text and those that are not. Analytically, an "exception" that is derived from the text is not an exception, so much as it is part of the fabric of the Constitutional rule. It delineates the boundaries of that rule.[92] In contrast, an exception that is not derived from the relevant constitutional text, but is justified solely based on pragmatic considerations external to the Constitutional provision—such as efficient use of judicial resources, or the effect on absent individuals who face obstacles to assertion of their own rights—is accurately described as an "exception." The application of such exceptions undermines the assertedly Constitutional nature of the underlying rule. The routine practice among federal courts of applying prudential exceptions to mootness, with no effort to link them to the cases or controversies clause of Article III, thus reveals that mootness is not being treated as a jurisdictional doctrine.

Chief Justice Rehnquist offered an early argument for the tension between the Constitutional model and the prudential nature of the mootness exceptions in his often-overlooked concurrence in *Honig v. Doe*:

> If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are "moot" but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions.[93]

The plaintiffs in *Honig* were disabled students who sued a school district alleging violations of the Education of the Handicapped Act (the "Act").[94] The Act covers disabled children between the ages of 3 and 21, which led the Court to dismiss as moot the claims of one respondent, who

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[91] Honig v. Doe, 484 U.S. 305, 329-32 (1988) (Rehnquist, C.J., concurring); *Geraghty*, 445 U.S. at 411 (Powell, J., dissenting) ("Since the question is one of power, the practical importance of review cannot control."); *see also* Chemerinsky, *supra* note 13 at 692 ("If mootness is an Article III requirement, then how can the Court create broad exceptions based on the desire to facilitate judicial review?"); WRIGHT, ET AL., *supra* note 2 § 3521; Budinich v. Becton Dickinson and Co., 486 U.S. 196, 203 (1989) (stating that where a jurisdictional rule was not satisfied, "Court of Appeals was without jurisdiction to review the merits.").

[92] A helpful illustration can be found in the collateral consequences "exception" to mootness, which I discuss above, in note 53. The collateral consequences "exception" is, according to the distinction I am defending, part of the mootness rule rather than an exception to it, which is to say: a case is not actually moot if the exception applies (in this instance, because the plaintiff is still suffering harm from the fact of his or her earlier criminal conviction).

[93] Honig v. Doe, 484 U.S. at 330 (Rehnquist, C.J., concurring).

[94] Education of the Handicapped Act, 20 U.S.C. §§ 1400-1482 (1970).

was 24 years of age at the time the case was decided.[95] The other respondent, Smith, was 20 years of age, and thus still covered by the Act. Although Smith's claims were evidently moot, as he was not facing any proposed expulsion or suspension proceedings, and no longer even resided in the petitioner school district, the Court applied the capable of repetition yet evading review exception and declined to dismiss his claims for injunctive relief.[96]

Chief Justice Rehnquist concurred in the majority's opinion, and also wrote separately to explain his reservations about the Constitutional model of mootness. As Rehnquist explained, if *Liner v. Jafco* were correct that the general rule favoring dismissal of moot cases is jurisdictional and mandated by the Constitution, then courts would lack authority to hear and decide moot cases even if prudential factors strongly favored hearing the claim.[97]

Rehnquist also argued that the roots of the capable of repetition yet evading review exception were plainly pragmatic in nature, and unrelated to the text of the cases or controversies clause.[98] Indeed, Rehnquist wrote, the only logical conclusion that could be drawn from the history of the development of mootness doctrine is that, while Article III concerns may animate mootness doctrine in some way, mootness is fundamentally a prudential doctrine.[99] Rehnquist cited the capable of repetition yet evading review and voluntary cessation exceptions as examples of circumstances where sufficient reason existed to override the Article III concerns that animate the mootness bar.[100] Given the force of his criticism of the

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[95] *Honig*, 484 U.S. at 318.

[96] *Id.* The Court acknowledged that respondent Smith was not at the time of decision even enrolled in any public school, that he had not asserted any intention to re-enroll, and that he was just three months from his 21st birthday, at which time he would no longer be covered by the Act. *Id.* at 318-19. The Court nonetheless found that Smith's claims were capable of repetition yet evading review. *Id.* at 319.

[97] *See, e.g.*, *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 411 (1980) (Powell, J., dissenting) ("Since the question is one of power, the practical importance of review cannot control.").

[98] *Id.* at 330-31 (noting that the exception was initially adopted "in the light of obvious pragmatic considerations, with no mention of Art. III as the principle underlying the mootness doctrine.").

[99] *Id.* at 331 ("[W]hile an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.").

[100] *Id.* More recent scholarship has expanded upon Chief Justice Rehnquist's argument and offered a more thorough critique of the Constitutional model of mootness. Professor Lee's important Article, for instance, mounts a persuasive normative argument against the Constitutional account of mootness, and argues that mootness doctrine should be reformulated in its entirety to "operate on a prudential basis." Lee, *supra* note 11 at 609. While I tend to agree with most of Professor Lee's normative and historical arguments, I differ with his description of the case law and his prescription for reform. First, I believe his argument that "the Court should transform mootness from a Constitutional doctrine into a prudential doctrine, *id.* at 605, fails to recognize the degree to which

Constitutional model, it is perhaps odd that Rehnquist's proposed solution was exceedingly incremental—he proposed only a new exception for cases mooted while pending before the Supreme Court.[101]

The criticism of mootness doctrine as theoretically incoherent would hardly set it apart from the other justiciability doctrines, such as standing and ripeness, many aspects of which have been similarly criticized.[102] A second critique of the conventional account of mootness, however, is perhaps more damaging: That in the subset of mootness cases in which the prudential and Constitutional models of mootness would dictate different results,[103] the current doctrine has little explanatory power. That is to say: the doctrine fails to account for the results in a wide range of actual cases because courts in those cases appear to be following a model of mootness that not only finds no explanation in the *Liner v. Jafco* model, but is flatly at odds with it.

B. The Constitutional Model Is Descriptively Inaccurate

Despite the prevalence in mootness cases of rhetoric suggesting that courts are treating mootness as a Constitutionally-mandated jurisdictional bar, the reasoning and results in a wide range of mootness cases cannot be explained by the Constitutional model but are consistent only with a prudential model of mootness. A close examination of the mootness cases reveals that conventional mootness doctrine does not account for the factors that courts actually apply in determining whether to dismiss claims as moot, and thus fails utterly to explain the results in a wide range of mootness cases. Rather than simply applying the doctrine underlying each exception, courts, including the Supreme Court, have frequently bent the doctrine to enable them to hear even more moot cases.

This subpart explores the manner in which courts have distorted the nominal elements of each of the mootness exceptions in order to expand the circumstances under which they can hear moot cases, and concludes that the

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mootness already operates as a prudential doctrine. *See infra*, Parts II.B, III.B. Second, I argue below that the arguments for deconstitutionalization of mootness that have been raised by critics of the Constitutional model apply exclusively (or almost exclusively) to personal stake mootness. *See infra*, Part III.D. Third, and perhaps most important, there is a significant practical advantage to my more incremental approach: because my partially prudential model of mootness is based on a reconciliation of tensions in the existing case law, rather than a proposed "transform[ation]" of the doctrine, my approach can be adopted by lower federal courts without need to await further authority from the Supreme Court. *See infra,* Part III.D.

[101] *Id.* at 332 (proposing "an additional exception to our present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari.").

[102] *See supra*, notes 11-13, 40.

[103] This would be the case, for instance, in cases in which the claim is arguably moot but a strong argument can be made for hearing it on prudential grounds.

evident pattern of routine departures from the nominally governing doctrine indicate that mootness decisions are frequently driven by prudential factors.[104] It bears emphasizing again that, as discussed above, the mootness exceptions are themselves incompatible with an Article III analysis. The courts' relaxation of the so-called "requirements" of these flawed "exceptions" so as to hear an even larger group of otherwise moot cases, reveals the true prudential nature of the doctrine.

1. The Pertinent Subset of Cases

As an initial matter, it is worthwhile to define the subset of mootness cases that is most capable of illuminating the nature of the mootness bar. In most cases, both a Constitutional and a prudential rule will dictate the same result: either dismissal (because the claim is moot and no compelling prudential reasons exist to hear it) or non-dismissal (because the claim is not moot at all). Thus any discussion of the Constitutional or prudential nature of the mootness bar in such cases is arguably *dicta*, inasmuch as it is not pertinent to the result.[105] The critical subset of cases, for purposes of analyzing whether courts treat mootness as jurisdictional or prudential, is that set of cases in which a claim is moot but there exist powerful prudential arguments in favor of hearing the case.

In such cases, because a prudential rule would likely dictate a different result than a Constitutional rule, the reasoning and decision of the court help illuminate the nature of the mootness rule actually applied by federal courts. There are of course exceptions, but frequently, when prudential factors strongly favor hearing a moot claim, courts find a way to hear the claim, even at the expense of distorting the doctrine. Thus, the oft-remarked inconsistency among mootness cases can be seen as an indication that, where strong prudential reasons exist to hear a case, courts relax the ostensible doctrinal requirements in order to hear the case—precisely as a prudential model of mootness would permit. In close cases courts often treat mootness as prudential.

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[104] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 281-83 (2000) (reciting that Article III requires dismissal of moot cases but declining to dismiss even where plaintiff disavowed, under oath, any ongoing interest in action); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (reciting that dismissal of moot cases is mandated by the Constitution, but declining to dismiss moot case because of likelihood of recurrence as to "other voters"); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973) (same); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395-407 (1980) (reciting that dismissal of moot cases is mandated by the Constitution, but declining to dismiss moot case because of likelihood of recurrence as to others); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (reciting that dismissal of moot cases is required by Article III, but declining to dismiss moot claim, based on certainty of recurrence as to others).

[105] *See infra*, Part III.D.

2. Judicial Distortion of the Capable of Repetition Yet Evading Review Exception

The ostensible prerequisites for application of the exception for cases "capable of repetition yet evading review" are that: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."[106] The reality is quite different, however. Courts commonly – even routinely – relax each of the nominal requirements and hear moot cases where the challenged action is not necessarily short-lived,[107] and even where there is no reasonable expectation that the same party would again be subjected to the same action.

Although the "requirement" that the same complaining party will be harmed by recurrence of the challenged action appears to a be a bright-line rule – and has frequently been cited as such by courts declining to apply the "capable of repetition yet evading review" exception[108] – courts have

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[106] Weinstein v. Bradford, 423 U.S. 147, 149 (1975). Although the version of the capable of repetition yet evading review exception set forth in *Weinstein* ostensibly has two requirements, an influential commentator has observed that it can be broken down further into three separate elements: First, that the official acts that provoked the litigation are reasonably likely to recur; second, that the same plaintiff will be affected by such repetition; and third, that effective remedies could not be provided in the event of repetition (in other words, the issue evades review). 13A WRIGHT ET AL., *supra* note 2 § 3533.8.

[107] Although it is routinely discussed as part of the "capable of repetition" exception, no one seriously contends that the "yet evading review" portion is Constitutionally-mandated. Even Justice Scalia—the sitting Justice most adamant in his defense of the *Liner* Constitutional model of mootness, *see, e.g.*, *Pap's A.M.*, 529 U.S. at 305-06 (2000) (Scalia, J., concurring) ("[W]e have no power to suspend the fundamental precepts that federal courts are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties, and that this limitation applies at all stages of review.") (internal citations omitted); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. 528 U.S. 167, 212 (2000) (Scalia, J., dissenting) ("We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III."); Honig v. Doe, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) ("the probability of recurrence between the same parties is essential to our jurisdiction as a court")—has conceded that "the yet evading review portion of our capable of repetition, yet evading review test is prudential; whether or not that criterion is met, a justiciable controversy exists." *Id.*; *see also, e.g.*, Clark v. Brewer, 776 F.2d 226, 229 (8th Cir. 1985) (holding that proper inquiry is not into whether the particular challenged activity would evade review, but into whether claim is of a sort that would *typically* evade review); National Wildlife Fed'n v. Castle, 629 F.2d 118, 124 (D.C. Cir. 1980) (rejecting argument that order with three-years' duration is too long to permit application of exception).

[108] *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (holding plaintiff's challenge to denial of entry into law school moot when plaintiff was in final year of school despite "great public interest in the continuing issues" raised on appeal); Laurenzo v. Mississippi High Sch. Activities Ass'n, 662 F.2d 1117, 1120-21 (Former 5th Cir. Dec. 1981) (dismissing as moot plaintiff's challenge to his exclusion from high school athletics; refusing to apply capable of repetition exception based on likelihood of recurrence as to plaintiff's younger siblings); Gomes v. Rhode Island Interscholastic

nonetheless frequently disregarded this so-called "requirement" and held claims not to be moot despite the lack of any reasonable likelihood that the same complaining party would again be subject to the same action.[109]

One type of such claim, which predictably becomes moot before litigation can be concluded and is not likely to recur as to the same plaintiff, is a claim challenging a state durational residency requirement. A durational residency requirement is a statutory provision that conditions access to some privilege or benefit of state citizenship—such as voting,[110] social welfare benefits,[111] or state employment,[112]—on residency in the state for some particular period of time. Because the requisite period of time is generally short, any one plaintiff's claim will invariably be mooted by the passage of time before the completion of appellate review.[113] And yet the orthodox capable of repetition yet evading review exception would not save the claim from mootness, because a durational residency requirement is highly unlikely to be applied repeatedly to the same plaintiff—once an individual has satisfied the residency requirement, it would not again be applied to her unless she later: (1) established residency outside the state,

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League, 604 F.2d 733, 736 (1st Cir. 1979) (refusing to hold that question presented was capable of repetition as to other high school students after original plaintiff graduated).

[109] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 , 333 n.2 (1972) (holding that "although appellee now can vote, the problem to voters posed by the Tennessee residence requirements is capable of repetition, yet evading review"); Roe v. Wade, 410 U.S. 113, 125 (1973) (challenge to abortion law not moot after plaintiff no longer pregnant; "[p]regnancy often comes more than once to the same woman, *and in the general population*, if man is to survive, it will always be with us) (emphasis added); Cruz v. Farquharson, 252 F.3d 530, 534 n.4 (1st Cir. 2001) (noting that the Court in Roe arguably diluted the same party requirement since it never inquired as to whether there was an expectation that Roe herself might become pregnant again; "[i]n the abstract, this might be an interesting subject for a law review article"); Schaefer v. Townsend, 215 F.3d 1031, 1032 (9th Cir. 2000) (holding plaintiff's challenge to eligibility to run for political office not moot after election passed, although plaintiff did not allege an intention to run for office again); Corrigan v. City of Newaygo, 55 F.3d 1211, 1214 (6th Cir. 1995) (challenge to eligibility requirements for city government not moot after election passed; "to hold this case moot would require the absurd result that a court would never be able to rule on the [city] ordinance…The town could repeatedly apply the ordinance to different candidates, none of whom could ever challenge it in court").

[110] *See, e.g.*, *Dunn*, 405 U.S. at 332 n.1 (12 month state residency and three month county residency required to be eligible to vote); Hall v. Beals, 396 U.S. 45, 46 n.1 (1969) (six month state residency, 90 day county or city residency, and 15 day precinct residency required to be eligible to vote).

[111] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 624 n.3 (1969) (one year durational residency requirement to qualify for full state welfare benefits); Roe v. Anderson, 134 F.3d 1400, 1402 n.2 (9th Cir. 1998) (same).

[112] *See, e.g.*, Walsh v. City and County of Honolulu, 460 F. Supp.2d 1207, 1209 (D. HI. 2006) (state residency required at time of application to be eligible for employment); Nehring v. Ariyoshi, 443 F. Supp. 228, 229 (D. Haw. 1977) (three year durational residency requirement for government employement).

[113] Indeed, if courts enforced a strict rule of dismissal of moot cases, states would be able to evade judicial review of their durational residency requirements simply by providing a sufficiently brief required term of residency.

(2) subsequently moved back into the state, and (3) thereafter again sought access to the privilege or benefit in question.

Because this combination of events is ordinarily both highly speculative and exceedingly unlikely to occur, courts are unable to find a "reasonable likelihood" that the challenged conduct will recur as to the same plaintiff.[114] One would therefore expect courts to find the capable of repetition exception inapplicable, and to dismiss the claim as moot. And yet quite frequently, the result is just the opposite: in cases where the prudential factors line up in favor of hearing the case, frequently courts will simply relax the same-plaintiff requirement and apply the capable of repetition exception based on a likelihood of recurrence as to others.[115]

A 1972 case involving voting rights—*Dunn v. Blumstein*—exemplifies this phenomenon.[116] *Dunn* concerned a Constitutional challenge to Tennessee's durational residency requirement for registering to vote.[117] The plaintiff (and respondent), James Blumstein, moved to Tennesee on June 12, 1970 to begin employment as an Assistant Professor of Law at Vanderbilt University. Desiring to vote in the upcoming August and November elections, he attempted to register on July 1, 1970.[118] His application was rejected, however, on the ground that Tennessee law then authorized registration only for persons who—at the time of the next election—would have been residents of the state for a full year, and of their county for three months.[119] A three-judge district court, convened pursuant to 28 U.S.C. §§ 2281 & 2284, held the durational residency requirement unconstitutional, and the Supreme Court affirmed.[120]

Under conventional doctrine, Professor Blumstein's claims appeared to be moot: the Supreme Court opinion in *Blumstein* was issued over twenty months after Blumstein took up residency in Tennessee, and at a time when he had plainly satisfied both the three month and one year state residency requirements. Nor could his claim be found "capable of repetition" under conventional doctrine, as there was no suggestion that Blumstein himself might move out of state and establish residency, and then return, or

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[114] *See, e.g.*, *Hall*, 396 U.S. at 49-50 (1969) (referring to such a scenario as "speculative contingencies [that] afford no basis for our passing on the substantive issues the appellants would have us decide.")

[115] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 331-32 (1972) (finding case non-moot based on likelihood of recurrence as to others); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973) (same); Storer v. Brown, 415 U.S. 724, 738 n.8 (1974) (same).

[116] 405 U.S. 330 (1972).

[117] *Id.* at 331-32 & n.1.

[118] *Id.* at 331.

[119] *Id.*

[120] *Id.* at 332-33.

otherwise again be subjected to the durational residency requirements. Thus, there was nothing to support a finding that the plaintiff had a reasonable likelihood of again suffering the same alleged deprivation.[121]

The Supreme Court, however, quickly dispensed with the apparent mootness of respondent's claims. The Court affirmed as "proper" the district court's rejection of the state's mootness argument, and held that the claim was "capable of repetition yet evading review,"[122] because "although respondent now can vote, the problem to voters posed by the Tennessee residence requirements is "capable of repetition yet evading review. . . . [because] the laws in question remain on the books."[123] The Court, in short, simply substituted ongoing harm to Tennessee voters, coupled with likely recurrence as to other Tennessee voters, for the purported "requirement" that the moot claim be shown to be capable of repetition as to the plaintiff.[124]

3. Judicial Modification of the Class Action Exception

The evolution of the class action exception over the past 30 years provides another instance of the steady march of case law away from the Constitutional model. Although Article III had, since *Liner*, been held to require that the "case or controversy" that must exist at the outset of the action must also persist through all stages of appellate review, the Court in *Sosna* effectively dispensed with this requirement, holding that the mootness of the named plaintiff's claim will not require dismissal – so long as absent members of the class plaintiff seeks to represent have non-moot claims.[125] In *Sosna*, for instance, the Court held that the controversy remained very much alive for the class of persons appellant had been certified to represent because new residents of Iowa were being affected by the enforcement of the allegedly unconstitutional statute.[126]

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[121] *See* Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

[122] Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972).

[123] *Id.* (emphasis added).

[124] The Supreme Court has applied a similar rationale in numerous other cases, in the area of voting rights law and elsewhere. *See, e.g.*, Rosario v. Rockefeller, 410 U.S. 752 (1973); Storer v. Brown, 415 U.S. 724 (1974).

[125] Sosna v. Iowa, 419 U.S. 393, 402 (1975) ("The controversy may exist…between a named defendant and *a member of the class represented by the named plaintiff*, even though the claim of the named plaintiff has become moot.") (emphasis added). *Sosna* also stated that the named plaintiff had to possess a live claim at the time the complaint was filed, and at the time class certification was granted.

[126] *Id.* at 401-403. One thing that is notable from this rationale is that it depends on a Congressional conferral of judicial authority (via enactment of Rule 23) to hear claims of absent class members. But Congress cannot grant jurisdiction to federal courts over anything other than a case or controversy. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491 (1983) ("This Court's

The opinion in *Sosna* expressed two limits on the rule in that case, both of which were subsequently abandoned in fairly short order: First, the Court attempted to cabin the exception by limiting it to circumstances in which class certification had been granted before the named plaintiff's claim was rendered moot.[127] At the same time, the opinion left the door open for a broader exception by stating, in footnote 11, that:

> there may be cases in which the controversy involving the named plaintiff is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.[128]

The second limitation that *Sosna* articulated was that the exception would not apply unless the issue would otherwise evade review: "the same exigency that justifies this doctrine serves to identify its limits. In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy," i.e. where "the issue sought to be litigated would [not] escape appellate review at the behest of any single challenger," "the general principles of Article III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation."[129]

These attempts to limit the breadth of *Sosna*'s class action exception have been systematically ratcheted back by subsequent decisions. The same year that it decided *Sosna*, the Court in *Gerstein v. Pugh*[130] walked through the door left open by *Sosna*'s footnote 11 and dispensed once and for all with the requirement that class certification be granted before the named Plaintiff's claim became moot.[131] *Gerstein* involved a due process challenge to a Florida statute permitting any non-capital offense to be charged by information, without a judicial determination of probable cause.[132] Individuals so charged could be detained for a substantial period based solely on the decision of a prosecutor. Two detainees filed a class action under 42 U.S.C. § 1983 challenging this scheme as violative of due

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cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution."); *see also* WRIGHT, ET AL., *supra* note 2 § 3521. Thus, if Congress has the authority to empower courts to hear class claims even where the named plaintiff's own claim is moot, then there can be nothing in the "cases or controversies" clause limiting federal jurisdiction to situations where *the plaintiff* has a live claim.

[127] *Id.* at 402.

[128] *Id.* at 402 n.11.

[129] *Id.* at 402.

[130] 420 U.S. 103 (1975).

[131] *Id.* at 111.

[132] *Id.* at 107-08.

process. The plaintiffs' pretrial detention had apparently terminated before class certification was granted, which—under the Constitutional model of mootness—would ordinarily have resulted in dismissal of their claims as moot.[133] The Court, however, declined to dismiss as moot, holding that the case belonged:

> to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class, [because] pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual *could* nonetheless suffer repeated deprivations, and it is *certain* that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is distinctly one that is "capable of repetition yet evading review."[134]

Thus, the combination of a speculative possibility that a named plaintiff could again be arrested and held in pretrial detention, together with the certainty that others will suffer deprivations under the same procedures suffices to satisfy the "capable of repetition" prong of the exception.[135] Although the opinion in *Gerstein* recites that mootness is a Constitutional matter, the Court's decision effectively suspends the personal stake requirement,[136] based on prudential concerns about the importance of the issues and their likely—indeed, certain—recurrence.

4. Judicial Distortion of the Voluntary Cessation Exception

As noted above, federal courts have long greeted with skepticism assertions of mootness based on Defendant's voluntary discontinuance of the challenged conduct.[137] This venerable doctrine is not easily harmonized with the more recent Constitutional model of mootness. Courts in voluntary cessation cases openly consider prudential and practical concerns that have

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[133] *Id.* at 110 ("the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under Sosna. But this case is a suitable exception to that requirement.").

[134] *Id.* at 110 n.11 (emphasis added).

[135] *Id.* at 110 n.11 ("[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain.").

[136] Although the Court asserted that the Plaintiff "could" suffer a repeated deprivation, this is precisely the sort of speculative possibility that the Court—in cases lacking the strong prudential arguments for hearing the case—has dismissed as inadequate. *See, e.g.*, Hall v. Beals, 396 U.S. 45, 49-50 (1969) ("such speculative contingencies afford no basis for our passing on the substantive issues the appellants would have us decide"). *Cf.* Lee, *supra* note 11 at 624-625 (characterizing *Roe v. Wade* and *U.S. Parole Comm'n v. Geraghty*, as "instance[s] in which the Court in effect suspended the personal stake requirement").

[137] *See supra* Part II.A.

no bearing on the case or controversy question, such as the public interest in having an issue resolved,[138] sunk costs in litigating the issue to date,[139] and the importance of avoiding party manipulation of federal jurisdiction.[140]

Just as with the capable of repetition and class action exceptions, courts often apply voluntary cessation in a results-oriented manner, to justify hearing cases that they wish to hear for prudential reasons. Take, for example, the Supreme Court's treatment of voluntary cessation in *City of Erie v. Pap's A.M.*[141] In *Pap's*, the plaintiff operated a nude dancing establishment, and sued the city of Erie, Pennsylvania seeking an injunction against enforcement of an ordinance that banned public nudity.[142] The state trial court granted the injunction on federal constitutional grounds, and the state Supreme Court affirmed that decision. While the City's petition for certiorari was pending, the 72 year-old man who owned the plaintiff corporation chose to retire. He submitted a sworn declaration stating that he had exited the adult entertainment business, closed the Kandyland club that was the subject of the litigation, and sold the real estate on which it was located. He therefore moved to dismiss the case as moot.[143]

The Court denied the motion, found the case not moot, and reversed on the merits.[144] The Court described the mootness issue as a "close" one, but found that the case was not moot because (1) Pap's could resume its nude dancing operations at some point in the future, and (2) the City (the defendant below) was suffering harm in the form of the state court's order invalidating its public nudity ordinance.[145] Neither of these rationales, of course, fits readily into the traditional voluntary cessation doctrine. That doctrine has been applied where (1) the *defendant* ceases engaging in the challenged action, in a way that arguably moots the claim, but (2) the court

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[138] *See, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (holding that the reasons to hear a case despite defendant's voluntary cessation include "*the public interest in having the legality of the practices settled*").

[139] *See, e.g.,* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 192 (2000).

[140] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Khouzam v. Ashcroft, 361 F.3d 161, 167-68 (2d Cir. 2004) (rejecting contention of mootness based on government's agreement to *vacatur*, based on evidence that government was seeking to avoid court ruling on issue of public importance); Albers v. Eli Lilly & Co., 354 F.3d 644, 646 (7th Cir. 2004) (refusing to dismiss claim on petitioner's motion, stating: "One good reason to exercise discretion against dismissal is to curtail strategic dismissal . . . We think it best . . . to carry through . . . [so that] an attempt to make the stock of precedent look more favorable that it really is may be foiled.").

[141] *Pap's A.M.*, 529 U.S. 277.

[142] *Id.* at 284-85.

[143] *Id.* at 287.

[144] *Id.* at 283.

[145] *Id.* at 288.

finds it reasonable to expect *the challenged action* to recur.[146] The Court's opinion in *Pap's* turns this doctrine on its head, applying voluntary cessation in a situation utterly divorced from its usual context and rationale: It was the plaintiff who had changed course, thereby mooting his own claim, and the challenged action—defendant's enforcement of its ordinance—was certain *not* to recur absent court action (because it had been enjoined by the state court).

The Court's first rationale—that Pap's could resume its activities despite the retired owner's sworn statement that he did not intend to do so—is unpersuasive as a mootness analysis. The Court cited no opinion in which a case had been deemed non-moot despite the plaintiff's desire to abandon his claim for relief. Concurring in part,[147] Justice Scalia referred to this part of the Court's rationale as "the neat trick of identifying a 'case or controversy' that has only one interested party."[148] Justice O'Connor's opinion for the majority appears to rest on a desire to protect the court's authority against party manipulation that is intended to destroy jurisdiction.[149] A legitimate prudential concern, to be sure, but one that is not evidently derived from any interpretation of the cases or controversies clause—which makes no distinction between moot cases rendered moot by party manipulation and those rendered moot by other causes.

The Court's second rationale—that the case was saved from mootness by the ongoing harm suffered by the City, in the form of an arguably incorrect merits opinion by the state courts[150]—is no more persuasive. Any injunction entails harm to defendant of having to comply with an arguably incorrect merits opinion. If the Court's analysis were correct, then, no injunctive relief claim could ever become moot if plaintiff prevailed below and secured an injunction, so long as defendant wished to challenge the injunction. Moreover, the argument again ignores the plaintiff's sworn assertion that he lacked any interest in the outcome of the litigation.[151]

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[146] WRIGHT ET AL., *supra* note 2, § 3533.5.

[147] Justice Scalia concurred as to the Court's merits opinion and its judgment of reversal, but not its mootness analysis. *Pap's A.M.*, 529 U.S. at 307 (Scalia, J., concurring in part). His concurrence in the judgment is curious, to say the least, given that he believed the case was moot and thus—supposedly—outside the Court's Article III jurisdiction. *Id.*

[148] *Id.* at 307 (Scalia, J., concurring in part). In terms of the traditional rationale for justiciability doctrines, there was, of course, ample reason to doubt that plaintiff would vigorously advocate the issues, in light of his sworn statement that he had no ongoing interest in the subject matter.

[149] *Pap's A.M.*, 529 U.S. at 287-88 (stating that Pap's "could again decide to operate a nude dancing establishment in Erie," and hinting at concerns about Pap's veracity.)

[150] The Court held that the simple possibility that it might reverse the state court injunction and thereby affect the defendant's rights was "sufficient to prevent the case from being moot." *Id.* at 288.

[151] *Id.* at 302 (Scalia, J., concurring in part); *cf. also* Waite v. Dowley, 94 U.S. 527, 534 (1876)

The cases in which courts apply the most common mootness exceptions reveal a troubling disconnect between mootness doctrine and mootness practice. When faced with cases presenting strong prudential reasons for adjudication, the Court has regularly distorted or revised the doctrine to expand the class of moot cases that federal courts may hear. Courts are, in short, applying something other than the doctrine they claim to apply.[152] Part III, *infra*, further analyzes the cases in order to begin to derive the "real" doctrine of mootness—the doctrine that courts actually apply.

III. TOWARD A COHERENT DOCTRINE OF MOOTNESS

If the Constitutional model is both descriptively inaccurate and internally inconsistent, two questions naturally arise: How do courts decide mootness questions, and how should they decide them? Are judicial decisions in the mootness area arbitrary and unprincipled, as some scholars have suggested,[153] or is there an intelligible doctrine hidden amidst the clutter that can help explain the results in past cases, and guide courts to the best results in the widest range of future cases?

I argue that judicial practice can be reconciled with theory, by recognizing that there are two distinct kinds of mootness, which merit—and, in the pertinent subset of cases, frequently already receive—substantially different judicial treatment. Cases may become moot either because post-filing events moot *the issue* raised in the claim, or because those events moot *plaintiff's personal stake* in that issue. The former type of mootness (which I refer to as "issue mootness") raises concerns of a different sort than the latter type of mootness ("personal stake mootness"). Federal courts confronting mootness issues appear to apply a two-part doctrine of mootness that requires dismissal of "issue moot" cases, but

("This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it"); South Spring Hill Gold-Mining Co. v. Amador Medean Gold-Mining Co., 145 U.S. 300, 301, (1892) (on appeal of action between two corporations that came under control of same person after judgment was rendered in lower court, "litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one").

[152] *See* Daniel J. Meltzer, *Deterring Constitutional Violations By Law Enforcement Officials: Plaintiffs And Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 302-03 (1988) (stating that, in cases applying capable of repetition or class action exceptions, "it seems fair to say that . . . the litigant is permitted to advocate the rights of third parties . . . in order to assure . . . adequate deterrence of the misconduct involved).

[153] *See, e.g.*, Chemerinsky, *supra* note 13 at 692 ("The only apparent answer sounds terribly cynical: a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that"); *see also* Shults, *supra* note 11 at 1035 (("[E]xceptions to the personal stake requirement are difficult to understand if mootness is constitutionally required and suggest that the doctrine has been applied more as a matter of discretion."); Pushaw, *supra* note 11, at 490; Lee, *supra* note 11 at 631 (stating that the Court "has sometimes obscured its reasoning about the personal stake requirement" when applying mootness doctrine).

gives courts discretion to hear "personal stake moot" cases, or not, as they deem appropriate.

In applying this two-part doctrine of mootness, courts begin with the question whether the harm alleged is reasonably likely to recur as to anyone—which implicates the question whether any order the court might issue would affect the status quo. This is the question of "issue mootness," and a finding that the issue is moot entails that the case no longer presents a "case or controversy" and thus must be dismissed. If the court finds the issue raised by plaintiff's claim is not itself moot, the next question is whether the plaintiff's personal stake in that issue is moot. If so, then the claim is subject to dismissal *at the court's discretion*.

Part III.A introduces this distinction and shows that this two-part model of mootness is more consistent with mootness case law than the Constitutional model, illustrating the point with several well-known, and widely misunderstood, mootness cases. Part III.B addresses the factors that should—and, often, already do—guide courts' exercise of discretion in determining whether or not to hear a case that is moot only in the personal stake sense. Part III.C defends this partially prudential model of mootness by analogy to the doctrine of third-party standing, under which courts have long permitted plaintiffs with standing to raise the claims of certain absent third parties. Part III.D argues that my partially prudential model of mootness is both better justified than prior proposals to treat mootness as entirely prudential, and far more likely to succeed, because it can be adopted by lower courts based on the existing stock of precedent.

A. The Two Doctrines of Mootness: Issue Mootness and Personal Stake Mootness

The term "moot" in contemporary legal discourse refers to at least two distinct concepts: the expiration of the substantive issue involved in a claim, and the expiration of the plaintiff's personal stake in that issue.[154] Despite the prevalence of Constitutional rhetoric in modern mootness case law, the Supreme Court has actually treated "moot" cases very differently depending on whether they were moot in the sense of "issue mootness" or in the sense of "personal stake mootness." While courts invariably dismiss "issue moot"

[154] Murphy v. Hunt, 455 U.S. 478, 481 (1982) (holding that a case becomes moot when "the issues presented are no longer live or . . . the parties lack a legally cognizable interest in the outcome."); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) ("It is clear that the controversy over the Parole Release Guidelines is still a "live" one between petitioners and at least some members of the class respondent seeks to represent. . . . We therefore are concerned here with the second aspect of mootness, that is, the parties' interest in the litigation. The Court has referred to this concept as the "personal stake" requirement.").

cases,[155] a long line of cases suggests that the mootness doctrine is far more flexible with regard to personal stake mootness. Indeed, in many cases, courts have effectively treated dismissal on mootness grounds as non-mandatory in circumstances where only the plaintiff's personal stake is moot.[156]

The seeds of a distinction between personal stake mootness and issue mootness can be traced to the Supreme Court's 1980 decision in *United States Parole Commission v. Geraghty.*[157] In that case, the Court seemed to suggest that mootness doctrine had two aspects—whether the issue was live as to anyone, and whether the plaintiff has retained an ongoing interest in it.[158] But although the Court held that the mootness bar is "more flexible" where only plaintiff's personal stake was moot, it also recited that mootness remains a jurisdictional doctrine, and it never clarified the boundaries of the Constitutional concern.[159] Subsequent cases following *Geraghty* have perpetuated this uncertainty, continuing to treat personal stake mootness inconsistently.[160]

The plaintiff in *Geraghty* sought to represent a class to challenge the Parole Commission's Release Guidelines on statutory and Constitutional grounds.[161] While his appeal from the denial of class certification was pending, plaintiff was released from prison, which of course rendered his personal stake in the relief sought—an injunction requiring changes in the Release Guidelines—moot.[162] Although his personal stake had expired, the issue that Plaintiff sought to litigate remained live. The Third Circuit declined to dismiss Plaintiff's appeal as moot, and the Supreme Court

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[155] *See, e.g.*, United States v. Chambers, 291 U.S. 217 (1934) (prosecution for violation of criminal statute dismissed as moot where statute under which it is brought is repealed without a saving clause); United States v. Alaska S.S. Co., 253 U.S. 113, 115-16 (1920) (civil action for injunction against agency order requiring shippers to use particular form of bill of lading dismissed as moot where intervening statute required changes in forms).

[156] *Geraghty*, 445 U.S. at 400-01; Sosna v. Iowa, 419 U.S. 393, 401-02 (1975); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972).

[157] 445 U.S. at 388.

[158] *Id.* at 396.

[159] *Id.* at 395.

[160] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 280-83 (2000) (reciting that Article III requires dismissal of moot cases but declining to dismiss even where plaintiff disavowed, under oath, any ongoing interest in action); *see also* Meltzer, *supra* note 152 at 302 (describing as "strained" the Court's efforts to find "that the named plaintiff maintained a personal stake" in various cases under the class action exception).

[161] *Geraghty*, 445 U.S. at 390.

[162] *Cf.* Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (dismissing as moot plaintiff's challenge to parole board procedures where his custody had ended, and stating "Plaintiff, of course, has no personal stake…").

affirmed.[163]

The Court began its analysis by distinguishing two kinds of "moot" cases: Those in which the issues presented are no longer "live," and those in which the Plaintiff no longer has a legally cognizable interest in the outcome.[164] The Court held that the two categories of cases could properly be treated differently under Article III—the former sort of moot case should simply be dismissed,[165] while mootness doctrine is "more flexible" in cases that were rendered moot only by plaintiff's loss of a personal stake in the outcome.[166] The Court stated that prior decisions demonstrate the prudential basis of the mootness exceptions:

> the strict, formalistic view of Article III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, *the Court has looked to practicalities and prudential considerations*.[167]

The Court then explained what sorts of "practicalities" and "prudential considerations" ought to guide courts in deciding whether to dismiss as moot cases where the issue remained live but plaintiff's personal stake had become moot. Rather than applying a "rigidly formalistic approach to Art. III,"[168] *Geraghty* held, courts should be guided by the *purpose* of the "personal stake" requirement, which is merely to ensure that the case is in a form capable of judicial review.[169] "The imperatives of a dispute capable of judicial resolution" include: (1) sharply presented issues in a concrete factual setting, and (2) self-interested parties vigorously advocating opposing positions.[170] These two requirements may be satisfied even where

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[163] *Geraghty*, 445 U.S. at 409.

[164] *Id.* at 396.

[165] *Id.* at 404. The Court held that this was not such a case, because "it is clear that the controversy over the validity of the Parole Release Guidelines is still a live one between petitioners and at least some members of the class respondents seek to represent." *Id.* at 396.

[166] *Id.* at 400; *see also id.* at 401 (noting that cases refusing to dismiss based on plaintiff's loss of personal stake reveal that "Article III justiciability is not a legal concept with a fixed content or susceptible of scientific verification.") The Court cited *Gerstein v. Pugh*, 420 U.S. 103 (1975), *Deposit National Guaranty Bank v. Roper*, 445 U.S. 326 (1980), and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) , as examples of cases found not to be moot despite the class representative's loss of a personal stake in the merits of the litigation. *Id.* at 399-400.

[167] *Id.* at 404 n.11 (emphasis added); *see also, e.g.*, Flint v. Dennison, 488 F.3d 816, 823 (9th Cir. 2007) (Mootness…is a "flexible justiciability doctrine); United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 955 F.2d 171, 174 (2d Cir. 1992) ("mootness doctrine is flexible and recognizes the uncertain and shifting contours for Article III justiciability."); Southern Ohio Coal Co. v. Donovan, 774 F.2d 693, 698 (6th. Cir. 1985) (mootness doctrine is "a flexible concept with uncertain and shifting contours.")

[168] *Geraghty,* 445 U.S. at 404 n.11.

[169] *Id.* at 403.

[170] *Id.; see also* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 51 (1984) (the "functional requisites of

the named plaintiff's substantive claim has become moot, because (1) the named plaintiff's loss of a personal stake does not render the issues any less concrete or sharply presented,[171] and (2) vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome."[172]

The decision in *Geraghty* aroused a vigorous dissent by Justice Powell, joined by 3 others. The dissent defended the orthodox Constitutional model, insisting that the requirement of a live "personal stake" was "embedded in the case-or-controversy limitation imposed by the Constitution,"[173] and rejected what he saw as the majority's holding "that the personal stake requirement lacks constitutional significance."[174] Justice Powell acknowledged that, in the context of standing, "the personal stake requirement has a double aspect"[175] because "[o]n the one hand [the requirement of personal stake] derives from Art. III limitations on the power of the federal courts. On the other, it embodies *additional self-imposed restraints* on the exercise of judicial power."[176] But he insisted that mootness is different, and that the personal stake requirement in the mootness context is entirely mandatory.[177]

Geraghty's contribution to the proper understanding of mootness has been underappreciated. The Court specifically rejected dissenting Justice Powell's insistence that Article III required dismissal whenever plaintiff's personal stake evaporated prior to judgment.[178] The Court described personal stake, rather, as *merely one means to an end*—the end being assurance that the case is "in a form capable of judicial resolution," which

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effective adjudication" are "[c]oncrete facts and adversarial presentation").

[171] *Geraghty,* 445 U.S. at 403.

[172] *Id.* at 404.

[173] *Id.* at 412. Justice Powell also acknowledged that the case was moot, if at all, only in the sense that I term "personal stake moot." *Id.* at 409-10 (Powell, J., dissenting) ("There is undoubtedly a 'live' issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may – through counsel – continue to litigate it.").

[174] *Id.* at 410, n.1.

[175] *Id.*

[176] *Id.* at 410 (emphasis added).

[177] *Compare id.* at 410 (Powell, J., dissenting) (stating that in the standing context, "the requirement of personal stake [includes both] Art. III limitations on the power of the federal courts, [and] additional self imposed restraints"), *with id.* at 414 (Powell, J., dissenting) ("The Court announces today for the first time – and without attempting to reconcile the many cases to the contrary – that there are two categories of 'the Art. III mootness doctrine': flexible and less flexible.")

[178] *Compare id.* at 414 (Powell, J., dissenting) (insisting that personal stake requirement is mandated by Article III) *with id.* at 403-04 ("vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome").

entails "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions."[179] If, as *Geraghty* held, the so-called "requirement" of a personal stake is but one means of serving the policies that underlie Article III, then a dismissal of a "personal stake moot" case is a discretionary decision, guided by "practicalities and prudential considerations,"[180] including whether, in the circumstances of the case, the policies underlying Article III's "cases or controversies" clause are being served in some other way.

And *Geraghty* is just one of many Supreme Court cases that arguably follow—or at least, are consistent with—this two-part, partially prudential model of mootness. Many cases that recite the rhetoric of the Constitutional model nonetheless follow *Geraghty* in both recognizing (explicitly or implicitly) the two types of mootness, and applying personal stake mootness as though it permits, but does not require, dismissal. Two illustrative examples are *Dunn v. Blumstein*[181] and *Rosario v. Rockefeller*.[182]

In *Dunn*, the Tennessee voting registration case, the Court permitted a plaintiff with a moot personal stake to proceed based on the importance of the issue to the general public.[183] In *Rosario*, the Court considered a challenge to a New York law requiring voters wishing to vote in a party primary to enroll as members of their party at least 30 days prior to the general election preceding the primary in which they intended to vote. At the time of decision, the Court noted, the relevant primary election "ha[d] been completed and the petitioners would be eligible to vote in the next scheduled New York primary."[184] Again, this rendered the petitioners' claims moot in the personal stake sense, and any recurrence as to them would have required a speculative and unlikely chain of events.[185] But although there was no reasonable likelihood of recurrence as to the petitioners, the Court found the claim to be non-moot, "since the question

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[179] *Geraghty*, 445 U.S. at 403; *see also id.* at 403-04 ("Implicit in [*Sosna*] was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.'").

[180] *Id.* at 404 n.11.

[181] 405 U.S. 330 (1972).

[182] 410 U.S. 752 (1973).

[183] *Dunn*, 405 U.S. at 333 n.2; *see also supra*, Part II.B.2.

[184] *Rosario*, 410 U.S. at 756 n.5.

[185] Specifically, it would require the petitioners to disenroll as members of their party, then later re-enroll in a political party at a time less than 30 days prior to the next scheduled primary election. The Court has held in other cases that such a series of events was too speculative to provide a reasonable likelihood of recurrence. *See* Hall v. Beals, 396 U.S. 45, 49-50 (1969) ("such speculative contingencies afford no basis for our passing on the substantive issues the appellants would have us decide").

the petitioners raise is 'capable of repetition yet evading review.'"[186] Thus, the fact that the question raised by the petitioners was reasonably likely to recur as to other members of the general public was itself sufficient to reject the assertion of mootness.[187]

Similarly, in *Honig v. Doe*—the case in which Chief Justice Rehnquist first questioned the Constitutional model—the Supreme Court once again treated personal stake mootness very differently from issue mootness. *Honig* involved claims by two plaintiffs—referred to as Doe and Smith—that the Defendant and Petitioner had deprived them of rights under the Education of the Handicapped Act ("Act").[188] At the time the Supreme Court delivered its opinion, both Plaintiffs' claims were arguably moot in the personal stake sense: Doe was over 24 years of age, and thus no longer protected by the Act at all,[189] while Smith was just three months shy of his 24th birthday, had moved out of the school district where the claimed violation of his rights occurred, and was no longer even enrolled in any public school.[190] The Court emphasized that the *issue* raised by plaintiffs—whether disabled students could be suspended or expelled based on behavior caused by their disability—was very much alive, and focused its inquiry on the plaintiffs' personal stake in the outcome.[191] Under the Constitutional model, of course, each plaintiff's personal stake in the relief sought—an injunction forbidding their school district from expelling them—had expired: Neither student was still enrolled at the district (or in any other public school district, for that matter). The Constitutional model would therefore require dismissal of both plaintiffs' claims.[192] A prudential

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[186] *Rosario*, 410 U.S. at 756 n.5.

[187] *Id.*; *see also* Storer v. Brown, 415 U.S. 724 (1974) (noting that:

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is capable of repetition, yet evading review").

Id. at 737 n.8. In *Storer*, the Court expressly based its decision to resolve the case on practical considerations, noting that deciding the case would "have the effect of simplifying future challenges" and would thereby increase the likelihood that future cases raising the same issues could swiftly be adjudicated. *Id.*

[188] *Honig v. Doe*, 484 U.S. 305, 308-09 (1988) (*citing* Education of the Handicapped Act, Pub. L. No. 91-230. Title VI. 84 Stat. 175 (codified as amended in scattered sections of 20 U.S.C. §§1400-1485).

[189] *Id.* at 317-18.

[190] *Id.* at 318-19. Indeed, Smith's counsel had not indicated that her client would ever seek to reenter the public school system. *Id.* at 318-19 & n.6.

[191] *Id.* at 319.

[192] *See id.* at 333 (Scalia, J., dissenting) (interpreting Constitutional model of mootness to require dismissal of both plaintiffs' claims); *see also, e.g.,* Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (expired personal stake mandates dismissal of action; *United States Parole Comm'n v.*

model of mootness, on the other hand, would permit the Court to consider other factors and exercise discretion whether to dismiss plaintiffs' claims—precisely as the *Honig* court actually did.[193]

What these cases—and the many others in which the federal appellate courts and Supreme Court have declined to dismiss claims as moot even though there was no demonstrated likelihood of recurrence as to the named plaintiff—reveal is that where the named plaintiff's stake in the claim for prospective relief has been rendered moot, federal courts do not treat plaintiff's ongoing personal stake as a prerequisite to jurisdiction. Instead, they often exercise jurisdiction even absent a showing of likely recurrence as to the named plaintiff.[194] Personal stake is, in effect, treated as but one of many ways to satisfy certain policy goals—and it is those policy goals themselves, and not the requirement of a live personal stake—that are considered to be derived from Article III. In addition to the disability and election law cases cited above, this pattern is apparent outside the election law context, in substantive areas including abortion,[195] the establishment clause,[196] and miscellaneous other cases.[197]

Geraghty, 445 U.S. 388, 411 (1975) (Powell, J., dissenting) (arguing that Article III requires that plaintiff maintain an ongoing personal stake in the outcome of the litigation until adjudication is completed). Indeed, Chief Justice Rehnquist concurred in the court's opinion in *Honig* holding the claims non-moot, and wrote separately precisely to explain that the decision of the Court in *Honig*—as well as decisions in many other mootness cases—could not be squared with the Constitutional model.

[193] *Honig,* 484 U.S. at 318-19. The Court dismissed only Doe's claim, holding that Smith's claim was not moot on account of his continued eligibility for benefits under the Act. *Id.*

[194] *See e.g.*, *Geraghty*, 445 U.S. at 388; Storer v. Brown , 415 U.S. 724 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972).

[195] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973) (holding that "pregnancy provides the classic justification for a conclusion of nonmootness" because the duration of an individual pregnancy is so short as to effectively deny appellate review when pregnancy is a significant fact in the litigation, but "[P]regnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us …. It truly could be 'capable of repetition, yet evading review'"); *see also* Bellotti v. Baird, 428 U.S. 132, 138 n.7 (1976); Doe v. Bolton, 410 U.S. 179, 187 (1973).

[196] *See, e.g.*, Grossberg v. DeEusebio, 380 F. Supp. 285, 292 (N.D. Va. 1975) (claim by high school students and their parents seeking injunction against religious component of graduation ceremony not rendered moot by students' graduation; even though plaintiffs "will never again be susceptible to the conduct of which they complained," hearing claim is appropriate where it "is the only effective means to insure full and deliberate adjudication of the Establishment clause issues they raise.").

[197] *See, e.g.*, Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) (alleged violation of state usury law); Gerstein v. Pugh, 420 U.S. 103 (1975) (alleged Fourth Amendment violations); Sosna v. Iowa, 419 U.S. 393, 402 (1975) (Constitutional challenge to durational residency requirement for divorce); Shapiro v. Thompson, 394 U.S. 618, 624 n.3 (1969) (Constitutional challenge to durational residency requirement for welfare benefits); American Healthcare Corp. v. Schweiker, 688 F.2d 1072, 1076 n.10 (7th Cir. 1982) (challenge to termination of medical provider status with Medicare); Trachtman v. Anker, 563 F.2d 512, 514 (2d. Cir. 1977) (First Amendment); Grossberg, 380 F. Supp. at 292 (First Amendment's establishment clause).

Even Justice Scalia—the most ardent defender of the Constitutional model in the 45 years since *Liner*—has conceded the descriptive point, noting that the Supreme Court has previously "dispens[ed] with the same-party requirement entirely" in election and abortion law cases, and focused on the "great likelihood that the issue will recur between the defendant and the other members of the public at large without ever reaching us."[198] However, in an opinion that was joined by no other member of the Court, Justice Scalia has attempted artificially to limit the effect of this line of authority, stating that:

> Arguably those cases have been limited to their facts, or to the narrow areas of abortion and election rights, by our more recent insistence that, at least in the absence of a class action, the capable of repetition doctrine only applies where there is a reasonable expectation that the same complaining party would be subjected to the same action again.[199]

There are two flaws in Justice Scalia's attempt to harmonize these cases with the Constitutional model of mootness: First, as noted above, Scalia's factual premise is unquestionably mistaken: the courts have frequently applied the "capable of repetition yet evading review" exception, in cases with no likelihood of recurrence as to the same plaintiff, where the substantive claims concerned neither election nor abortion law,[200] and in cases not pled as class actions.[201]

Second, and more fundamental, Justice Scalia's concession is fatal to the Constitutional model of mootness, even if the case law supported his proposed limitation of scope. Even if the Court's tendency to disregard the same-plaintiff "requirement" and expand the capable of repetition exception as needed to enable it to hear important cases *were* limited to class actions and/or to the narrow substantive areas suggested by Justice Scalia, it would still demonstrate that the Court was not applying mootness as a true

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[198] *Honig v. Doe*, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting) (emphasis omitted).

[199] *Id.* at 336.

[200] *Honig* itself, of course, is one such case. *Id.* at 322-23 (applying capable of repetition, yet evading review doctrine to hold student's claim under Education of the Handicapped Act not moot even though the student 1) no longer resided within school district where violation was alleged to have occurred, 2) was no longer attending public school, and 3) did not profess any interest in returning to public school). *See also supra*, note 197 (citing cases from other areas of law).

[201] *See, e.g.*, *Honig*, 484 U.S. at 323; Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973) (consolidated cases challenging voter registration requirement, one of which was brought as class action and the other of which was not; court found both non-moot, without according any significance to class action status); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (finding individual's claim non-moot based on likely repetition of allegedly wrongful conduct as to others); Schaefer v. Townsend, 215 F.3d 1031, 1033 (9th Cir. 2000); Corrigan v. City of Newaygo, 55 F.3d 1211, 1214 (6th Cir. 1995); *Trachtman*, 563 F.2d at 514 ("Although the complaint did not formally so assert, Trachtman was litigating in a representational capacity. Plaintiffs seek to vindicate not only Trachman's rights as an individual student, but the right of the [student newspaper] and its staff to conduct the survey."); *Grossberg*, 380 F. Supp. at 292.

jurisdictional limitation. There is, after all, nothing in the "cases or controversies" clause that broadens federal jurisdiction with regard to election law and abortion, or to class actions. If a moot case is outside of Article III's grant of federal jurisdiction because it is not a "case or controversy," then that must be true even if the action concerns election law or abortion, and regardless of whether it satisfies Rule 23's requirements for a class action.[202] Conversely, if the Court's exercise of jurisdiction over a subset of moot cases is proper—which Justice Scalia does not question—then the Court must have discretion to exercise jurisdiction over at least some moot cases in other substantive contexts.

In summary, the apparent incoherence in mootness case law is largely the product of the imprecise usage of the term "moot" to refer to two distinct sets of circumstances, which appear to be governed by two distinct sets of rules. Once we recognize that there are two categories of mootness, and that they are governed by very different rules, the confusion resolves, and it becomes clear that there are two doctrines of mootness—one largely Constitutional in nature, according to which a case raising only a moot issue must be dismissed, and the other largely prudential, pursuant to which federal courts may hear cases rendered moot by the expiration of plaintiff's personal stake, but, depending on the court's assessment of certain prudential factors, may also dismiss such cases. That the familiar "exceptions" to mootness apply only in cases of personal stake mootness[203] reinforces the salience of this distinction.

Despite the continuing prevalence of Constitutional rhetoric, the actual decisions of the Supreme Court reveal that it has repeatedly treated personal stake mootness as a discretionary doctrine, under which courts can dismiss or not as they deem appropriate in view of certain prudential considerations—the content of which will be discussed *infra*, in Part III.B. The Court has applied this doctrine of personal stake mootness in class actions and individual actions, and in a variety of substantive areas of law. Recognition that this is what Courts have been doing in the mootness area helps to resolve the apparent inconsistencies within mootness doctrine, and between the ostensible doctrine and the conflicting practice of courts in certain categories of mootness cases.

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[202] *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491 (1983) ("This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution."); *see also* WRIGHT, ET AL., *supra* note 2 § 3521.

[203] The three major exceptions discussed *supra* are solely applicable in cases of personal stake mootness, as each of them applies only where recurrence is at least reasonably likely, while an issue moot case is, by definition, one that has no reasonable likelihood of recurrence as to anyone. *See infra*, Part III.D.

B. The Factors That Guide Prudential Mootness Decisions

My argument that Article III's "cases or controversies" clause does not mandate dismissal of all moot cases does not, of course, entail that Article III concerns have no role in mootness analysis. It is a fact that federal courts are generally reluctant to decide moot cases; however, the determination whether or not to decide a particular moot claim is made, not categorically (based on the answer to the single question "is it moot?"), but case by case, based on a variety of prudential factors, only some of which bear any evident relationship to Article III. These factors include at least the following: (1) Whether the policies that are typically said to be served by justiciability doctrines are sufficiently satisfied under the circumstances of the case; (2) The importance of adjudicating the issue or issues promptly; (3) The effect on judicial authority of hearing and deciding the claim; and (4) The effect on the efficient use of judicial resources of hearing and deciding the claim.

1. Whether Justiciability Policies Are Served By Hearing the Case

The prudential vision of personal stake mootness that I have presented here regards plaintiff's personal stake not as a Constitutional requirement in itself, but as a proxy for the policies that have been said to underlie justiciability doctrines. These justiciability policies are features—such as vigorous advocacy and the sharp presentation of legal issues in a concrete factual setting[204]—that courts consider desirable because they promote better judicial decisionmaking, and which might also be regarded as bearing some relation to Article III's "cases or controversies" clause.[205] Thus, although I argue that personal stake is not—and has not generally been treated by federal courts as—a prerequisite for the exercise of federal jurisdiction, I do concede that Article III and the policies underlying it play a role even in personal stake mootness analysis.

The first step in a proper, prudential, analysis of a personal stake mootness issue is to consider whether the circumstances of the present case are such that these justiciability policies adequately would be served by

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[204] *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 401-03 (1975) (holding that the policies embodied in Article III's cases or controversies clause, including the desirability of vigorous advocacy, may be satisfied through means other than requiring that plaintiff maintain a personal stake until the termination of the litigation); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403-04 (1980) (holding that *Sosna* implicitly held that "vigorous advocacy" could be provided through means other than personal stake).

[205] *See, e.g.*, Honig v. Doe, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring) (stating that "[W]hile an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.")

adjudicating the issue in the present case. In *Geraghty*, for example, far from insisting that personal stake was required by the "cases or controversies" clause, the Court emphasized the *functions* served by the personal stake requirement—namely, ensuring vigorous advocacy and concrete presentation of issues—and then expressly held that both interests could be served without requiring that plaintiff maintain an ongoing personal stake.[206] That courts are following this prudential model of personal stake mootness, rather than the Constitutional model, can be seen from the fact that they do not justify their exercise of jurisdiction by offering an interpretation of Article III's "cases or controversies" clause that would explain their exercise of jurisdiction over this moot case but not another. Rather, they discuss the factual circumstances in the particular case that support the conclusion that the justiciability policies will be served[207]—that is, that in the present case the issues are sharply presented in a concrete factual setting, and that they will be vigorously advocated.[208]

2. Whether the Circumstances Render Prompt Adjudication Desirable or Necessary

The next category of prudential considerations that courts weigh in deciding whether to hear moot claims is whether the circumstances of the case are such as to render a prompt adjudication necessary or desirable. If a claim appears moot it might nonetheless appear desirable, from a prudential point of view, to hear and decide the claim in the present action when one or both of the following circumstances is present: (1) the claim raises that affects absent third parties, or otherwise concerns an issue of significant social importance, and (2) the wrong of which plaintiff complains might "evade review" if it is not reviewed now. Early decision might be desirable in circumstances where the alleged wrongful conduct is causing ongoing harm to others (or is likely to cause harm in the future to the plaintiff or to third parties)[209]—especially if those third parties face obstacles to effective assertion of their rights.[210]

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[206] *Geraghty*, 405 U.S. at 403.

[207] *See, e.g.*, Franks v. Bowman, 424 U.S. 747, 755 (1976) (mootness of a class action depends on whether a sufficiently adversary relationship persists between the parties).

[208] *See, e.g.*, *Geraghty*, 445 U.S. at 403; Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) ("[T]he laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class of people affected by the presently written statute."); Gerstein v. Pugh, 420 U.S. 103, 111 n.11 (1975) ("[I]n this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.").

[209] *See, e.g.*, *Dunn*, 405 U.S. at 333 n.2 (1972) (declining to dismiss moot claim based on ongoing harm to general public); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (same).

[210] This would be the case, for instance, in a durational residency requirement claim, where

Supreme Court case law reveals the importance to mootness decisions of this "evading review" concern: The Court has identified a variety of distinct factual circumstances in which moot claims come within federal jurisdiction, such as: (1) a class action challenge to a short durational residency requirement, where the district court has already certified the class at the time that mootness occurs;[211] (2) a class action challenge to pretrial detention, whether or not the district court has certified a class;[212] (3) a Rule 23(b)(3)[213] class action seeking damages, where defendant has tendered the full amount of the named plaintiff's damages;[214] (4) an individual action seeking to enjoin agency action.[215] The Court has never offered an interpretation of the "cases or controversies" clause that would explain why each of these disparate factual contexts presents a "case" or "controversy" while other moot claims do not. The only thing that these various factual contexts appear to have in common is that they present circumstances where the application of a rule requiring dismissal would appear to insulate from judicial review a whole category of similar claims, because the same circumstance that rendered the claim moot would similarly affect every later claim.[216] One might view these cases as defining a "necessity" exception to any mootness bar—pursuant to which courts could ignore the mootness bar where its application would likely insulate a challenged course of conduct from judicial review.[217]

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third parties who later seek to assert their rights in litigation would predictably find their claims moot before final adjudication. *See, e.g.*, *Dunn*, 405 U.S. at 333 n.2 (refusing to dismiss plaintiff's claim on mootness grounds, despite its evident mootness, based on ongoing harm to general public).

[211] *Sosna v. Iowa*, 419 U.S. 393, 401-02 (1975).

[212] *See Gerstein*, 420 U.S. at 111 n.11 ("The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class.").

[213] Fed. R. Civ. Proc. 23(b)(3).

[214] *See* Deposit Nat'l Guar. Bank v. Roper, 445 U.S. 326, 339 (1980) ("Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions.").

[215] *See, e.g.*, Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911).

[216] Courts have repeatedly stated that it would be unacceptable, and contrary to sound judicial administration to render a whole category of cases immune from judicial review, *see, e.g.*, Corrigan v. City of Newaygo, 55 F.3d 1211, 1214 (6th Cir. 1995) (holding case non-moot in part because "[t]o hold this case moot would require the absurd result that a court would never be able to rule on the Newaygo ordinance."). However persuasive this argument may be from a prudential standpoint, it would be irrelevant if mootness were actually being applied as a jurisdictional bar, given that the very purpose of a jurisdictional limitation is to define a category of cases that is not subject to judicial review.

[217] *See, e.g.*, *Corrigan*, 55 F.3d at 1214. For a slightly different characterization, *see*

3. The Effect on Judicial Authority of Hearing The Claim

Mootness may arise because of the action of a party to the litigation, which creates the potential for intentional manipulation of mootness rules by litigants seeking strategic or tactical advantage. Courts have thus been quite reluctant to enforce mootness doctrine in a way that would give parties the ability unilaterally to destroy federal jurisdiction in order to preserve, or avoid, a judicial ruling.[218] The entire doctrine of voluntary cessation may be seen as one manifestation of this concern with preventing party use of mootness rules to manipulate federal jurisdiction.[219] But numerous other mootness decisions outside of the voluntary cessation area are animated by these concerns as well. A common variant occurs when a repeat litigant, such as the government or a large corporate defendant, seeks to secure mootness, even at the expense of losing the present case, in order to avoid bad precedent. In *Khouzam v. Ashcroft*, for instance, the government agreed—after oral argument—to vacatur of a Board of Immigration Appeals deportation order, in an apparent effort to avoid a court ruling regarding the government's definition of torture.[220] The Court rejected the contention of mootness and proceeded to the merits, commenting that it was "troubled by the government's tactics here," in conceding defeat in the present case in order to avoid an adverse court ruling.[221]

These issues arise most frequently with respect to equitable relief claims, where defendants seek to procure mootness in order to avoid adjudication. But there are other, far less frequent, variants—for instance, (1) plaintiffs seeking to moot their own claims for strategic reasons, or (2)

Suntharalinkam v. Keisler, 506 F.3d 822, 830 (9th Cir. 2007) (Kozinski, J. dissenting) (noting that litigation can be completed very swiftly, albeit at a high cost to both the judicial system and parties, and that capable of repetition exception may best be seen as rule of "judicial convenience" to permit courts to proceed at a slower pace).

[218] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here"); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); *see also* Khouzam v. Ashcroft, 361 F.3d 161, 167-68 (2d Cir. 2004) (rejecting contention of mootness where litigant sought to avoid an unfavorable ruling).

[219] *See, e.g.*, *Grant*, 345 U.S. at 632 n.5 (Describing voluntary cessation doctrine as "the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.") (*citing* United States v. Oregon State Med. Soc'y, 343 U.S. 326, 333 (1952).)

[220] *Khouzam*, 361 F.3d at 167-68 (characterizing issue of government's definition of torture as "dispositive in Khouzam's case, [as well as] clearly an issue of public importance").

[221] *Id.* at 168 (Torture is clearly an issue of public importance. For the government to agree to a vacatur two weeks after oral argument suggests that it is trying to avoid having this Court rule on that issue.").

parties seeking to moot damages claims—that demonstrate that courts are ever-vigilant to prevent parties from gaming mootness to destroy federal jurisdiction.

First, because it is plaintiffs who initially seek relief from the courts, it is most often defendants who seek to procure mootness in order to avoid adjudication of a claim. But it is not always so. The Court has been equally vigilant to protect judicial authority in the rare circumstance where *plaintiffs* appear to be gaming the mootness doctrine by seeking to procure mootness for strategic reasons. In *City of Erie v. Pap's A.M.*[222], for example, the Court refused to dismiss the case as moot *on plaintiff's own motion*, where plaintiff had gone out of business and sold the real estate on which the business had previously been operated. The lower court injunction was still in place, and the Court expressed the concern that plaintiff might have closed the business in an effort to establish mootness and thereby protect the injunction from Supreme Court review.[223] Despite the fact that only the defendant still claimed to be interested in the subject matter of the litigation, the Court held that the case was not moot, based on this possible gamesmanship.[224]

Second, although any discussion of mootness typically will be concerned primarily with injunctive or other equitable relief, (because damages claims rarely become moot),[225] the issues presented by party efforts to game mootness for strategic advantage may occasionally arise with respect to damages claims as well. For example, a plaintiff's damages claim ordinarily may be mooted by a Rule 68 offer of judgment in the full amount of plaintiff's claim.[226] But where plaintiff proceeds in a

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[222] 529 U.S. 277, 278 (2000). In *Pap's A.M.*, the plaintiff, operator of a nude dancing establishment, challenged an anti-nudity ordinance. After securing an injunction below, plaintiff decided to retire, closed the business, and sold the real estate on which the business had operated. *Id.* at 284-85.

[223] *Id.* at 288.

[224] *Id.* at 288-89; *see also* Albers v. Eli Lilly & Co., 354 F.3d 644, 646 (7th Cir. 2004) (refusing to dismiss claim on petitioner's motion, stating: "One good reason to exercise discretion against dismissal is to curtail strategic dismissal . . . We think it best . . . to carry through . . . [so that] an attempt to make the stock of precedent look more favorable that it really is may be foiled."); *cf also Suntharalinkam v. Keisler*, 506 F.3d 822, 828 (9th Cir. 2007) (Kozinski, J. dissenting) ("That petitioner's counsel has filed a motion that can do his client zero good, and possibly great harm, for no apparent reason other than to avoid an adverse ruling that would affect other parties in other cases, militates strongly against exercising our discretion in favor of granting the motion at this late date.").

[225] Perhaps it is more accurate to say that in those circumstances when a damages claim does become moot, it is exceedingly rare to have a plaintiff who still wishes to litigate, because for a damages claim to become moot the defendant ordinarily must pay it in full—or bindingly agree to do so, as by an offer of judgment under Rule 68. Fed. R. Civ. Proc. 68.

[226] *See, e.g.*, Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004)("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation"); *see also* FED. R. CIV. PROC. 68.

representative capacity, such as in a class action, a Rule 68 offer to the named plaintiff might be used in an effort to moot the claim prior to a court decision on class certification (and thus perhaps to avoid a decision on the merits entirely).[227] In such cases, courts have not hesitated to protect their authority, and prevent party manipulation, by rejecting the contention of mootness.[228]

4. The Effect on Judicial Efficiency of Hearing The Claim

Courts are, of necessity, always concerned with efficiently using their limited judicial resources,[229] and determinations on matters of justiciability are no exception.[230] The Supreme Court has noted that dismissal on justiciability grounds at an early stage of the litigation may tend to conserve judicial resources, whereas dismissal at a later stage of an action, when significant judicial resources have already been expended, may waste judicial resources, particularly when the claim is likely to recur.[231] Thus, dismissals for mootness will, as a general rule, do less to conserve judicial resources than dismissals for lack of standing, and may actually waste resources.[232] The "cases or controversies" clause, of course, says nothing about sunk costs.[233] Thus, the Constitutional model of mootness, which insists that any moot case must be dismissed because it does not present a case or controversy, does not permit courts to weigh the effect on judicial efficiency of a dismissal. The Supreme Court, however, has held that it is entirely proper for federal courts to give weight to "sunk costs" in ruling on mootness decisions.[234]

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[227] *See Weiss*, 385 F.3d at 340-41.

[228] *See, e.g.,* Deposit Nat'l Guar. Bank v. Roper, 445 U.S. 326, 339 (1980) (Rejecting contention of mootness based on practical concern that it would undermine Rule 23 and waste judicial resources, because "Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement"); *see also Weiss*, 385 F.3d at 340-41; *id.* at 344 (reversing mootness dismissal based on practical concern that "allowing the defendants here to "pick off" a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure, and frustrate the objectives of this procedural mechanism for aggregating small claims").

[229] *See, e.g.,* Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997).

[230] *See, e.g.*, *Roper*, 445 U.S. at 339.

[231] *See* Friends of the Earth v. Laidlaw Env. Servs., 528 U.S. 167, 191-92 (noting that standing doctrine functions to preserve scarce federal judicial resources, by excluding cases early, whereas dismissal of case as moot after years of litigation "may prove more wasteful than frugal.").

[232] *Id.*

[233] See U.S. CONST. art. III.

[234] *Friends of the Earth*, 528 U.S. at 192 (holding that Courts may consider sunk costs in

The contrast between the rhetoric and reality of mootness case law could hardly be more stark. Courts discuss mootness as thought it were a unified, jurisdictional, doctrine, but regularly determine whether to dismiss personal stake moot cases based on their assessment of a constellation of prudential factors, most of which bear no evident relation to the cases or controversies clause.[235] The courts' consideration of these pragmatic concerns is sensible, and yet cannot be explained under the orthodox Constitutional model of mootness. If the mootness analysis were truly as simple as the Constitutional model professes—a moot case is simply not a "case" or a "controversy," and thus is beyond federal jurisdiction—then it would not matter, for instance, whether the alleged wrong also harms third parties who face obstacles to asserting their own rights, or whether dismissal would waste limited judicial resources, or even whether mootness was procured by a party seeking to manipulate federal jurisdiction. Although one can mount fairly compelling arguments from the standpoint of sound judicial administration for the results in all of these cases, those arguments are entirely prudential in nature, and are not based on any reading of the text of Article III's "cases or controversies" clause. That Courts take account of these factors in deciding whether to dismiss personal stake moot cases reveals the prudential nature of personal stake mootness.

C. The Doctrine of Third Party Non-Mootness

The Court's treatment of personal stake mootness—in class actions and in the subset of "capable of repetition yet evading review" cases in which the likely recurrence is as to someone other than plaintiff—as favoring but not requiring dismissal, is consistent with its treatment of personal stake in the context of other justiciability doctrines. Third party standing doctrine has long permitted plaintiffs to establish the justiciability of their claims by asserting the rights of absent third parties. And, most critically, the Court has always regarded the decision whether or not to permit plaintiffs to rest their claim for relief on the rights of others as a discretionary decision for the court.[236]

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mootness analysis, which "highlights an important difference between the [standing and mootness] doctrines").

[235] *See, e.g.*, Honig v. Doe, 484 U.S. 305, 331 (Rehnquist, C.J., concurring) (noting that Court's consideration of effect on third parties demonstrates that "while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.").

[236] The general rule about third party standing is that plaintiffs may not assert the rights of others. The important point for our purposes, however, is that that rule is regarded as purely prudential—meaning that courts have discretion to permit a party to rest his claim for relief on the rights of others. Warth v. Seldin, 422 U.S. 490, 499 (1975); *see also* United Food and Commercial Workers v. Brown Group, 517 U.S. 544, 557 (1996) (discussing prudential nature of the prohibition

But if the way courts handle personal stake mootness is consistent with the application of third party standing, there remains, at least nominally, a crucial doctrinal difference. Like mootness, third party standing takes the form of a general prohibition against a plaintiff's establishing the justiciability of her claim by reference to the rights of a third party.[237] But there is a crucial doctrinal difference: In the standing context, the Court has always treated the general rule barring plaintiffs from asserting the rights of third parties as prudential in nature—that is, as a restriction imposed by the courts, and not a mandatory limitation imposed by Article III.[238] Yet Courts persist in labeling the rule favoring dismissal of personal stake moot claims as mandatory and jurisdictional.

There is no persuasive justification for this doctrinal difference between standing and mootness. If, in the context of standing, Article III presents no bar to a plaintiff establishing a justiciable claim for relief by reference to the rights of others, then it is difficult to see why the analysis in the mootness context should differ.[239] The same policy concerns apply in both contexts. The three major exceptions to the prudential bar against third party standing each appear to serve prudential concerns similar to those articulated above in Part III.B.1 and B.2. The three exceptions are: (1) where the third party faces obstacles to the assertion of her own rights;[240] (2) where there is a close relationship between the plaintiff and the third party;[241] and (3) where the wrong complained of may chill protected expression by third parties (the first amendment overbreadth doctrine).[242] The first and third exceptions are analogous to the mootness case law that permits courts to exercise jurisdiction if the wrong complained of by plaintiff harms third

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against third party standing).

[237] *See, e.g.*, *Warth*, 422 U.S. at 499 (stating the general prudential rule that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, the Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

[238] *See id.* It is well-established that the case or controversy clause presents no barrier to federal courts' exercise of discretion under third party standing doctrine. As long as the case presents a case or controversy, the question of who is a proper party to assert the claim is regarded as a matter within the Court's discretion. *Id.*; *see also* United Food and Commercial Workers, 517 U.S. at 557.

[239] For a related criticism, *see* Chemerinsky, *supra* note 13 at 692 ("The only apparent answer sounds terribly cynical: a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that.")

[240] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that pharmacist could assert rights of potential customers where customers lacked ability to assert their own rights).

[241] *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that parochial school could assert rights of families to make educational choices for their children).

[242] *See, e.g,* Village of Schaumberg v. Citizens for a Better Env't., 444 U.S. 620, 634 (1980) (permitting litigant whose own activities were unprotected to challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.)

parties who face obstacles to the assertion of their own rights.[243] The second serves the justiciability policy of promoting vigorous assertion of rights and the sharp presentation of issues in a concrete factual context. Taken together, these exceptions demonstrate the Court's recognition, at least in certain contexts, that each of these factors is but one of many prudential considerations to guide courts in determining whether to exercise jurisdiction.

Thus, the established rule that the bar on third party standing is only prudential provides support by analogy for the notion that the personal stake mootness of a claim asserted by a plaintiff with initial standing presents no obstacle to the exercise of jurisdiction by a federal court. The courts' flexible treatment of personal stake mootness in cases—whether class action or otherwise—can be understood as representing a purely prudential doctrine of third party non-mootness. Given their familiarity with third party standing doctrine, it is perhaps not surprising that, as discussed above in Part III.B, federal courts have tended to treat mootness in precisely the same way, holding that once the plaintiff has established initial standing, later events that destroy her personal stake may weigh against the exercise of federal jurisdiction, but they do not bar it *per se*.[244]

In view of the overlapping policy concerns and the courts' far more theoretically defensible treatment of third party standing, it becomes ever more difficult to understand the persistence of the Constitutional model of mootness.

D. Why Not Deconstitutionalize Issue Mootness As Well?

The Constitutional model of mootness has been criticized as incomprehensible,[245] and unnecessary,[246] and some have argued for its wholesale abandonment.[247] This Article has proposed recognizing the

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[243] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 , 333 n.2 (1972); Roe v. Wade, 410 U.S. 113, 125 (1973) (third parties will not know that law will harm them until they are pregnant); Hall v. Beals, 396 U.S. 45, 50-51 (1969) (Brennan, J., dissenting) (noting that rules of ripeness may prevent a potential future plaintiff from challenging the law prior to its application to him).

[244] *See, e.g.*, United States Parole Comm'n v. Geraghty, 445 U.S. 388, 391 (1980); Dunn, 405 U.S. at 333 n.2; Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973); *Roe*, 410 U.S. at 125; Grossberg v. DeEusebio, 380 F. Supp. 285, 292 (N.D. Va. 1975).

[245] *See* Pushaw, *supra* note 11 at 490 (mootness exceptions are "incomprehensible" if federal courts lack Article III jurisdiction to resolve moot cases); *see also* Shults, *supra* note 11 at 1035 ("[E]xceptions to the personal stake requirement are difficult to understand if mootness is constitutionally required").

[246] *See, e.g.*, 13A WRIGHT, ET AL., *supra* note 2 § 3533.1 ("there is reason to wonder whether much reliance should be placed on Constitutional concepts of mootness when these concepts are as flexible as they are and all ordinary needs can be met by the discretionary doctrines).

[247] *See* Lee, *supra* note 11 at 605 (arguing that mootness should be "transform[ed]" into a

prudential nature of personal stake mootness, while retaining a Constitutional conception of issue mootness. One objection that might be raised is that the proposal does not go far enough—that issue mootness, as well, should be regarded as a prudential doctrine not required by Article III's "cases or controversies" clause. There are, however, two principal reasons for stopping short of deconstitutionalizing mootness in its entirety.

First, the case has not yet been made for deconstitutionalizing issue mootness; the arguments for recognizing mootness as prudential apply uniquely to personal stake mootness. This is true both of the theoretical argument advanced above, in Part II.A, and of the descriptive argument offered in Part II.B. The theoretical argument—that the established prudential exceptions to the mootness bar cannot be reconciled with the Constitutional model of mootness—has no application to issue mootness, because the three major exceptions discussed herein are solely applicable in cases of personal stake mootness. This is because each of the exceptions depends on a reasonable likelihood of recurrence,[248] while an issue moot case is, by definition, one that raises an issue with no reasonable likelihood of recurrence as to anyone. Similarly, the descriptive argument—that in circumstances where prudential factors strongly favor hearing a case courts distort the elements of the exceptions as necessary to justify hearing the case—also pertains principally to personal stake mootness, because an issue moot case is unlikely to present a compelling argument for immediate resolution under the prudential factors discussed above, in Part III.B.[249]

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wholly prudential doctrine). For arguments that mootness has always been entirely prudential, *see* Shults, *supra* note 11 at 1030-36 (arguing that "the [mootness] doctrine has been applied more as a matter of discretion"); Pushaw, *supra* note 11 at 489-91 (arguing that "[M]ootness is, and always has been, a matter of discretion.").

[248] None of the exceptions can apply absent some sufficient likelihood of recurrence. The capable of repetition yet evading review exception can be applied only if the issue is reasonably likely to recur. Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 501 (1911). Similarly, the class action exception, which depends on a reasonable likelihood of recurrence as to some other member of the class that plaintiff seeks to represent, cannot apply. Sosna v. Iowa, 419 U.S. 393, 402 (1975). Similarly, the voluntary cessation exception also depends on the likelihood of recurrence, as it bars dismissal based on defendant's cessation of the challenged activity, unless defendant shows that it is "absolutely certain" that the wrong cannot be expected to recur. *See* Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs., 528 U.S. 167, 189 (2000). In a case that is "issue moot," the defendant will presumably have little difficulty establishing the requisite degree of certainty.

[249] Although there are many instances in which courts have distorted doctrine to justify hearing personal stake moot cases, *see supra* Part II.B, I am not aware of any circumstance in which a court has bent the doctrine in order to justify hearing an issue moot case. Nor does such an occurrence seem likely: In a case raising an issue that is not reasonably likely to recur, at least two of the prudential factors are quite unlikely to weigh in favor of hearing the case. There will be no special urgency to prompt resolution as the issue is not affecting third parties and is not reasonably expected to do so. *See supra* Part III.B.2. Moreover, the interest in efficiently using judicial resources will generally counsel against deciding an issue that is unlikely to recur. *See supra* Part III.B.4.

There is also a compelling practical argument for my more incremental approach to deconstitutionalizing mootness: It can be adopted by lower federal courts based on existing precedent. Because the paradigm of mootness offered in this Article is implicit in much of the mootness case law, the explicit adoption of a prudential conception of personal stake mootness can be justified as a reinterpretation of existing precedent,[250] rather than a wholesale abandonment or "transformation" of it.[251] In contrast, previous scholarly proposals to deconstitutionalize mootness in its entirety are likely foreclosed by precedent and thus could be adopted only by the Supreme Court.[252]

Rather than abandon the Constitutional model of mootness, courts should adopt a more sensible interpretation of Article III—one implicit in much of the mootness case law—that holds that what the Constitution requires is a live issue. Whether the plaintiff is the correct person to assert a claim based on that issue should be recognized as a prudential matter. This conception of Article III's relevance to mootness analysis mirrors the interpretation that courts apply in resolving third party standing issues, and the reasons for recognizing the distinction between issue and person in the standing context have at least equal weight in the context of mootness.

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[250] For a thoughtful critique of this methodology of judicial decisionmaking, coupled with an acknowledgement of its prevalence, *see* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2023-2040 (1994).

[251] The overwhelming number of federal cases stating that mootness is a jurisdictional bar derived from Article III is not fatal to this argument, for three reasons: First, many of those cases involved issue mootness, and thus can properly be regarded as limited to that context. Second, a great many of those cases apply a mootness exception, and thus decline to dismiss the case. Musings on the nature of the mootness bar in cases declining to apply it, are properly regarded as *dicta* as they arguably do not "actually decide" the nature of the mootness bar, and do not lead to the result in the case. *See* Michael Abramowicz and Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 961 (2005) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta."). And third, even in the set of cases that describe mootness as a jurisdictional bar and then proceed to dismiss, it is very often the case that the prudential factors would not have supported hearing the case in any event, and thus, that a court applying an explicitly prudential doctrine of mootness would also have dismissed. In these cases, as well, the court's musings on the nature of the mootness bar as jurisdictional or prudential are arguably *dicta*, inasmuch as they are unnecessary to the result. *See* BLACK'S LAW DICTIONARY, 1102 (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)."). Ultimately, the authority regarding the jurisdictional or prudential nature of personal stake mootness is equivocal. There is Supreme Court and Court of Appeal authority for both models, which leaves room for the possibility of reinterpretation of existing precedent by lower courts.

[252] *See* Lee, *supra* note 11, at 605 (suggesting that Supreme Court action would be necessary to "transform" mootness from a Constitutional doctrine into a prudential doctrine).

CONCLUSION

The conventional understanding of mootness as a constitutional bar to federal court jurisdiction is a doctrine at war with itself. The judicially developed exceptions to the mootness doctrine cannot be reconciled with the Constitutional account of mootness, and case law reveals that courts regularly apply mootness, not as a mandatory bar on jurisdiction, but as a prudential doctrine. This disconnect between the rhetoric and reality of mootness doctrine creates confusion for litigants and courts, makes it difficult for litigants to predict results, and invites cynicism about results-oriented decision making.

To resolve this confusion, this Article has developed an alternative paradigm for mootness, based on the recognition that "mootness" refers to two quite distinct doctrines—a constitutional core, which bars federal jurisdiction for cases where the issue is moot, and a larger, prudential curtilage, applicable when the plaintiff's personal stake in the outcome has become moot. This partially prudential model of mootness avoids many of the difficulties inherent in previous scholarly efforts to untether mootness from Article III, and offers three principal advantages over the discredited Constitutional model: (1) it is theoretically coherent; (2) it better explains the results in a wide range of difficult mootness cases, and thus has more predictive power; and (3) by bringing personal stake in the mootness context into alignment with third party standing doctrine, it represents a step in the direction of a more unified theoretical approach to issues of justiciability.

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