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The Constitutional Model of Mootness

Tyler B. Lindley∗

Article III limits the federal courts to deciding cases and controversies, and this limitation has given rise to the black-letter law of standing, ripeness, and mootness. But the law of mootness presents a puzzle: Over time, the Court has recognized various "exceptions" to ordinary mootness rules, allowing federal courts to hear arguably moot cases. On one hand, the Court consistently asserts that mootness doctrine, including its exceptions, is compelled by the original understanding of Article III. On the other hand, the scholarly consensus is that these exceptions are logically inconsistent with the Court’s claims about Article III and that their existence proves that mootness is fundamentally prudential, not constitutional.

This Article seeks to provide a coherent justification for the mootness exceptions within the constitutional model. First, some exceptions are not really exceptions at all. Collateral consequences; voluntary cessation; and capable of repetition to the same plaintiff, yet evading review—these doctrines merely recognize a shift from a present harm to a potential future harm. And that harm might be sufficiently likely to occur when examined in the light of Bayes’ Theorem. Second, the other exceptions, for class actions, are justified through a better understanding of the history of representative litigation. And that understanding also justifies the extension of the capable of repetition, yet evading review exception to non-parties who are similarly situated to the plaintiff. Modern mootness doctrine is

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therefore conceptually consistent with the Court’s understanding of the original meaning of Article III.

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INTRODUCTION

Article III limits federal courts’ jurisdiction to cases or controversies. This limitation has generally been interpreted to mean that federal courts can only hear “cases and controversies . . . traditionally amenable to, and resolved by, the judicial process.” 1 And according to the Supreme Court’s standing doctrine, such cases or controversies, in turn, must have (1) a concrete, particularized

injury in fact (2) that is traceable to the unlawful conduct of the defendant, and (3) that can be redressed by a court order. Even when a plaintiff’s suit initially satisfies those requirements, the Court has interpreted Article III to require a court to dismiss the case as “moot” should there cease to be a justiciable case or controversy at any point in the lawsuit.

Scholarly commentary has generally been very critical of the mootness doctrine, particularly the claim that it is constitutionally required. And yet, the Supreme Court has consistently asserted that the mootness limitation is an Article III requirement rather than a prudential decision made by courts under the circumstances of each case.

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3. Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013) (“We have repeatedly held that an ‘actual controversy’ must exist not only ‘at the time the complaint is filed,’ but through ‘all stages’ of the litigation.” (quoting Alvarez v. Smith, 558 U.S. 87, 92 (2009)).
5. See, e.g., Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964) (“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.”); United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1537 (2018) (“A case that becomes moot at any point during the proceedings is ‘no longer a ‘Case’ or ‘Controversy’ for purposes of Article III,’ and is outside the jurisdiction of the federal courts.” (quoting Already, LLC, 568 U.S. at 91)); Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160 (2016) (“We have interpreted [the Article III case or controversy] requirement to demand that ‘an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed.’” (second alteration in original) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997))); Already, LLC, 568 U.S. at 91 (“A case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—‘when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.’” (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam)); Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc., 528 U.S. 167, 180 (2000) (“The Constitution’s case-or-controversy limitation on federal judicial authority . . . underpins . . . our mootness jurisprudence . . . .”)); Spencer v. Kemna,
One source of the disconnect between the Court and commentators arises out of the so-called “mootness exceptions.” Commentators have criticized the exceptions’ apparent inconsistency with the constitutional model of mootness. Under this account, if the exceptions allow federal courts to hear cases that would otherwise be moot under the constitutional model, then mootness cannot be a constitutional limitation. And if mootness is not constitutional, then current mootness doctrine can be assailed as unduly rigid—and its exceptions not always justifiable—on pragmatic terms.

To date, there has been no thorough conceptional defense of the mootness exceptions as consistent with a constitutional model of mootness; this Article seeks to present such a defense. Although the core relationship between the exceptions and the constitutional model of mootness is sound, some decisions might have been incorrect or have misapplied the doctrine and created inconsistency. But these rogue cases do not undermine the constitutional model because no doctrine is perfectly applied.

Before mounting the defense, though, it is important to properly frame the question this Article seeks to answer. The question is a factual one—did courts at the time of the founding...

523 U.S. 1, 18 (1998) (“But mootness . . . simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so.”); Honig v. Doe, 484 U.S. 305, 317 (1988) (“[W]e address the suggestion . . . that this case is moot. Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. That the dispute between the parties was very much alive when suit was filed . . ., cannot substitute for the actual case or controversy that an exercise of this Court’s jurisdiction requires.” (footnote omitted) (citations omitted)).

6. See, e.g., Hall, supra note 4, at 584–88 (arguing that the mere existence of the exceptions disprove the constitutional model because they are not “derived from the pertinent constitutional provision”); Shults, supra note 4, at 1036 (“[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 4, at 490 (concluding that the “exceptions are incomprehensible if federal courts lack Article III jurisdiction to resolve moot cases at all”); see also Bradley & Young, supra note 4, at *12–16, *14 n.82 (arguing that a standing rule should “admit of the sort of prudential exceptions that exist in mootness . . . doctrine” and asserting that some “aspects of mootness . . . are generally [not] viewed as” constitutionally required).

7. See, e.g., Chemerinsky, supra note 4, at 678–96 (developing several criticisms to mootness and other justiciability doctrines); see also Hall, supra note 4, at 609–16 (arguing that strong prudential concerns guide mootness decisions when the doctrine would lead to undesirable results).
have the power to hear this kind of case? Often, courts and commentators have used shorthand in stating the general rule of mootness: a plaintiff must keep her personal stake sufficient to establish standing throughout the duration of the case; if a plaintiff loses her personal stake at any point of the proceedings, the case must be dismissed. Under this framing, the exceptions certainly allow some cases to proceed even after the plaintiff’s real-world personal stake that helped to establish initial standing has evaporated. Hence, one commentator has suggested that dismissing a case when the underlying issue becomes moot is constitutionally required, while dismissing a case when the plaintiff’s own personal stake in the case becomes moot is merely a prudential question (and ought to be treated as such).

But the ultimate question is not whether the plaintiff has or continues to have a real-world personal stake in the dispute. To be sure, that question matters a great deal in questions of justiciability and is often dispositive. But it is merely a special application of the case-or-controversy requirement. The case-or-controversy requirement restricts the use of judicial power to “cases and controversies . . . traditionally amenable to, and resolved by, the

8. E.g., Campbell-Ewald, 577 U.S. at 160–61 (“If an intervening circumstance deprives the plaintiff of a ‘personal stake in the outcome of the lawsuit,’ at any point during the litigation, the action can no longer proceed and must be dismissed as moot.” (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)); Lee, supra note 4, at 631 (listing cases that allowed the Court to hear cases despite the lack of a plaintiff’s personal stake and despite “previous cases [which] had frozen the personal stake requirement into Article III”). Recently, the Court framed the question slightly differently, which might capture the nuance I am trying to highlight here: “[w]e have repeatedly held that an ‘actual controversy’ must exist not only ‘at the time the complaint is filed,’ but through ‘all stages’ of the litigation.” Already, LLC, 568 U.S. at 90–91 (quoting Alvarez v. Smith, 558 U.S. 87, 92 (1984)). But in the next paragraph of the same opinion, the Court reframed the standard, possibly more consistent with the strict personal stake approach: “[a] case becomes moot . . . ‘when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.’” Id. at 91 (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam)).

9. See, e.g., Sosna v. Iowa, 419 U.S. 393, 397–403 (1975) (refusing to dismiss as moot a case in which during the pendency of the suit the plaintiff satisfied the statutory requirement that inflicted the harm giving rise to the suit); S. Pac. Terminal Co. v. Interstate Com. Comm’n, 219 U.S. 498, 514–16 (1911) (refusing to dismiss as moot a case in which the agency order that originally inflicted the harm giving rise to the suit had expired).

judicial process.”¹¹ In most cases, this traditional approach as adopted by the Supreme Court requires the plaintiff to have (and continue to have throughout the entirety of the litigation) a “legally cognizable interest in the outcome” of the controversy, whether that interest is a personal stake or not.¹²

So, if the traditional view allows a federal court to hear a case in which a plaintiff whose personal stake has evaporated, that is an application of the constitutional model rather than an exception to it.¹³ Because the question is a factual one (a historical contingency), a contradiction between any two methods of answering that question does not on its own defeat the whole theory because the theory does not require the answers to come out the same way or require the results to be politically desirable.¹⁴

Many commentators have attempted to undermine the constitutional model of mootness by asserting that it was created by the Supreme Court in Liner v. Jafco, Inc.,¹⁵ in 1964.¹⁶ But the Court has dismissed moot cases as beyond its power to decide since at least the late nineteenth century,¹² and, at a high level of generality,¹⁷ and, at a high level of generality,

¹² See Already, LLC, 568 U.S. at 91.
¹³ Cf. Stevens, 529 U.S. at 774–78 (detailing the rich historical background of qui tam relator actions, explaining that that history was as an independent reason for finding the case justiciable, and concluding that the “history [is] well nigh conclusive with respect to the question . . . whether qui tam actions were ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process’” (quoting Steel Co. v. Citizens for a Better Envt’t, 523 U.S. 83, 102 (1998))).
¹⁴ Even though it is not required to be, I believe that the conceptional justification laid out here is ultimately more coherent than incoherent.
¹⁶ See, e.g., Hall, supra note 4, at 571 (“[M]ootness was abruptly transfigured, in early January 1964, into a constitutionally mandated jurisdictional doctrine.”); Pushaw, Jr., supra note 4, at 490, 490 n.470.
¹⁷ See, e.g., Singer Mfg. Co. v. Wright, 141 U.S. 696, 700 (1891) (“[The case] would present only a moot question, upon which [the Court has] neither the right nor the inclination to express an opinion.” (emphasis added)); California v. San Pablo & T.R. Co., 149 U.S. 308, 314 (1893) (“The duty of this court . . . is limited to determining rights . . . which are actually controverted in the particular case before it. . . . But the court is not empowered to decide moot questions . . . .” (emphases added)); Allen v. Georgia, 166 U.S. 138, 140 (1897) (noting the “universal practice” of dismissing cases when moot); Hooker v. Burr, 194 U.S. 415, 419 (1904) (“[C]ourts do not sit to decide [moot] question[s].” (emphasis added)); Richardson v. McChesney, 218 U.S. 487, 492 (1910) (“The duty of the court is limited to . . . actual pending
mootness limitations are likely justified by the traditional limits on courts’ jurisdiction. To be sure, early mootness decisions framed the doctrine in terms of “right,” 18 “empower[ment],” 19 and “authority,” 20 rather than explicitly mentioning Article III. But that language is not surprising because those terms were commonly used to frame constitutional issues of jurisdiction at the time. 21 And of the authorities that argue that Liner created the constitutional model out of thin air, I have not found any attempt to explain what other right, power, or authority was lacking in those moot cases other than the judicial power in Article III. What’s more, these cases did not just include circumstances in which the issue itself had become moot but also included circumstances in which the plaintiff’s personal stake had become moot, even when the court could have issued a judicial decision resolving the issue. 22

This Article does not set out to conduct a comprehensive historical analysis of whether Article III requires the dismissal of moot cases as an original matter. However, there is at least a plausible case that it does. If so, this Article argues that the

controversies, and it should not pronounce judgment upon [moot cases].“ (emphases added)); Buck’s Stove & Range Co. v. Am. Fed’n of Lab., 219 U.S. 581, 581 (1911) (per curiam) (concluding that moot cases “must be dismissed” (emphasis added)); United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466, 475–77 (1916) (refusing to “sanction” a lower court’s decision that heard arguments in a moot case and noting the “absence of authority” to hear a moot case (emphasis added)); Shaffer v. Howard, 249 U.S. 200, 201 (1919) (“[T]he controversy has become merely moot and . . . we have no authority to further consider or dispose of it.” (emphasis added)).

The proposition in California v. San Pablo & T.R. Co., that “the court is not empowered to decide moot questions,” 149 U.S. at 314 (emphasis added), was then cited in numerous cases. E.g., Kimball v. Kimball, 174 U.S. 158, 161–62 (1899); Tyler v. Judges of Ct. of Registration, 179 U.S. 405, 408–09 (1900); Hamburg-Amerikanische, 239 U.S. at 475–76.

18. E.g., Singer Mfg., 141 U.S. at 700.
19. E.g., San Pablo, 149 U.S. at 314.
20. E.g., Hamburg-Amerikanische, 239 U.S. at 477.
21. See id. at 476 (citing Dir. of Prisons v. Ct. of First Instance, 239 U.S. 633, 633 (1915) (per curiam) for an example of a case in which the Court “dismissed for want of jurisdiction because the case had become a moot one” (emphasis added)); see also Honig v. Doe, 484 U.S. 305, 339–41 (1988) (Scalia, J., dissenting) (addressing the question and collecting sources).
22. See Singer Mfg., 141 U.S. at 699–700 (dismissing as moot a case where the plaintiff had already paid the tax in dispute, even though the tax law was still in effect and the Court could have ruled on the issue presented by the case).
constitutional view is conceptionally coherent and is not undermined by the exceptions.

The mootness exceptions can be divided into two broad categories: First, some exceptions are not really exceptions at all. These exceptions, instead, are consistent with the requirement that a plaintiff have suffered harm or be sufficiently likely to suffer harm in the future.\(^\text{23}\) This category includes the collateral consequences, voluntary cessation, and capable of repetition (to the same plaintiff) exceptions.\(^\text{24}\) Examining these exceptions through the lens of Bayes’ Theorem can clarify their application. In many cases, the circumstances giving rise to the suggestion of mootness make it relatively more likely that the defendant will engage in that or similar behavior in the future.

The second category centers on the class action. The “class action exception” allows the named plaintiff to continue the litigation as a representative of absent class members even after her personal stake has become moot.\(^\text{25}\) Additionally, because the Article III requirement asks whether the case was traditionally seen as justiciable, federal courts can hear actions that traditionally would have been allowed as class actions in courts of equity at the Founding.\(^\text{26}\) The Federal Rules of Civil Procedure (specifically Rule 23) provide procedural requirements for class actions as prerequisites for federal courts’ ability to order class relief and ensure their judgments will bind unnamed class members. But the question of justiciability—as opposed to whether a judgment binds non-parties—requires only that a case to be traditionally amenable to judicial resolution at the time of the Founding.\(^\text{27}\) Thus, even when a legal harm is capable of repetition only to non-parties who are similarly situated to the plaintiff, federal courts are still permitted

\(^{23}\) Thus, Justice Rehnquist’s assertion that at the time of the earliest known mootness cases “there was no thought of any exception for cases which were ‘capable of repetition, yet evading review’” rings hollow. Honig, 484 U.S. at 331 (Rehnquist, J., concurring). If the exception is an application of basic justiciability doctrines requiring an injury, it would not matter that the Court had not applied the “exception” until no earlier than 1911. See S. Pac. Terminal Co. v. Interstate Com. Comm’n, 219 U.S. 498, 514–16 (1911).

\(^{24}\) See infra Part I.

\(^{25}\) See infra Part II.

\(^{26}\) See infra Part III.

\(^{27}\) See supra notes 11–12 and accompanying text.
to entertain the case if it would have been allowed as a class action at the Founding.

Incorrect or inconsistent decisions do not compel a contrary conclusion. If the practice of federal courts when addressing potentially moot cases is inconsistent with the constitutional model, the answer would not be to abandon the doctrine and embrace a wholly—or even partially—prudential approach. Instead, courts should simply abandon those precedents or parts of the doctrine that allow federal courts to hear cases that were not traditionally amenable to judicial resolution.

On the other side, there are cases in which the doctrine would require dismissal even when not constitutionally required. It is an open question whether federal courts can refuse to decide cases that are otherwise within their jurisdiction, and I do not try to resolve that issue here. Rather, it is sufficient to merely acknowledge that this result (dismissal of a case otherwise justiciable under Article III) does not necessarily undermine the constitutional model of mootness because courts would be refusing to decide Article III cases rather than deciding non-Article III cases. Thus, although I argue that the “evading review” prong of the capable of repetition, yet evading review exception is not constitutionally required, its presence (or what is left of it) does not disprove the constitutional model of mootness.

Part I discusses the non-exception exceptions, arguing that they are consistent with the traditional constitutional model. Part II discusses the class action exception and defends it. And Part III argues that traditional class actions provide the justification, in some circumstances, for the expansion of the capable of repetition exception to non-parties.

28. See Hall, supra note 4, at 588–98 (arguing that the constitutional model is descriptively inaccurate).
29. For a slightly more robust discussion on this issue, see infra Part II.C.1.
30. See infra Part II.C.1.
31. As this term is used in this Article, I mean the type of class actions that were allowed in courts of equity at the Founding but distinguished from modern class actions which class is certified under Rule 23.
I. THE NON-EXCEPTION EXCEPTIONS

The use of the term “exception” to describe this category of doctrines has caused an analytical misstep. Rather than providing an exception to the personal-stake requirement, these doctrines take what is essentially a redressability inquiry (mootness) and turn it into an injury inquiry (ripeness). For example, when a plaintiff seeks an injunction ordering a defendant to cease then-ongoing behavior, the relevant question is whether the injunction would give relief to the plaintiff. When the defendant stops the conduct or the plaintiff’s harm otherwise ceases before the injunction is issued, the injunction can no longer cause the offensive conduct to cease (because it has already ceased) or stop the plaintiff from continuing to incur harm (because the harm is not actively being suffered). The question then becomes whether the threat that the harm reoccurs in the future is likely enough to satisfy the requirements of Article III. If so, then an injunction that orders the defendant to not engage in the offensive conduct going forward will certainly remedy that harm.\(^{32}\) In this Part, I examine each exception from this point of view: when, why, and how accurately each exception captures the threat of the future, reoccurring harm to the plaintiff.

A. Collateral Consequences

Of the non-exceptions, the collateral consequences exception is justified with the simplest explanation. Even some critics of the constitutional model admit that this exception is not really an exception and that it does not pose problems for the constitutional

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32. This feature of the non-exception exceptions is often dismissed because the exceptions purportedly do a poor job at identifying instances in which recurring conduct is sufficiently likely. See, e.g., Hall, supra note 4, at 582 n.90, 589–93 (acknowledging the possibility that in voluntary cessation cases the “case is not moot at all” but dismissing that explanation because the Court has allegedly relaxed the inquiry).

First, as explained in this Part, this critique often relies on a misunderstanding, misstatement, or ignoring of the relevant probability analysis. Second, the extension of the capable of repetition exception from the plaintiff herself to similarly situated non-parties can be separated as a separate exception—and then justified (or not) on its own merit. After this logical step, the critique loses much of its power. And third, any remaining error in application, as opposed to incoherency with the doctrine itself, does not undermine the constitutional model. See infra notes 93–98 and accompanying text.
model. In the pertinent cases, the plaintiff is still suffering an ongoing harm, and a favorable decision can still provide a remedy for that harm.

In the prototypical collateral consequences case, a criminal defendant appeals a conviction, but, while on appeal, he is released from prison or finishes his probation or supervised release. At this point, one could superficially argue that the case is moot. On this account, the criminal-defendant-turned-plaintiff no longer has an interest in overturning the conviction because he cannot be released from incarceration or have burdens of probation or parole lifted. Because there is no relief to be granted, the argument would go, the case is moot and falls outside of an Article III court’s power to decide the underlying question.

The collateral consequences “exception” recognizes that imprisonment or temporary probation restrictions are not the only consequences of a criminal conviction. If there are indeed still consequences that can be reversed or ameliorated by a favorable decision on appeal, then “[i]n no practical sense . . . can [the] case be said to be moot.”

While this non-exception easily fits within the constitutional model of mootness that I set forth here, this analytical approach is exemplary of how the other non-exceptions work: Under the broadest, and perhaps somewhat naïve, conception of “mootness”—in which the plaintiff must keep the exact same personal stake throughout the entirety of the litigation—any event that extinguishes the plaintiff’s personal stake, defined in this narrow sense, renders a case moot. But the plaintiff is still suffering from an ongoing or threatened harm caused by the defendant, and a favorable decision can still provide the plaintiff relief from that harm. In the collateral consequences context, that harm is current in time but collateral and ancillary to the prototypical kinds of harm. With respect to the voluntary cessation and capable of repetition,

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33. See, e.g., Hall, supra note 4, at 576 n.61 (“Strictly speaking, then, the collateral consequences exception is not an exception at all.”).
34. See, e.g., Fiswick v. United States, 329 U.S. 211, 222 (1946).
35. See id. (noting that a felony conviction might eliminate the defendant’s chances of qualifying for naturalization and prevent him from serving on a jury, voting, or holding office).
36. Id.
yet evading review exceptions, the presently inflicted harm ceases, but there is still a future, threatened harm. And in both cases, there remains a case or controversy under Article III in the traditional sense as defined by the Court.

B. Voluntary Cessation

The voluntary cessation exception applies when a plaintiff has alleged that the defendant’s conduct is inflicting an ongoing injury and the defendant later voluntarily ceases to engage in that conduct. In those circumstances, the case does not automatically become moot. In other words, “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.”37 Only when the defendant satisfies the “heavy burden” of establishing that the “challenged conduct cannot reasonably be expected to start up again” does the case become moot.38 So, a defendant must not only establish that he has abandoned the conduct in question but also that “subsequent events [make] it absolutely clear”39 that there is no reasonable expectation that he will “renew[] the practice.”40

As a practical matter, if mere voluntary cessation by the defendant could moot a case, he could cease his conduct whenever he is sued, and then recommence the conduct as soon as the case is

38. Friends of the Earth, Inc. v. Laidlaw Envt Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Exp. Ass’n, 393 U.S. 199, 203 (1968)). Some circuit courts have incorrectly refused to put the burden on the defendant when the defendant is a government entity. See, e.g., Djadju v. Vega, 32 F.4th 1102, 1108 (11th Cir. 2022); Chemical Producers & Distrib. Ass’n v. Helliker, 463 F.3d 871, 878 (9th Cir. 2006). It is plausible that, in some instances, the burden does not shift; rather, the voluntary cessation burden is easier to meet as a practical matter because government entities will be more likely to successfully demonstrate that they will not re-engage in the conduct. See Sossamon v. Lone Star State of Tex., 560 F.3d 316, 325 (5th Cir. 2009) (concluding that there is a lighter burden but only because the court will “assume that formally announced changes to official governmental policy are not mere litigation posturing”). Although some circuits had tried to dismiss early Supreme Court statements to the contrary as “dicta,” see, e.g. Fed’n of Advert. Indus. Representatives, Inc. v. City of Chi., 326 F.3d 924, 930 n.5 (7th Cir. 2003) (with respect to repealing a statute), the Supreme Court has repeatedly made clear that the same burden applies to government defendants, see West Virginia v. EPA, 142 S. Ct. 2587, 2607 (2022); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 n.1 (2017); Parents Involved in Cmtv. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007).
39. Concentrated Phosphate, 393 U.S. at 203.
40. City of Mesquite, 455 U.S. at 289.
dismissed. And if the defendant is never subjected to a negative judicial determination or binding injunction, then an injured plaintiff would need to start afresh each time. This never-ending game would produce various adverse consequences for the plaintiff and for society: increased total legal costs from multiple suits; increased costs per suit because the plaintiff can no longer merely prove a violation of the injunction to prevail; depriving the plaintiff of receiving public recognition of harm and acknowledgement of defendant’s unlawful behavior; significant delay in solving the externality problems that are normally solved when plaintiffs are incentivized to bring suit; slower development of the law; and others.

To be sure, negative consequences alone are not enough to justify hearing a moot case that would otherwise fall outside of Article III’s requirements. But there is at least one additional reason beyond practical consequences that voluntary-cessation cases fit squarely within Article III: Bayesian probability analysis.

1. Bayesian Probability Analysis

Bayes’ Theorem is an approach to conditional probability. In simple terms, the analysis applies if the probability that event $x$ occurs depends on whether another event, $y$, occurs. If the two events are probabilistically independent, the fact that $y$ has or has not occurred does not affect the probability of $x$ occurring. For example, imagine that event $y$ is a coin landing on heads on flip

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41. See Concentrated Phosphate, 393 U.S. at 203 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)).
42. See Friends of the Earth, Inc., 528 U.S. at 192 (explaining that prudential reasons for hearing a voluntary cessation case “[d]o[ ] not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest . . . .”); Richardson v. Ramirez, 418 U.S. 24, 36 (1974) (“[P]urely practical considerations have never been thought to be controlling by themselves on the issue of mootness in [the Supreme] Court.”); cf., e.g., City of Mesquite, 455 U.S. at 289 (noting that practical considerations relate “to the exercise . . . of judicial power” in issuing an injunction but that mootness related to “the existence of judicial power”); Concentrated Phosphate, 393 U.S. at 203–04 (noting that the defendant might establish that the “likelihood of further violations [was] sufficiently low such that injunctive relief was unnecessary, but that the case did not require dismissal”).
43. Event $x$ could be an existing but unknown fact (whether a fire is currently burning) or a future fact (whether it will snow).
1, and that event $x$ is a coin landing on heads on flip 2. That $y$ occurred on flip one does not change the probability that $x$ will occur on flip 2. On the other hand, imagine that event $y$ is pulling a purple Skittle out of a bag of Skittles without looking, and that $x$ is pulling a red Skittle out of the same bag. If $y$ occurs (and the Skittle is not replaced), then $x$ is more likely because there are now fewer non-red Skittles in the bag (even if the increase in probability is very low because there are always criminally too few red Skittles in each bag).

Stated formally, the probability of $x$ given that $y$ has occurred equals the general probability that $x$ occurs times the probability that $y$ occurs given that $x$ occurs, all divided by the general probability of $y$:

$$P(x | y) = \frac{P(x) \times P(y | x)}{P(y)}$$

After observing $y$ occur, a good Bayesian “updates” the probability of $x$ occurring. For example, assume that on average it precipitates in some form in Chicago 125 days out of the year.\textsuperscript{44} Imagine a family plans an entire day outside: at the zoo, to Millennium Park to see the Bean, and on a boat architecture tour of Chicago on the Chicago River. On any given day of the year, there is a 0.34 probability it precipitates.\textsuperscript{45} But the family knows that its outing is scheduled for September, in which there is only a 0.27 chance of precipitation.\textsuperscript{46} And imagine further that the family wakes up and sees dark clouds. The family would consider the likelihood of precipitation to be somewhat more than 0.27.\textsuperscript{47} The family would naturally “update” that probability, adjusting it somewhat upward (and perhaps choosing instead to go to the Willis Tower Skydeck or the Shedd Aquarium). We do this every


\textsuperscript{45.} Of course, it is possible the precipitation for the day occurs at night, when the family is asleep, or when the family is indoors. This discussion is only meant to be demonstrative.

\textsuperscript{46.} See Skilling, \textit{supra} note 44.

\textsuperscript{47.} This assumes, of course, that the presence of dark clouds makes precipitation more likely, an assumption that I hope to be uncontroversial.
day in the normal course of our lives,\textsuperscript{48} often instinctually without explicitly going through the updating process.

Mastering the precise mathematical approach is not necessary to understand its application to mootness. First, neither courts nor commentators have explicitly engaged in this analysis. This Article argues that a more explicit acknowledgement of Bayes’ Theorem helps make the constitutional model consistent. If the justiciability question is whether the harm is sufficiently likely to occur, one cannot say it is likely enough or too unlikely without acknowledging Bayesian probability analysis. Second, even if courts and commentators did engage in a Bayes-style analysis, the probabilities of each variable in the equation are generally (if not always) unavailable. Instead, more generally, the point of using and acknowledging Bayes probability is to properly analyze whether and in which cases voluntary cessation makes a case nonjusticiable under Article III.

In a conventional voluntary cessation case, a defendant engaged in conduct,\textsuperscript{49} was sued for the conduct (and likely had pre-suit interactions with the plaintiff, or with others, concerning the issue more generally), and then ceased the offensive conduct at

\textsuperscript{48} Bayes’ Theorem has also been used to show that people over- or underestimate the true probability of an event occurring. This problem would persist regardless of whether courts explicitly acknowledge the role of Bayes probability. In fact, explicitly acknowledging the role of Bayes probability might help solve the problem to the extent it forces judges to account for that potential misestimation in their probability analysis. Further, in most cases, judges will need to consider only marginal increases or decreases, in which case the absolute value matters less to the analysis. In this example, the exact probability of precipitation would matter less than that the fact that it is more likely to precipitate on this particular day than a randomly selected September day.

\textsuperscript{49} It does not matter that often the conduct is only alleged, and not admitted. The plaintiff must ultimately prove her case regardless. If at any point in the litigation the factfinder decides that the defendant never did engage in the alleged unlawful conduct, then the court should enter judgment in favor of the defendant; under current doctrine, Article III is no more offended here than when a plaintiff’s claim for damages goes unproven. See ACLU v. St. Charles, 794 F.2d 265, 269 (7th Cir. 1986) (“If a plaintiff merely fails to prove injury, his failure goes to damages (or ... right to obtain an injunction), rather than to jurisdiction. Otherwise the consequences of a failure to prove actual or threatened injury ... might allow the plaintiff to start the suit over again.”). In any event, in voluntary cessation cases, the suggestion of mootness usually comes from a defendant who, by claiming that he has ceased the alleged conduct, necessarily admits that he was engaging in that conduct in the past.
some point during the pendency of the litigation. These events, which could be labelled \( \tilde{y}_1, \tilde{y}_2, \) and \( \tilde{y}_3 \), inform the true probability that the defendant will again engage in the conduct after dismissal of the case. Further, the guaranteed absence of a binding judicial decision (\( \tilde{y}_4 \)) would similarly affect the probability the conduct resumes in the future. In most cases, all four “events” individually and collectively make it more likely that the defendant will again engage in that conduct after the case is dismissed.

Of course, not every time a person stops certain conduct is the reoccurrence of the conduct likely, but two factors correct for that possibility: (1) The defendant in these cases ceased the conduct only after the initiation of the litigation. This fact makes it much more likely that the defendant’s change of course, or “reformation” is insincere.\(^{50}\) (2) The defendant still has the opportunity—even if he also has the burden—to establish that the reoccurrence of such conduct is sufficiently unlikely to deprive the court of a case or controversy within the meaning of Article III.\(^{51}\) A defendant could argue that, in his particular case, \( \tilde{y}_1, \tilde{y}_2, \tilde{y}_3, \) and \( \tilde{y}_4 \) decrease the probability of recurrence. Or separately, a defendant could argue that a separate event, \( \tilde{y}_5 \), decreases the likelihood of recurrence and should be considered.

2. Burden Shifting

When viewed from the perspective of probability updating, one can see that the voluntary cessation “exception,” conceptionally speaking, merely recognizes the application of Bayes’ Theorem and shifts the burden of proving the presence of a case or controversy, which at some point was initially satisfied by the plaintiff, to the defendant to prove that there is no longer a case or controversy. This burden shifting is appropriate and should be unobjectionable. At certain stages of the litigation, the plaintiff must affirmatively establish standing—in accordance with the burden of proof necessary for any other element of the cause of action at that stage. For example, at the pleading stage, a “plaintiff must ‘clearly’ . . .


allege facts demonstrating ‘each element’ of standing. After surviving the pleading stage, the plaintiff is presumed to have standing unless and until the defendant moves for summary judgment on that basis. And so on, each step with higher burdens of proof for the plaintiff to satisfy, culminating in a verdict, in which case standing must be proved to the same standard as any element of the claim.


53. The court must also raise a standing issue sua sponte if there are serious concerns about whether the case is justiciable. See, e.g., Kokesh v. Curlee, 422 F. Supp. 3d 1124, 1132 (E.D. La. 2019).

54. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (“The party invoking federal jurisdiction must support ‘each element . . . with the manner and degree of evidence required at the successive stages of the litigation.’); see also id. at 590 (Blackmun, J., dissenting). Lower courts have established a practice of jurisdictional factfinding in which a district court judge can conduct “[i]n essence, . . . a bench trial on the facts that give rise to its subject matter jurisdiction” so long as the jurisdictional issue is not bound up with a merits question. Barnett v. Okeechobee Hosp., 283 F.3d 1232, 1237–38 (11th Cir. 2002); see also, e.g., Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F.2d 884, 891–92 (3d Cir. 1977). Mortensen from the Third Circuit is the landmark case that established this practice and has been cited by many circuits. See, e.g., Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (9th Cir. 1980). Mortensen cites old Supreme Court decisions that rely on a now-repealed statute that did arguably allow district courts to conduct such factfinding. See Mortensen, 549 F.2d at 891 & n.16; Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472; Act of June 25, 1948, ch. 646, 62 Stat. 869; 28 U.S.C.A. Table 1 (West 2023); see also Gibbs v. Buck, 307 U.S. 66, 71–72 (1939) (quoted in Mortensen, 549 F.2d at 891 n.16) (“As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.”) (emphasis added)). But I have found no Supreme Court decision after Congress repealed the statute that endorses such factfinding and exempts jurisdictional issues from Rule 56. See, e.g., Land v. Dollar, 330 U.S. 731, 735 (1947). And none of the recent decisions appear to address the apparent conflict with Lujan—at least with respect to jurisdictional challenges based on standing. See, e.g., Laufer v. Arpan LLC, 29 F.4th 1268, 1275 (11th Cir. 2022); Kennedy v. Floridian Hotel, Inc., 998 F.3d 1221, 1230–33 (11th Cir. 2021); see also 5B CHARLES A. WRIGHT, ARTHUR R. MILLER, & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. Apr. 2022 update).
<table>
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<tr>
<td>Posttrial</td>
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Except when on appeal, if the defendant ceases to engage in the conduct, but does not move to dismiss the case for mootness, the plaintiff would fail to establish standing at the next relevant juncture.\(^{55}\) Because the defendant is asking the court to disturb the normal course of litigation and dismiss the case, the burden is rightly on the defendant to establish that now is the proper time as opposed to the next relevant stage of the litigation.\(^{56}\)

When, instead, the lower court has already entered final judgment (or other intermediate decision, appealable, in part, because of its finality\(^{57}\) or by statute\(^{58}\)), the defendant must bear the

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55. Of course, this is assuming the plaintiff does not amend her complaint (or the court does not explicitly assume an amendment) to seek an injunction based on the likelihood of future conduct. Although the plaintiff would then once again bear the burden of establishing standing, this might make strategic sense to properly set the stage for the factual questions in the litigation going forward, particularly at trial.

56. And because the harms are so similar (the same harm, just temporally distinct), the defendant essentially must prove that the harm has actually ceased. See infra notes 119–120 and accompanying text.

57. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (quoting Swint v. Chambers Cnty. Comm’n, 514 U.S. 35, 42 (1995)) (setting forth the collateral order doctrine, which allows interlocutory appeals when the decision is “conclusive,” “resolve[s an] important question[ ] separate from the merits,” and “effectively unreviewable on appeal from the final judgment . . . .”).

58. See, e.g., 28 U.S.C. § 1292(a) (granting jurisdiction for interlocutory appeals from preliminary injunction decisions, receiverships, and admiralty cases); 28 U.S.C. § 1292(b) (granting discretion for the district court to certify an order for appeal and discretion for the court of appeals to exercise jurisdiction over the appeal); FED. R. CIV. P. 23(f) (granting discretionary jurisdiction over an appeal from a class certification or denial).
burden of proof for another reason. When a case is deemed moot while on appeal from a federal court, three corollaries follow: (1) the defendant is entitled to appellate review of the lower court’s decision, (2) that decision will not be adequately reviewed because the appellate court no longer has (or never had) jurisdiction, and (3) that decision should therefore be vacated as if it were never entered.\(^59\) Like when the plaintiff sues and requests that the court disturb the status quo, the defendant in these cases is asking the appellate court to disturb the lower court’s decision. The party who is seeking to change the status quo bears the burden of proof.\(^60\)

While some questions are reviewed \textit{de novo} on appeal, many appellate doctrines are put in place to favor the status quo (the lower court’s opinion) and require the challenger (here, the defendant arguing that the case is moot) to overcome some level of burden: any standard of review less strict than \textit{de novo},\(^61\) addressing new arguments only when they support affirmation,\(^62\) split appellate courts affirming the lower court opinion,\(^63\) and others.

3. \textit{Inconsistent Decisions}

To be sure, there are cases in which federal courts have failed to rigorously apply this test — to say the least. The fact that courts have incorrectly applied certain doctrines is not fatal to my enterprise. This conceptional defense of the constitutional model provides a clear delineation between permissible and impermissible applications of the mootness exceptions and explains why the exceptions are constitutionally justified. This alone is a step forward


\(^{62}\) See, e.g., Stahmann Farms, Inc. v. United States, 624 F.2d 958, 961 (10th Cir. 1980) (noting that arguments raised for the first time on appeal are more likely to be considered when they favor affirmation of the lower court).

\(^{63}\) See United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam) (affirming the lower court decision by an equally divided court).
from the general consensus that the mere existence of the exceptions disproves the constitutional model.\textsuperscript{64}

One of the starkest instances is in the Supreme Court’s decision in \textit{City of Erie v. Pap’s A.M.}\textsuperscript{65} There, the city of Erie, Pennsylvania, enacted a “public decency ordinance” that banned any intentional appearance “in public in a ‘state of nudity.’”\textsuperscript{66} Pap’s hosted performances of nude dancing, and its dancers were required to dress differently as a result of the ordinance.\textsuperscript{67} Pap’s sued in state court for an injunction that would enjoin the city from enforcing the ordinance.\textsuperscript{68} The state courts granted and upheld the injunction under the theory that the ordinance violated the First Amendment, and the Court granted certiorari.\textsuperscript{69}

However, after the state supreme court had affirmed the injunction but before the Supreme Court heard the appeal, Pap’s closed the establishment.\textsuperscript{70} Its owner—who was seventy-two at the time—submitted an affidavit that “he [did] not intend to invest—through Pap’s or otherwise—in any nude dancing business.”\textsuperscript{71} If the Court would have applied the voluntary cessation exception with any degree of strictness, it would have likely vacated the lower court’s opinion and remanded with instructions to dismiss the case for lack of jurisdiction.\textsuperscript{72} That the appeal was from a state court complicated matters, though, because the Court had previously concluded that it could not vacate a state court’s decision if the case lied outside the bounds of Article III.\textsuperscript{73} So, if the Court had dismissed the appeal as moot, both the judgment of the Pennsylvania Supreme Court—and the injunction—would have

\begin{itemize}
\item \textsuperscript{64} Compare Hall, \textit{supra} note 4, at 584–88, with Powell v. McCormack, 395 U.S. 486, 562 (1969) (Stewart, J., dissenting) (“[M]ost importantly, the ‘voluntary abandonment’ rule does not dispense with the requirement of a continuing controversy, nor could it under the definition of the judicial power in Article III of the Constitution.”).
\item \textsuperscript{65} City of Erie v. Pap’s A.M., 529 U.S. 277 (2000).
\item \textsuperscript{66} Id. at 283.
\item \textsuperscript{67} Id. at 284.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id. at 284–87.
\item \textsuperscript{70} Id. at 303 (Scalia, J., dissenting).
\item \textsuperscript{71} Id.
\item \textsuperscript{72} See id. at 304–05 (citing Arizonans for Official English v. Ariz., 520 U.S. 43, 72 (1997)).
\item \textsuperscript{73} See id. at 305 (citing ASARCO Inc. v. Kadish, 490 U.S. 605, 621 n.1 (1989)).
\end{itemize}
remained undisturbed.\textsuperscript{74} Given that the majority of the Court ultimately believed that the decision below was erroneous,\textsuperscript{75} that result must have seemed particularly troublesome.

The Court offered three potential justifications for avoiding the mootness bar and deciding the underlying legal issue: First, despite the affidavit from Pap’s owner, Pap’s was reasonably likely to engage in similar conduct again.\textsuperscript{76} Second, the city was still suffering harm from the adverse decision below and could gain relief from a favorable decision at the Supreme Court.\textsuperscript{77} And, third, dismissing the appeal as moot would “insulate” the injunction “from review.”\textsuperscript{78} The second justification is not based on the voluntary cessation doctrine, and although it might be a basis for a finding of non-mootness, it is irrelevant to the discussion here.\textsuperscript{79} And the first and the third justifications are not persuasive, and neither brings the case within the jurisdiction of Article III courts.

\begin{itemize}
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. at 302 (majority opinion).
\item \textsuperscript{76} Id. at 287–88 (concluding that “Pap’s could again decide to operate a nude dancing establishment in Erie” and that “a life of quiet retirement is [not] his only reasonable expectation”).
\item \textsuperscript{77} Id. at 288.
\item \textsuperscript{78} Id. at 288–89.
\item \textsuperscript{79} It is unclear how much the Court relied on this justification. As Justice Scalia explained, id. at 306–07, 307 n.4 (Scalia, J., dissenting), the Court discussed the city’s interest in protecting the judgment as an independent basis for upholding the judgment, but then expressly noted Pap’s “concrete stake in the outcome,” id. at 288–89 (majority opinion) (“And Pap’s still has a concrete stake in the outcome of this case because, to the extent Pap’s has an interest in resuming operations, it has an interest in preserving the judgment [below].”). But if the city’s interest were sufficient, then the voluntary-cessation analysis would have been unnecessary. See id. at 307 n.4 (Scalia, J., dissenting).
\end{itemize}

To the extent that the Court did rely on the “lower court decision as injury” justification, it seemed to have based its conclusion on ASARCO, which held that “an adverse decision below suffices to keep a case alive” when the “judgment, if left undisturbed, would cause direct, specific, and concrete injury to the” petitioning party. Id. at 306 (quoting ASARCO, 490 U.S. at 623–24 (alteration adopted)). Justice Scalia’s dissent seems to make three possible counterarguments (or some combination of the three): First, the injunction was not an Article III injury (repeating the argument in the dissenting opinion in ASARCO). Second, the injunction was limited to enforcement against Pap’s, but that assertion seems unlikely given the language of the trial court, Pap’s A.M. v. City of Erie, 1995 WL 610276 (Pa. Com. Pl. Jan. 18, 1995), and state supreme court, Pap’s A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998). Or third, that the problem was that the underlying dispute was no longer adversarial—that is, the Court needs the right appellant and appellee, even on appeal. See infra note 266. Regardless, I bracket the ASARCO issue here and focus, instead, on the Court’s voluntary-cessation analysis.
First, even accounting for past behavior by both the city and the owner, there was no reasonable expectation that Pap’s would again suffer the same harm. In order for Pap’s to again create the circumstances that gave rise to the case, the owner would have had to (1) be alive and capable (2) decide to come out of retirement, (3) choose to operate a nude dancing club (4) through the same Pap’s entity, and (5) do so in Erie, Pennsylvania. Again, Pap’s closed the business after the favorable decision in the Pennsylvania Supreme Court, and its owner (again, seventy-two years old at the time) filed a sworn affidavit that he had no intention of opening any business—not in Erie, Pennsylvania, not a nude dancing business, not through Pap’s. Given these facts, there is hardly a reasonable possibility that the controversy would arise again, let alone a reasonable expectation, regardless of how that is defined.

The Court made two errors in analyzing the likelihood of the plaintiff engaging in the conduct. First, the Court concluded that there was a reasonable expectation that Pap’s owner would not engage in a “life of quiet retirement.” But that was not the relevant inquiry. Even if the Court were right, there are numerous ways in which Pap’s owner might not have enjoyed a “life of quiet retirement” but still not have engaged in conduct giving rise to the same controversy. He could have opened a nude dancing establishment in another city or opened a different type of entertainment establishment entirely, just to name two examples. Second, the Court noted its skepticism of the affidavit because it was not filed until after the Court granted certiorari even though Pap’s closed the establishment before filing a brief in opposition to the petition for writ of certiorari. But that skepticism appears to have been unwarranted. There was no indication that Pap’s owner had formed the intention (or lack thereof) that was sworn in the affidavit before certiorari was granted. And the city made no argument that his affidavit was insincere. Further, if Pap’s had

80. Cf. infra note 114.
82. Pap’s, 529 U.S. at 288.
83. Id.
84. See id. at 304 n.3 (Scalia, J., dissenting).
been trying to insulate the state supreme court’s decision from review, he would have wanted to raise the mootness issue as soon as possible and prevent certiorari from being granted.\textsuperscript{85} Ultimately, even if some level of skepticism was warranted, it is difficult to argue that closing shop before certiorari was even filed increases to a sufficient level the likelihood that Pap’s would operate a nude dancing establishment in Erie, Pennsylvania.

Second, the Court’s worries about the practical insulating effect of dismissing the case as moot rings hollow when there are multiple justiciability doctrines that expressly or effectively prevent cases from being heard, judgments from being reviewed, and harms from being remedied. It is unclear exactly how much the Court relied on this concern in deciding to hear the case. The Court specifically stated that its “interest” in preventing party manipulation “further counsels against a finding of mootness here.”\textsuperscript{86} The constitutional basis for considering that interest, whether “further” implies that it was unnecessary to the outcome, and whether “counsels” means that it could be dispositive or that it is a closure rule when “the issue is close”\textsuperscript{87} are all left ambiguous.

But to the extent practical difficulties were considered in the mootness analysis, it does not follow that the Court could hear the appeal under Article III. “If non-[A]rticle III plaintiffs . . . lose their federal challenge in state court,” that decision is unreviewable.\textsuperscript{88} And while parties can appeal unfavorable judgments, they generally cannot obtain review of unfavorable opinions even though those opinions might have unfavorable reasoning or lead to unfavorable outcomes.\textsuperscript{89} Standing doctrines limit the type and

\textsuperscript{85} The Court is less likely to hear a case if there are procedural obstacles to hearing the merits. \textit{See}, \textit{e.g.}, Davis \textit{v.} Ermold, 141 S. Ct. 3, 4 (2020) (Thomas, J., statement respecting the denial of certiorari) (“This petition . . . does not clearly present [the question]. For that reason, I concur in the denial of certiorari.”).

\textsuperscript{86} Pap’s, 529 U.S. at 288.

\textsuperscript{87} \textit{See} \textit{id.} at 289.

\textsuperscript{88} \textit{See} William A. Fletcher, \textit{The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions}, 78 CAL. L. REV. 263, 280–82 (1990) (noting this practical consequence of the \textit{ASARCO} decision).

\textsuperscript{89} \textit{See} Camreta \textit{v.} Greene, 563 U.S. 692, 703–04 (2011).
timing of cases that come before federal courts in the first instance.\textsuperscript{90} And Congress can strip the federal courts of certain types of jurisdiction at any moment.\textsuperscript{91} In \textit{Pap’s}, one party did not want to continue the litigation and did not have an interest in it. In fact, the Bayesian analysis that can justify the exception applies with particularly weak force here as the underlying harm was the threat of enforcement—not operating the establishment.\textsuperscript{92}

At least for the voluntary-cessation exception, decisions such as \textit{City of Erie} are the exception rather than the norm.\textsuperscript{93} On my count,
the Court has explicitly addressed whether voluntary cessation of certain conduct rendered the case moot in twenty-one decisions. Of those twenty-one decisions, only two—Pap’s and Vitek v. Jones—are inconsistent with the analysis I set out here.

Nonetheless, even these two erroneous (in my view) decisions are not fatal to the constitutional model. Exceeding the judiciary’s limits by deciding moot cases does not negate the existence of that limit any more than the Taft-Hartley Act negated the constitutional limit on Congress enacting bills of attainder or than President Obama’s appointments to the NLRB in 2010 negated the president’s limit on recess appointments. It is also striking that even in Pap’s—the starkest example of a court extending the voluntary cessation stipulated] dismissal is to curtail strategic behavior” and concluding that “[t]he case is not moot” because there was still a dispute over the terms of settlement); Khouzam v. Ashcroft, 361 F.3d 161, 167–68 (2d Cir. 2004).


95. Vitek v. Jones, 445 U.S. 480 (1980). *Vitek* addressed whether an inmate who had been “transferred to the state mental hospital” and had reentered prison had a continuing controversy with the prison officials. *Id.* at 486. The Court cited several voluntary cessation decisions, see *id.* at 487, but it never addressed what conduct the prison officials had voluntarily ceased and why the parole board’s decision to revoke parole made it more likely that the prison officials would transfer the inmate to the mental hospital, see *id.* at 503 & nn.2–3 (Blackmun, J., dissenting). The case might not have been moot, but to the extent the Court’s decision did rely on the voluntary cessation “exception,” the Court appears to have misapplied it.


exception beyond credible limits—the Court still felt compelled to purport to find the requisite probability.\footnote{exception beyond credible limits—the Court still felt compelled to purport to find the requisite probability.} As I argue here, the exceptions are theoretically compatible with the constitutional model. And if mootness doctrine is in fact constitutionally mandated, inconsistent decisions should be overthrown to comply with the reasoning expressed in those decisions themselves, not the other way around.

C. Capable of Repetition, Yet Evading Review

The capable of repetition, yet evading review doctrine traditionally has two distinct prongs: “there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again,” and “the challenged action [is] . . . too short to be fully litigated prior to its cessation or expiration”\footnote{Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam).}—that is, before a final decision can be issued and all appeals exhausted, the harm will necessarily cease and the case become, arguably, “moot.”\footnote{See Roe v. Wade, 410 U.S. 113, 125 (1973) (noting that the nature of pregnancy is such that a woman’s personal stake “seldom [would] survive much beyond the trial stage, and appellate review will be effectively denied”), overruled on other grounds by Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2284 (2022).} This second prong—evading review—is not constitutionally required.\footnote{Even among proponents of the constitutional model, I am not alone in reaching this conclusion. Honig v. Doe, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) (“[T]he ‘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.”).} Thus, that courts have applied it less rigorously over time does not pose even a potential challenge for the constitutional model. Although, as a prudential jurisdictional bar, it is subject to increasing scrutiny.\footnote{See, e.g., Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014) (citing Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014)).}

The first prong, capable of repetition to the same plaintiff, is similar to the voluntary-cessation exception in that it is


100. See Roe v. Wade, 410 U.S. 113, 125 (1973) (noting that the nature of pregnancy is such that a woman’s personal stake “seldom [would] survive much beyond the trial stage, and appellate review will be effectively denied”), overruled on other grounds by Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2284 (2022).

101. Even among proponents of the constitutional model, I am not alone in reaching this conclusion. Honig v. Doe, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) (“[T]he ‘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.”).

constitutionally justified by reference to probability analysis and a current-harm-to-future-harm shift. Like with the evading review prong, courts have expanded the doctrine to include cases in which the harm is only likely to be similarly suffered by other individuals similarly situated. But unlike the evading review prong, the constitutional model must either reject that expansion or provide an independent justification. I seek to provide that justification in Part III; in this section, I address only the exception as it applies to harm that reasonably could reoccur to the plaintiff herself.

1. Evading Review

Whether a case evades review is merely a prudential prong, and it is not a prerequisite to a federal court hearing a case that is otherwise capable of repetition to the plaintiff. Although the fact that it has positive practical justifications does not necessarily preclude it from being constitutionally mandated, there is no constitutional justification for imposing this constraint on federal courts.

Whether a case evades review is completely dependent on the speed at which courts — either by statute or by internal processes — can adjudicate the relevant case. But this limit is somewhat artificial; “cases can be litigated very swiftly when the need arises.” For example, in the Pentagon Papers Case, the Supreme Court received briefing, heard oral argument, and issued an opinion a mere fifteen days from the day the district court issued the first injunction that gave rise to the appeal. Of course, such speed might lead to hastily made decisions, or “take[ ] a considerable toll on the litigants and the judicial process.” But that hardly answers the question. Why not hire more judges, instead? Alternatively, why not limit jurisdiction so courts can quickly handle the cases? Or why not eliminate intermediate

103. See supra notes 41–42 and accompanying text.
104. Suntharalinkam v. Keisler, 506 F.3d 822, 830 (9th Cir. 2007) (Kozinski, J., dissenting).
105. See N.Y. Times Co. v. United States (Pentagon Papers Case), 403 U.S. 713 (June 30, 1971); United States v. N.Y. Times Co., 328 F. Supp. 324 (S.D.N.Y. June 15, 1971); see also Suntharalinkam, 506 F.3d at 830.
106. See Suntharalinkam, 506 F.3d at 830.
review by circuit courts of appeal or the certiorari stage, both of which prolong the case?

The evading review prong has been called one of “judicial convenience,” under which the Court can choose to hear cases that “cannot readily be decided while there is a live controversy.” But there is no need for this prong of the exception because there still is a live controversy in such cases, as discussed below.

This conclusion is buttressed by the fact that this prong is rarely, if ever, the basis for dismissal where the case would otherwise have fallen within the exception. Although courts often note the fleeting or temporary nature of a harm as a consideration that supports hearing the case, I have found no case in which the harm was capable of repetition, but was not “evading review,” and the court dismissed the case as moot. And yet, federal courts’ near non-enforcement of this prong has largely occurred without great dissent. Whereas, when application of the exception has been relaxed in other situations, objections are much stronger and louder, often resting on Article III limitations.

Under my account, it does not matter whether courts choose to dispose of “not evading review” or strictly enforce it. In either event, the constitutional model is not undermined because hearing cases that are capable of repetition but not evading review does not allow a court to issue a decision untethered to a case or controversy. And, similarly, declining to hear a case that is not temporally

107. See, e.g., id. (emphasis added). The same judge to have used that term identified the entire “capable of repetition, yet evading review” doctrine as prudential and not limited by Article III. Id. But as discussed in Part I.C.2, the “capable of repetition” prong is fundamentally distinct. This conclusion is reinforced by the fact that in such cases there is a live controversy.

It is possible that “evading review” is actually a prudential ripeness consideration: federal courts will not hear a case that is capable of repetition unless it was also evading review because the courts would have preferred to decide a case that arose directly from a suit for pre-enforcement review and framed as such, which would avoid the potential messiness discussed in note 55. This account would be subject to the same attack from proponents of an unflagging jurisdiction approach. See infra notes 110–111 and accompanying text. But even if this ripeness account is correct, it does not undermine the constitutional model for the same reasons as if it were a prudential mootness consideration.

108. See Honig v. Doe, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting); Nat’l Wildlife Fed’n v. Costle, 629 F.2d 118, 123 n.19 (D.C. Cir. 1980) (concluding without dissent that three years was not too long to satisfy the evading review prong because the issue had not yet been resolved at the time).

109. See Hall, supra note 4, at 590 n.119 (collecting cases).
limited but is obviously capable of repetition does not extend a court beyond constitutional limits.

I do acknowledge that for those who believe that federal courts cannot refuse to hear any case that is in that court’s jurisdiction, the “yet evading review” prong raises other constitutional concerns. The unflagging jurisdiction approach\(^{110}\) does not follow logically from the constitutional model of mootness or vice versa. Instead, the constitutional model would only prevent federal courts from deciding non-Article-III cases for prudential reasons.\(^{111}\)

2. Capable of Repetition to the Plaintiff

This section addresses the capable of repetition prong of the exception only when the harm is capable of repetition to the same plaintiff. The purported use of this exception when the harm is not capable of repetition to the plaintiff—but instead is capable of repetition to some similarly situated non-party who might be subject to a similar harm in the future—is addressed in depth in Part III.

Due to the nature of this exception, in most cases in which it is applicable, the defendant’s conduct (ofttimes prosecuting a law) is

\(^{110}\) The earliest account of this approach is from Chief Justice Marshall: “We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.” Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); see also Laura A. Smith, Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication, 61 GEO. WASH. L. REV. 1548 (1993) (arguing that judges sometimes invoke prudential rules of standing to “abdicate [their] ultimate responsibility ‘to say what the law is.’”) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Recent decisions have breathed life into the approach, calling into question all prudential justiciability requirements. See supra note 102.

\(^{111}\) Of course, many of the same themes underlying the constitutional model of mootness—constitutionalizing justiciability doctrines, a particular vision for the role of federal courts, and the judiciary’s ultimate authority and duty to resolve concrete disputes between parties—might also support the view that courts do not have discretion to dismiss cases over which they have jurisdiction. But there are reasons why one might conclude that, although the Constitution places limits on federal courts’ jurisdiction, nothing in the Constitution requires courts to act in all cases—such as the authority to refrain from action in cases in equity, the possibility of jurisdiction stripping, or analogies to Congress not using its enumerated powers. And even further, different arguments would need to justify the power to refuse to hear cases arising from the Supreme Court’s original jurisdiction, which is grounded in the Constitution. See generally Texas v. California, 141 S. Ct. 1469 (2021) (Alito, J., dissenting from denial of motion for leave to file complaint).
constant, but the plaintiff’s harm is not. Thus, the defendant most likely (but not necessarily) never changed or planned on changing his conduct. When a defendant has engaged in conduct that causes a harm, and the harm then ceases (but the conduct does not) before a binding judgment is entered against that person, there is every reason to suspect that the defendant will continue to engage in that conduct. Of course, that the defendant will continue to engage in the potentially offensive conduct is not enough alone to create an Article III case or controversy. The plaintiff must also establish that she will engage in a course of conduct such that the defendant’s continued conduct will inflict again harm on her.

There are other cases in which it is the defendant’s action that is short lived by nature rather than by choice. The first decision to coin the phrase “capable of repetition, yet evading review” featured exactly this pattern. In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, the ICC issued an order to private railroads governing their conduct. But the order itself specified that it would only last two years, and by the time the dispute was before the Supreme Court, the order had expired. The Court, though, refused to dismiss the case as moot both because the order might have still affected the legal rights of the parties (collateral

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112. It is worth repeating that the plaintiff’s harm need not be fleeting under the constitutional model. See *supra* Part II.B.1. So long as the plaintiff’s harm can stop (because the law no longer applies to the plaintiff or because the plaintiff’s condition has changed such that she is not suffering harm at the time), the likelihood of repetition of harm can support an Article III case or controversy.

113. And if there is not, then the defendant can move to dismiss the case as moot and the plaintiff would need to argue that the case should continue under a different doctrine, such as voluntary cessation.

114. Exactly what must be capable of repetition is subject to debate. See *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 421–23 (D.C. Cir. 2005) (recounting the various terms that have been used—order, controversy, question presented, wrong, subject to same action, deprivation, injury, and issue—and concluding that they are “equivalent [and] . . . must be defined in terms of the precise controversy it spawns”). No matter the precise formulation, the present case must present an issue, the resolution of which will resolve the controversy capable of subsequently arising, else the likely “repetitive” dispute would be irrelevant to the judicial resolution of the first.


116. *Id.* at 514.

117. *Id.*
consequences) and because the legal question underlying the order was likely to arise again.\textsuperscript{118}

When the defendant’s conduct is not ongoing, the plaintiff must establish that the defendant is likely to engage in the conduct again and that it is likely that the controversy will arise again.\textsuperscript{119} Placing the burden on the plaintiff is consistent with the placement of the burden throughout the exception. The defendant moves to dismiss the case as moot and carries the burden to establish that the plaintiff is no longer suffering the alleged harm. But, and unlike the voluntary cessation exception, the plaintiff must establish that the future conduct and harm is the same controversy. With the voluntary cessation exception, the defendant was required to establish that he wouldn’t return to the same conduct once the case was dismissed. The same conduct would naturally give rise to the same controversy. That logical necessity eliminates the need for the plaintiff to establish that the future harm—which grants the plaintiff a continued right to litigate in federal court—creates the same controversy.

Here again, the harm that gives rise to an Article III case or controversy shifts from a harm that is currently being suffered to one that will be suffered in the future. But the defendant’s conduct that inflicts the future harm is different (at least to an extent) than the conduct that inflicted the previous harm. And the plaintiff must prove that the future harm has a strong enough logical connection to the past harm to constitute a continuing case or controversy. Like establishing standing at the outset of the litigation,\textsuperscript{120} the plaintiff must establish that the cases are connected.

\textsuperscript{118} Id. at 514–16. The Court did not clearly examine the likelihood that the same controversy would arise between the same two parties. But, given the nature of the railroad companies’ business and the ICC’s apparent intent to keep issuing such short-term orders, it seems reasonably likely. However, the case was within Article III because, as the Court explained, “the order . . . may . . . be the bases of further proceedings.” \textit{id.} at 515.

\textsuperscript{119} See \textit{Hall, supra} note 4, at 589 n.118 (citing 13A CHARLES ALAN WRIGHT \textit{ET AL.}, \textit{FEDERAL PRACTICE AND PROCEDURE} § 3533.8).

That showing can be “easier” as a practical matter than establishing standing in a pre-enforcement challenge. 121 In a pre-enforcement challenge, the plaintiff would have to prove that (1) the defendant is engaging in conduct and will likely continue to engage in that conduct, or that he will engage in that conduct in the future, (2) such conduct will be capable of inflicting a legally cognizable harm, and (3) the plaintiff will behave in such a way that the defendant’s conduct will inflict that harm in the future.

By contrast, in a capable of repetition case, the plaintiff will have already proven 122 in the present action that (1) the defendant has engaged in the conduct, and, as mentioned above, he is unlikely to cease the conduct, (2) the defendant’s general type of conduct is capable of inflicting the harm alleged, and (3) the plaintiff has already engaged in a course of conduct that resulted in the harm being inflicted. The plaintiff must then prove that the defendant will continue to engage the conduct (or is likely to engage in the conduct in the future), and that the plaintiff will again engage in the relevant course of conduct.

Both requirements will be easier to prove in many instances because the parties’ past conduct informs Bayesian probability analysis. First, all else equal, defendant’s past conduct makes his future conduct more likely. 123 Other circumstances—such as the lack of a binding judgment and the outside force extinguishing the plaintiff’s harm rather than anything the defendant affirmatively did—further indicate that the probability of defendant engaging in the contested conduct is relatively higher. Of course, for the subset of cases in which the defendant’s conduct is inherently short-lived, the predictive power of past conduct is weaker, but it is still present. Second, in most circumstances, the plaintiff’s conduct that gave rise

121. This can explain why one Supreme Court justice stated that in this context “the Court has lowered the ripeness threshold.” See Vitek v. Jones, 445 U.S. 480, 503 (1980) (Blackmun, J., dissenting).

122. “Prove” is meant merely as a placeholder for whatever burden the plaintiff needed to meet at the particular point in the litigation in which the case became moot. See id.

to the initial harm makes it more likely that she will subject herself to the harm again.\textsuperscript{124} In any event, the standard is the same—the dispute must present a case or controversy within the meaning of Article III—and the application of that standard seems more generous only because the circumstances surrounding these cases generally make satisfying the standard more likely.

To be sure, in certain cases, prior occurrences instead make the reoccurrence \textit{less likely}.\textsuperscript{125} In those instances, the plaintiff must still meet the same standard, but it will practically require a \textit{greater} showing because the baseline probability of reoccurrence is lower. One example is the death of the plaintiff, in which case the reoccurrence of the harm is particularly unlikely.\textsuperscript{126} Such cases must either be dismissed or justified on an independent ground, such as the class action exceptions or where the plaintiff succeeds in making an increased showing of future likelihood in the particular circumstances of the case.

In this sense, it is of course true, as the Court explained in \textit{Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.},\textsuperscript{127} that the traditional “description of mootness as ‘standing in a timeframe’ is not comprehensive.”\textsuperscript{128} But that description is overly narrow not because mootness doctrine permits consideration of “factors not derived from the Case or Controversy Clause” in Article III or because the constitutional model is insufficient to

\textsuperscript{124} See \textit{Susan B. Anthony List v. Driehaus}, 573 U.S. 149, 164–67 (2014) (concluding that there was a credible threat of future enforcement due in part to the past actions of the defendants); see also \textit{S. Pac. Terminal Co. v. Interstate Comm’n}, 219 U.S. 498, 515 (1911) (assuming that the agency and the railroad would continue acting as they had in the past).

\textsuperscript{125} One potential example might be a challenge to residency requirements for voting. That an individual relocated from out of state and established residency in the new state, \textit{see}, \textit{e.g.}, \textit{Dunn v. Blumstein}, 405 U.S. 330, 331 (1972), probably makes it less likely the plaintiff will lose residency and then move back to the state. Another example might be a challenge to abortion laws, where the injury arises from an unplanned pregnancy.

\textsuperscript{126} Of course, if the requested relief can benefit the estate in some way, then the case is not moot at all because the estate is the successor in interest to the claim. \textit{See} \textit{FED. R. APP. P. 43(a)(1)} (procedure for substituting decedent’s personal representative when a party dies while the case is on appeal). But that is less likely with a claim for an injunction, as is often the case in mootness disputes.

\textsuperscript{127} \textit{Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.}, 528 U.S. 167 (2000).

\textsuperscript{128} \textit{Id.} at 190.
explain mootness doctrines. Those who cite the above language in *Friends of the Earth* as an example of the Court backing away from the constitutional model cannot base this conclusion in the opinion itself, which reaffirms the constitutional model. Indeed, *Friends of the Earth* explicitly rejected the prudential and anti-constitutional argument: "This argument from sunk costs does not license courts to retain jurisdiction over" otherwise moot cases, but "the argument surely highlights an important difference between the two doctrines." In rejecting "standing set in a time frame," the Court emphasized the different analytical steps courts take when deciding whether a plaintiff has standing and when deciding whether a case must be dismissed as moot. Thus, "standing set in a time frame" is not "comprehensive," but only because mootness requires a slightly different type of analysis in some circumstances, as this section has explained. However, the analogy is correct in that mootness and standing are rooted in the same Article III principles.

On my count, the Supreme Court has explicitly considered whether a dispute was "capable of repetition, yet evading review" in fifty-eight decisions. Eight were considered justiciable because

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129. *Contra* Hall, *supra* note 4, at 574–75.
130. See id. at 575 (conceding that, "[n]onetheless, the Court still regards mootness as being derived from Article III, and as reflecting Article III concerns." (citing *Friends of the Earth,* 528 U.S. at 180)).
131. *Friends of the Earth,* 528 U.S. at 192.
132. Id. at 189–92.
133. To be sure, *Friend of the Earth* did state that a plaintiff could satisfy the "capable of repetition" exception even if "she would have lacked initial standing had she filed the complaint" after the intervening fact. See id. at 190–91 (citing *Olmstead v. L.C.ex. rel. Zimring,* 527 U.S. 581, 594 n.6 (1991)). The Court (despite citing *Steel Co.*) might have been mistaken to have conceded that there would be no standing because *Steel Co.* had explained that, although "'past exposure to illegal conduct does not in itself show a present case or controversy,'" the plaintiff could have alleged "the likelihood of a future violation." *Steel Co.* v. Citizens for a Better Env’t, 523 U.S. 83, 109 (1998) (quoting *O’Shea v. Littleton,* 414 U.S. 488, 496–97 (1974)). Of course, there is no "presumption" about the defendant resuming the activity if he ceased it before litigation, see id., because not all of the prerequisites are met, see *supra* text accompanying note 49. But that does not mean that the ultimate standard by which justiciability is measured is different in mootness than in standing. See, e.g., *Renne v. Geary,* 501 U.S. 312, 320–23 (1991) (declining to apply the "capable of repetition" exception to "a dispute which became moot before the action commenced" but then analyzing whether there was a "ripe controversy" based on the likelihood of such a repetition).
134. The number of decisions in each category discussed in this paragraph add up to more than fifty-eight because of alternative holdings. In addition, one decision used the
the case fell within the class-action exception and mentioned the “capable of repetition yet evading review” prong as a prudential consideration that allows courts to decline to hear the case even though it is justiciable under Article III.135 Aside from class actions, thirty-five of fifty-one decisions appear to be consistent with the framework presented here—sixteen of which resulted in some form of dismissal.136 Nineteen of those were decided on the merits.137


That leaves sixteen decisions where the Court’s discussion of the exception was inconsistent with the framework set forth in this Part, in all of which the Court reached the merits of the case. Seven of the sixteen were not moot in any sense, even though the analysis with respect to the capable of repetition exception was either lacking or flawed, so the case was within Article III.138 The nine remaining decisions are facially instances in which the Court heard a case falling outside of Article III. But seven of those nine—although not justified by the likelihood of repetition to the plaintiff herself—were potentially justiciable under the traditional class action exception discussed in Part III.139 The remaining two, admittedly, appear to be irreconcilable with the constitutional model and represent instances in which the Court mistakenly

138. See S. Pac. Terminal Co. v. Interstate Commerce Comm’n, 219 U.S. 498, 515–16 (1911) (explaining that the expired order still had consequences for the railroad company); McGrain v. Daugherty, 273 U.S. 135, 180–82 (1927) (explaining that the Senate committee who jailed citizen whose habeas petition was being appealed still existed and still had its investigatory mandate); Carroll v. President of Princess Anne, 393 U.S. 175, 178–82 (1968) (explaining that a past order regulating a protest still had effect on regulations of future protests); Super Tire Eng’g Co. v. McCorkle, 416 U.S. 115, 125–27 (1974) (explaining that the legality of the then-resolved strike still had real-world effects on the parties); Cal. Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 577–78 (1987) (explaining that the government contractor’s challenge to a state agency’s enforcement authority had implications for the then-completed contract); Norman v. Reed, 502 U.S. 279, 287–88 (1992) (explaining that the legality of state rules governing whether candidates could list their party in a prior election determined whether the party could be listed in future elections).

139. See Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (independent political candidate challenging election laws with no discussion of his likelihood to run in the future); Roe v. Wade, 410 U.S. 113, 125 (1973) (expecting mother challenging an abortion restriction with only a mention that women can get pregnant again); Brown v. Chote, 411 U.S. 452, 457 n.4 (1973) (election law challenge with no discussion of likelihood of candidate to run again); Storer v. Brown, 415 U.S. 724, 737 (1974) (election law challenge with no discussion of likelihood of candidate to run again); Vitek v. Jones, 445 U.S. 480, 486–87 (1980) (inmate challenging transfer rules with no discussion of the likelihood that same inmates would be transferred again); Wis. Dep’t of Indus., Lab. & Hum. Relns. v. Gould Inc., 475 U.S. 282, 285 n.3 (1986) (government contractor challenging debarment scheme without analysis on how likely a repeat debarment would be); Honig v. Doe, 484 U.S. 305, 318–23 (1988) (mentally challenged students challenging discipline procedures even though neither was likely to reenter school let alone be subject to the same procedures).
decided a legal question outside the confines of Article III. But, again, one cannot infer from the mere fact that the Court had misapplied its justiciability doctrines that the exceptions are incoherent or inconsistent with the constitutional model, especially in the light of the fact that in none of the eight potentially inconsistent decisions (out of fifty-one total decisions) did the Court purport to dispense with the constitutional requirement.

II. THE CLASS-ACTION EXCEPTION

As defined in this Article, the “class-action exception” applies only to classes that are certified (or, as we shall see, cases in which a party has moved for class certification) under Federal Rule of Civil Procedure 23. As such, the history of the exception is necessarily limited because Rule 23 and even its ancestors are relatively recent. But a brief history of the development of the class action nonetheless illuminates its justification and classification as a case or controversy; the representative nature of the class action under the Federal Rules positions such cases within Article III.

A. History

After Rule 23 was adopted, cases arose in which the named plaintiff, who had established standing to sue the defendant, ceased suffering the harm or received all her requested relief from the defendant. Practically speaking, if these cases had to be dismissed as moot, defendants could pick off named plaintiffs one by one, effectively preventing a class from successfully forming. And,
less nefariously, class actions in which the underlying harm was necessarily fleeting would have trouble continuing to judgment if federal courts required the named plaintiff to be actively suffering the harm throughout the lawsuit. In response, the Court sought a justifiable way to allow class actions to continue even after the named plaintiff’s claim becomes moot.

In Sosna v. Iowa, the plaintiff, a married woman who had recently moved to Iowa, was seeking a divorce. But under Iowa’s durational-residency requirement, a spouse who sought a divorce must have been an Iowa resident for at least one year prior to filing the divorce petition. So she challenged the durational residency requirement as unconstitutional. The district court certified the class under Rule 23(a) pursuant to a stipulation of the parties. Predictably, Sosna had satisfied the durational residency requirement by the time the Court heard the appeal. In fact, she had obtained a divorce in New York, where she had previously lived and her husband still lived. The Court noted that if this particular case were moot, “no single challenger [would] remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion.”

143. The Supreme Court has been slightly misleading when explaining this negative possibility. The class action would not necessarily be doomed, but the named plaintiff would have to satisfy another mootness exception. Of course, the plaintiff might not be able to do so, ultimately dooming the class. But that result would not automatically obtain merely by the fleeting nature of the harm. In fact, one decision characterized this requirement as “one of the policy rules” that allows dismissal of a claim otherwise within its jurisdiction. See Franks v. Bowman Transp. Co., 424 U.S. 747, 756 n.8 (1976); see also supra Part I.C.1.
145. Id. at 395.
146. Id. at 395 (citing IOWA CODE § 598.6 (1973)).
147. Id. at 397–98.
148. Id. at 398.
149. Id. at 398 n.7.
150. Id. at 400. It bears repeating that the class-action exception can be used because it is dispositive, but even if it were unavailable, another non-exception exception could allow the case to proceed. See supra note 143.
The Court offered two reasons why the case was not moot, although it did not neatly separate or clearly analyze how each reason applied. First, the class had “acquired a legal status separate from the interest asserted by appellant.” Second, a “controversy may exist” between unnamed class members (who are represented by the named plaintiff who lost her personal stake) and the opposing party. The majority of the Court’s reasoning focused on this representation line of reasoning, and concluded that as long as the named plaintiff will still “fairly and adequately protect the interests of the class,” she could represent unnamed class members in the ongoing controversy.

151. Throughout the opinion, the Court noted various practical concerns if cases such as this were dismissed. However, this is an example of what is discussed in note 93: the Court explicitly acknowledged that prudential factors could not justify exercising the judicial power over a dispute that otherwise fell outside of Article III but that prudential considerations were merely “factor[s] supporting the result [reached] if consistent with Art[icle] III.” *Sosna*, 419 U.S. at 401 & n.9 (“This view draws strength from the practical demands of time. . . . Such a consideration would not itself justify any relaxation of the provision of Art[icle] III.”).

152. Note here that the Court did not conclude that the case was moot but that the Court could hear it anyway. Instead, it concluded that the circumstances of the case placed it within Article III’s case or controversy requirement. This conceptual approach is consistent with a theme of my argument for the constitutional model—the exceptions do not allow federal courts to expand their power beyond Article III, but they recognize that some disputes were traditionally seen as capable of resolution even when a plaintiff’s personal stake that gave rise to Article III standing does not continue throughout the entirety of the litigation. See *id.* at 402 (concluding that normally a personal stake is required, but that the class action exception falls within Article III even if the controversy only exists between unnamed class members and an opposing party).

153. *Id.* at 399.

154. *Id.* at 401-03 (“Although the controversy is no longer alive as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent.”).

155. Later cases have focused more on the distinct legal nature of the class once certified. *See*, e.g., United States v. Sanchez-Gomez, 138 S.Ct. 1532, 1538 (2018); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75 (2013). To be sure, these two justifications are related. The fact that the class has an independent legal status supports the named plaintiff’s ability to continue the litigation as a representative of that legal group. And the named plaintiff’s representative role supports the class’s ability to continue “litigating” the case through that representative. As discussed in Part III, however, the legal status of the class is more relevant to whether a judgment is binding on unnamed class members, while the representative nature of a class action generally is more relevant to whether the kind of case was traditionally capable of judicial resolution.

156. *Sosna*, 419 U.S. at 403 (quoting FED. R. CIV. P. 23(a)).
Although Sosna was the first case to explicitly recognize and expound on the class action exception, the Court cited a decision from three years earlier, Dunn v. Blumstein. Dunn has been cited as a canonical example of the Court expanding the capable of repetition exception even when it was entirely implausible that the harm would occur again to that specific plaintiff. Yet Sosna recharacterized the decision as an early application of the class action exception. Dunn did not rely on the legal effect of class certification or the ongoing controversy between unnamed class members and the defendant. But Sosna acknowledged that the only plausible reason that the harm in Dunn was capable of repetition was that it was capable of repetition to unnamed class members. Thus, separated by only three years, Sosna purported to recognize an existing class action exception “implicitly” applied in previous decisions and among the lower courts.

B. Timing of Certification Motion

After the Court decided Sosna and explicitly recognized the class action exception, it addressed the question of timing. Sosna had stated that the nature of the claim might mean that the claim will become moot as to the putative named plaintiff before a district court could “reasonably be expected to rule on a certification motion.” Just one month later, the Court addressed whether and when Sosna applied to a case in which the putative named plaintiff’s certification motion had not been granted when the named plaintiff’s claim became moot. It held that a class action concerning allegedly unlawful pretrial detention practices was not moot despite the termination of the named plaintiffs’ pretrial

158. See, e.g., Hall, supra note 4, at 592–93. I discuss the Dunn decision in more detail in Part III. infra notes 285–296 and accompanying text.
159. Sosna, 419 U.S. at 400–02 (citing Dunn, 405 U.S. at 333 n.2).
160. Dunn, 405 at 333 n.2. See also Hall, supra note 4, at 592–93.
161. Sosna, 419 U.S. at 400–02 (“This problem was present in [Dunn] and was there implicitly resolved in favor of the representative of the class”; “The rationale of Dunn controls the present case”; “[i]ke the other voters in Dunn . . .” “. . . as in Dunn . . .”).
162. Id. at 401 & n.10 (collecting cases).
163. Id. at 402 n.11.
detention before certification of the class.\textsuperscript{165} The Court reasoned that “[t]he length of pretrial custody” was unknown, and as such, “it is by no means certain that any given individual . . . would be in pretrial custody long enough” to even certify the class.\textsuperscript{166} Thus, the Court explained, inherently transitory claims can “relate back”\textsuperscript{167} to the filing of the complaint.\textsuperscript{168}

On the other hand, what if the class certification motion had been considered but was denied? In \textit{United States Parole Commission v. Geraghty},\textsuperscript{169} the Court addressed this exact question.\textsuperscript{170} The plaintiff, Geraghty, applied for parole, and his application was denied twice—six months apart from one another.\textsuperscript{171} Geraghty sued the commission, arguing that the parole guidelines were unlawful and the procedures used in considering his parole application were inadequate.\textsuperscript{172} Geraghty moved for certification of a class consisting of “all federal prisoners who are or will become eligible for release on parole.”\textsuperscript{173} The district court postponed ruling on the certification motion pending the disposition of the cross-motions for summary judgment. After ruling for the defendants on summary judgment, the court denied certification.\textsuperscript{174} While an appeal of both decisions was pending, Geraghty was released on mandatory parole.\textsuperscript{175} The Court held that an erroneous denial of a class certification motion can be appealed despite the arguable “mootness” of the putative named plaintiff’s claims.\textsuperscript{176} If successful,

\textsuperscript{165} Id. Although it was unclear when exactly the named plaintiffs’ claims became moot, the Court assumed that the named plaintiffs’ release occurred before the class was certified because it was not clear from the record whether the plaintiffs were in pretrial custody at that time. \textit{id.}
\textsuperscript{166} Id. (emphasis added).
\textsuperscript{167} \textit{Sosna}, 419 U.S. at 402 n.11.
\textsuperscript{168} \textit{Gerstein}, 420 U.S. at 110 n.11 (“At the time the complaint was filed, the [putative named plaintiffs] were members of a class of persons detained . . . .”).
\textsuperscript{170} \textit{id.} at 393–95.
\textsuperscript{171} \textit{id.} at 392-93.
\textsuperscript{172} \textit{id.} at 393.
\textsuperscript{173} \textit{id.}.
\textsuperscript{174} \textit{id.} at 393–94.
\textsuperscript{175} \textit{id.} at 394–95.
\textsuperscript{176} \textit{id.} at 404.
the reversal on appeal effectively ‘‘relates back’ to the time of the erroneous denial of the certification motion.’’177 Thus, the Court has determined that when a harm is inherently transitory, the relevant time is the filing of the complaint,178 and when certification was erroneously denied, the relevant time is the denial of certification.179

But this appears to be erroneous; there should be only one proper time for either type of case: when the plaintiff moves for class certification.180 At least one named plaintiff must have standing for a class certification motion to be granted.181 Before moving for class certification, the putative named plaintiff—and only the putative named plaintiff—‘‘has a legally protected interest

180. Of course, the complaint and the motion for class certification can be filed nearly simultaneously, and the motion need not be preceded by discovery. Cf. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982) (“Sometimes the issues [concerning interests of absent parties] are plain enough from the pleadings . . . .’’); Lisa L. Heller & Jennifer A. Adler, Using Motions to Dismiss to Challenge Class Allegations, BLOOMBERG L. REP. (2009), https://www.robinskaplan.com/~/media/PDFs/Using%20Motions%20to%20Dismiss%20to%20Challenge%20%20Class%20Allegations.pdf (last visited Mar. 24, 2023). But when the certification motion does come later and cannot be considered as having been filed simultaneously with the complaint, that time period is potentially relevant. But because a motion for certification can be filed immediately (and then argued and decided with the benefit of discovery), there is no threat to plaintiffs alleging inherently transitory harms. See, e.g., Gerstein, 420 U.S. at 110 n.11.

This conclusion is strengthened by the argument above (and consistent with the evading review prong) that the practical ability of federal courts to hear a case with adequate speed is not constitutionally mandated. See supra notes 104–109 and accompanying text. After removing the transitory nature of the harm from consideration, any distinction between an action before a class is certified and an action after class certification is erroneously denied is tenuous at best.

Finally, the Court in Geraghty justified relating back to the time of denial of certification as a way to prevent ‘‘[t]he judicial process [from becoming] a vehicle for ‘concerned bystanders’’ and to ‘logically . . . distinguish this case from the one brought a day after’’ the plaintiff’s claim becomes moot. Geraghty, 445 U.S. at 404 n.11 (quoting id. at 413 (Powell, J., dissenting)). Requiring the plaintiff to maintain standing through only the filing of class certification would yield the same result.

181. See Prado-Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) (‘‘[I]t is well-settled that prior to the certification of a class, . . . the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.’’).
in maintaining the suit.” After the filing of the complaint but before certification, the plaintiff could change course and maintain the suit individually. So, allowing the harm to relate back to the complaint would grant that putative named plaintiff the benefit of a justiciability doctrine that is limited to representatives of legally recognized classes. But there was no guarantee at the filing of the complaint that that plaintiff would even seek to represent the class at the time the named plaintiff’s claim became moot.

Even if I am right that the filing of the complaint should not be the relevant time marker for this exception, one might object that the right time is the class certification decision, not the filing of a motion for class certification: “The district court’s certification is what gives the class its distinct legal nature. The cases cited discuss the district court’s certification as being significant, and until then, the putative named plaintiffs are just individuals with no distinct interest in the class.” This counterargument, though, overlooks two points. First, the district judge might delay in ruling on a class certification motion, even postponing official certification as long as possible until the merits are resolved. There is no obligation to decide the certification issue in a sufficiently timely manner. Of course, this possibility alone does not justify changing what I have defined as a constitutional problem.

Second, once the class certification motion has been filed, the purported class is either a class or not a class at the filing of the certification motion. This idea is evident, if not fully fleshed out, in the Court’s decision in Geraghty. If the class had had zero legal significance until certification, then the timing of the exception could not relate back to the denial of class certification. Instead, the relevant timeframe would have been after the appeal was

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182. See Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 676 (7th Cir. 2009). The class-action exception as defined here and by the Court is separate from the traditional-class-action exception developed in Part III and now contained with the capable-of-repetition exception. So, although for purposes of the class-action exception the relevant moment is not the filing of the complaint, the plaintiff might be able to separately satisfy the traditional-class-action exception.

183. This was likely more prevalent when appeals from the class certification decision were categorically barred. See, e.g., Geraghty, 445 U.S. at 393 (noting that the district court postponed ruling on the motion for class certification until he had granted summary judgment to the defendants); infra note 208.
successful and when the class was certified. But the Court recognized that the class was always rightly a class and that the district court’s erroneous denial did nothing to change that.\textsuperscript{184} When the motion for class certification is filed, the correct answer exists; the district court’s choice to spend time making sure it has found the correct answer, or to delay issuing a decision for any other reason, does not change the correct answer or mean that that answer does not exist. As a statute is either always constitutional or unconstitutional, the class is either a class or not. Even the term “certification” implies that the district court certifies the class as a class under Rule 23 rather than “forming” or “creating” the class.\textsuperscript{185} To be sure, a class that was eligible for certification might become ineligible, but that can happen after certification as well. So long as the class is currently certifiable, and one named plaintiff had standing when moving for class certification, the non-moot claims of unnamed class members should be sufficient if those claims would be sufficient after a certification decision (discussed in the next section).

C. Representative Nature of Class Actions

The class-action exception is consistent with the constitutional model. As an initial matter, the class-action exception was originally viewed not as an independent exception, but as a limited application of the “capable of repetition, yet evading review” exception.\textsuperscript{186} For example, in \textit{Weinstein v. Bradford},\textsuperscript{187} the Court explained that \textit{Sosna} represented a departure of the traditional

\textsuperscript{184} Cf. Stephen E. Sachs, \textit{Finding Law}, 107 CAL. L. REV. 527, 562–63 (noting that an interpretation of a statue or constitution can be “wrong the day it was decided” because court decisions do not necessarily represent the “true law”).

\textsuperscript{185} The conclusion that the timing of official class certification is irrelevant finds additional support in the history of the procedure under which seventh-century class actions arose—as a defense against a demurrer for failure to include necessary parties to the suit. See \textit{infra} notes 307–311 and accompanying text.

\textsuperscript{186} See, e.g., \textit{Geraghty}, 445 U.S. at 398 (“When the claim on the merits is ‘capable of repetition, yet evading review,’ the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation.”); \textit{Gerstein}, 420 U.S. at 110 n.11 (“The claim, in short, is one that is distinctly ‘capable of repetition, yet evading review.’”); \textit{Bell v. Wolfish}, 441 U.S. 520, 526 n.5 (1979); \textit{cf. Weinstein v. Bradford}, 423 U.S. 147, 148–49 (1975) (‘\textit{Sosna} decided that in the absence of a class action, the ‘capable of repetition, yet evading review’ doctrine was limited to . . . .” (emphasis added)).

\textsuperscript{187} \textit{Weinstein}, 420 U.S. 147.
capable of repetition, yet evading review doctrine because the “capable of repetition” prong could be satisfied by the potential of recurrent (indeed, often present) harm to absent class members.\textsuperscript{188} So, it does not need a wholly unique justification, but there still must be a justification for allowing a named plaintiff whose individual claim has become moot to continue to pursue the litigation on behalf of the class. That is, why the named plaintiff can pursue the claim—at least temporarily, as the district court can replace or remove that named plaintiff as required by Rule 23(a).\textsuperscript{189}

There are a number of justiciability doctrines that allow individuals to act as a party in federal court even though they would not be able to do so individually. First, only one plaintiff must have standing for each form of relief sought in federal court, even if other plaintiffs would not have any individual right to litigate in federal court.\textsuperscript{190} The plaintiffs who do not have standing are still able to participate in the litigation as parties. But the mere fact that the named plaintiff would not be able to pursue her claim on her own does not undermine the constitutional model.\textsuperscript{191} To be sure, this example alone does not justify the class-action exception, but any effective counterargument must answer why absent named class members are insufficient when plaintiffs in multiple-plaintiff lawsuits are.

Another example is a qui tam relator action. Whether this historical type of action satisfied Article III was addressed only in 2000 in \textit{Vermont Agency of Natural Resources v. U.S. ex rel. Stevens}.\textsuperscript{192}

\textsuperscript{188} \textit{Id.} at 149. To the extent that class or class representative must rely on a harm being capable of repetition (as opposed to absent class members presently suffering a harm), the analysis in Part I.C.2, which discusses the proper analytical framework for the capable of repetition exception, would apply with equal force.

\textsuperscript{189} \textit{Geraghty}, 445 U.S. at 405–07 (“Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. . . . We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue.”).

\textsuperscript{190} \textit{See Town of Chester v. Laroe Ests, Inc.}, 137 S. Ct. 1645, 1651 (2017) (“The same principle applies when there are multiple plaintiffs. At least one plaintiff must have standing to seek each form of relief requested in the complaint.”).

\textsuperscript{191} This line of reasoning is persuasive only to the extent that the one-good-plaintiff rule is constitutionally permissible. For an argument that the rule should be abandoned, see Aaron-Andrew P. Bruhl, \textit{One Good Plaintiff Is Not Enough}, 67 DUKE L.J. 481 (2017).

The Court first rejected the argument that the “bounty” given to relators gave them standing.\textsuperscript{19} The majority then set forth two independent reasons in support of the relator’s standing. The pertinent reason here,\textsuperscript{19} the Court explained that the relator was a partial assignee of the claim of the United States.\textsuperscript{19} The “representational” nature of the relator as an assignee justified the relator’s ability to bring suit grounded partially on the United States’ injury and seeking partially the United States’ recovery. In qui tam actions, the United States is not required to be an active participant, and yet it is the government’s injury that gives the relator standing. So, returning to the class action exception, even though absent class members are not actively involved in the litigation, their lack of participation does not defeat the constitutional model.

One final example is prochain ami standing.\textsuperscript{19} Though present in the litigation, the third party was not a true party; instead, the representative served as “‘an officer of the court[,]’ . . . legally ‘appointed . . . to look after the interests’” of the true party.\textsuperscript{19} The “real party in interest” was the absent third party, who was then bound by the judgment.\textsuperscript{19} So, prochain ami standing allows a third party with no other claim of interest to represent the interests of an absent party who is later bound by the judgment in the action. Similarly, the class action exception allows a named plaintiff to

\textsuperscript{19}\textit{Id.} at 772–73. If the bounty were sufficient, it would create large conceptual and practical problems. Could the government give a dollar to all citizens—or even a large group of citizens—enabling them to bring cases that otherwise would be nonjusticiable? \textit{Cf.} Sprint Commc’ns Co. v. APCC Servs., 554 U.S. 269, 289 (2008) (noting that perhaps only a “dollar or two” could establish standing); \textit{id.} at 305 (Roberts, C.J., dissenting) (same); \textit{cf. also} Transcript of Oral Argument at 9–11, Whole Woman’s Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21–463) (assuming that a government-granted bounty would not be sufficient for standing). Could a private party give a bounty or reward (perhaps just one dollar) and allow anybody to bring suit on their behalf?

\textsuperscript{19} The second reason concerned the rich history of qui tam actions. \textit{Stevens,} 529 U.S. at 774–77. “Article III’s restriction of the judicial power . . . is properly understood to mean ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’” \textit{Id.} at 774 (quoting Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 102 (1998)). Thus, the extensive history of the qui tam action was “well nigh conclusive with respect to the question” of whether it was traditionally amenable to the judicial process. \textit{Id.} at 777.

\textsuperscript{19}\textit{Id.} at 773–74.


\textsuperscript{19}\textit{Id.} (quoting Blumenthal v. Craig, 81 F. 320, 321–22 (3d Cir. 1897)).

\textsuperscript{19}\textit{Id.}
represent the interests of a class, members of which are later bound by the decision on the merits.\textsuperscript{199} Absent class members do not lack legal capacity; instead, they need not be true parties for different reasons. And the named plaintiff is recognized by the court as a representative and has certain obligations to properly represent absent class member’s interests. Thus, the analogous representative nature of the named plaintiff’s participation could explain why a controversy “between a named defendant and a[n absent] member of the class”\textsuperscript{200} permits a named plaintiff whose “controversy is no longer alive”\textsuperscript{201} to continue to represent the class and litigate the case.\textsuperscript{202}

Another objection might come from my other flank: “If a named plaintiff without a live controversy can continue with the suit because of the class action’s representative nature and similar justiciability doctrines, then why does a named plaintiff need to establish standing at all? And if she does not, then the entire enterprise is flawed because the class action exception is rooted in the principle that the putative named plaintiff must have standing at some point.”

But there are other reasons why the putative named plaintiff must have standing at the outset of the litigation (and through filing

\textsuperscript{199} On the plaintiff’s role as a representative, see, for example, FED. R. CIV. P. 23(a)(4); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618–20 (1997) (holding that class representatives must adequately represent the class in negotiating a class settlement). On the binding nature of class actions, see Cooper v. Fed. Rsvr. Bank of Richmond, 467 U.S. 867, 874 (1984) (“There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. . . . A judgement in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim . . . .”).

\textsuperscript{200} Sosna v. Iowa, 419 U.S. 393, 402 (1975).

\textsuperscript{201} Id. at 401.

\textsuperscript{202} Another potential example is the Court’s third-party standing doctrines. The dispute over the propriety of allowing federal courts to hear cases falling under the third-party standing exceptions centers on whether the traditional rule against third-party standing is prudential or constitutional. Compare June Med. Servs. v. Russo, 140 S. Ct. 2103, 2117 (2020), with id. at 2142–46 (Thomas, J., dissenting). If the limitation is properly considered constitutional and the exceptions are impermissible, then the doctrine would not allow for representatives to litigate on behalf of others. If, however, the doctrine is prudential, and the instances in which a third-party can litigate in federal court are permissible, then the doctrine would represent another example of representative litigation.
for class certification).\(^{203}\) First, as developed more fully in Part III, traditional class actions were initiated by a member of the class, who then was excused from joining other, otherwise-necessary parties.\(^{204}\) But the initial plaintiff needed standing to bring the suit because the traditional class action was not a sword, but rather a shield against a defendant’s demurrer for failure to join necessary parties.\(^{205}\)

Second, the putative named plaintiff must first initiate a lawsuit and then file for class certification.\(^{206}\) Although those two filings might be nearly simultaneous, they do not need to be.\(^{207}\) Further, should class certification be denied on statutory grounds or abandoned by the plaintiff, the plaintiff must be able to continue the suit on her own standing.\(^{208}\) If, at the time of filing, the plaintiff

\(^{203}\) Supreme Court decisions asserting this proposition have not clearly or persuasively argued why a named plaintiff must have standing. In fact, in the decision that first clearly stated the proposition, there is no discussion of the issue, and the Court offered a citation to only two cases which offer little additional analysis. See O’Shea v. Littleton, 414 U.S. 488, 494 (1974) (citing Bailey v. Patterson, 369 U.S. 31, 32–33 (1962); Ind. Emp. Sec. Div. v. Burney, 409 U.S. 540 (1973)); see also Warth v. Seldin, 422 U.S. 490, 502 (1975) (quoting O’Shea, 414 U.S. at 494). Lower court decisions have distinguished between the initial Article III analysis and Rule 23(a)’s typicality requirement, but the correct result under either analysis is dismissal. See, e.g., Rivera v. Wyeth-Ayerst Lab’yrs, 283 F.3d 315, 319 (5th Cir. 2002) (“[S]tanding is an inherent prerequisite to the class certification inquiry.”) (quoting Bertulli v. Indep. Ass’n of Cont’l Pilots, 242 F.3d 290, 294 (5th Cir. 2001)); Prado-Steiman v. Bush, 221 F.3d 1266, 1279–80 (11th Cir. 2000) (“[P]rior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.”); LaDuke v. Nelson, 762 F.2d 1318, 1325 (9th Cir. 1985) (“Standing, however, is a jurisdictional element that must be satisfied prior to class certification.”).


\(^{205}\) See id.; FREDERICK CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY 113–16 (1837).

\(^{206}\) FED. R. CIV. P. 23(c)(1)(A) (requiring the court to rule on class certification at “an early practicable time after a person sues or is sued as a class representative” (emphasis added)).

\(^{207}\) See ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 426–27 (9th Cir. 2018) (invalidating a local rule requiring a motion for certification to be filed within 90 days because it was inconsistent with the “[a]t an early practicable time” standard in Rule 23(c)(1)(A) as that standard could be satisfied even when the motion is filed after 90 days (alteration in original) (quoting FED. R. CIV. P. 23(c)(1)(A)).

\(^{208}\) Before the Federal Rules allowed permissive appeals of class certification decisions, see FED. R. CIV. P. 23(f), plaintiffs whose class certification was denied and not certified for appeal, see 28 U.S.C. § 1292(b), were required to wait until after the claim was
does not individually have standing, the complaint should be dismissed because post-filing events, such as a class certification decision, cannot make a non-justiciable case justiciable.\textsuperscript{209}

Third, the Federal Rules themselves do not allow a class to be certified if the named plaintiff does not have standing. A plaintiff without standing cannot meet Rule 23(a)'s typicality requirement.\textsuperscript{210} So, if a plaintiff does not have standing on her own and so can proceed only if she is a representative of the class, her entire case must necessarily be dismissed because she cannot serve as the representative of the class. Under this theory, the constitutional requirement that the named plaintiff have standing is required by the Federal Rules rather than in the abstract.

In sum, the class action exception is not fatal to the constitutional model because it rests on the representative nature of class actions and traditionally representatives were able to conduct litigation even when they did not have a personal stake. Once a class exists — by the filing of an adequate class certification — the named plaintiff becomes a legal representative for the class in

\textsuperscript{209} Circuits are currently split as to whether post-filing events can give rise to standing when a plaintiff amends or supplements her original complaint pursuant to Rule 15. \textit{Compare}, e.g., \textit{S. Utah Wilderness All. v. Palma}, 707 F.3d 1143, 1153 (10th Cir. 2013) (standing determined permanently as of time of filing), \textit{with Scahill v. District of Columbia}, 909 F.3d 1177, 1184 (D.C. Cir. 2018) (an amended complaint alleging facts arising after filing can establish standing); see also \textsc{Rory T. Skowron}, \textit{Comment, Whether Events After the Filing of an Initial Complaint May Cure an Article III Standing Defect: The D.C. Circuit’s Approach}, 61 B.C. L. REV. \textsc{E. SUPP. II}.-230, II.232-35 (2020) (collecting cases and detailing the split). Regardless, the intervening event would in theory be certification, and certification itself would not be proper because the representative would not be able to satisfy the requirements of representing the class. See \textit{infra} note 210 and accompanying text. Further, the complaint would need to be amended, \textit{see Scahill}, 909 F.3d at 1184, which could potentially undermine the original certification decision.

\textsuperscript{210} \textit{See Prado-Steiman v. Bush}, 221 F.3d 1266, 1279 (11th Cir. 2000) ("Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class.").
addition to a plaintiff. So, even when she loses her status as a plaintiff because her personal claim becomes moot, she can continue in her role as a class representative just as other representatives can litigate in federal court.

III. TRADITIONAL CLASS ACTIONS AND CAPABLE OF REPETITION

The greatest challenge to the constitutional model is arguably the extension of the capable of repetition exception to cases in which the harm was capable of repetition to others similarly situated to the plaintiff—but not reasonably likely to be repeated to the plaintiff herself—in the absence of a Rule 23 class action. The extension is used by critics as a justification for dismissing the entire capable of repetition doctrine as inconsistent with the constitutional model.²¹¹ It seems reasonably clear that the justification for the capable of repetition doctrine with respect to the plaintiff herself cannot also justify the extension of that doctrine. The response of many proponents of the constitutional model is to split the two (as I have done here) and claim that the extension is ultra vires²¹² and try to limit its application to certain subject matter areas.²¹³

This Article’s most important argument is that the extension of the capable of repetition doctrine can be squared with the constitutional model. Although traditional class actions can no longer be maintained as class actions unless they meet the demands of Rule 23, whether a case would have traditionally been considered a class action is the relevant Article III question because federal courts can hear cases that were traditionally seen as amenable to, and resolvable by, the judicial process. This Part does not seek to establish the precise boundaries of what qualifies as a traditional class action or to provide a catalogue of cases. Instead, this Part provides a brief history of the traditional class action, explains why the traditional class action is relevant to a justiciability inquiry, argues that it provides a theoretical

²¹¹ See, e.g., Hall, supra note 4 at 589–93.
²¹³ See, e.g., id. at 335–36 (arguing that the extension has been limited to the “narrow areas of abortion and election rights”).
justification for at least some cases, and sketches a few rough characteristics of cases that fall within this exception.

A. The Traditional Class Action

The earliest origins of representative suits come from medieval group litigation. From that tradition, the group litigation in medieval times transitioned into something close to what we would recognize today as a class action in the seventeenth century. Common law courts traditionally allowed only one plaintiff and one defendant. When the strict common law pleading system did not entitle the plaintiff to relief, she could go to a court of equity. As a prerequisite to having your case heard by a court of equity, there had to have been no adequate relief at law—a clear preference for litigating in common law courts. Unlike common law courts, and "peculiar to courts of equity," if a "decision is made . . ., it shall provide for the rights of all persons whose interests are immediately connected with it."

The "necessary parties rule" was summarized in 1742 as follows: "The general rule is, that if you draw the jurisdiction out of a court of law, you must have all persons as parties before this court who will be necessary to make the determination complete,

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214. See Stephen C. Yezell, From Medieval Group Litigation to the Modern Class Action 24–26 (1987) (criticizing the mainstream legal account that identifies the 17th century as the first example of innovation in representative litigation); id. at 38–99 (detailing the structure and development of medieval group litigation); Ortiz v. Fibreboard Corp., 527 U.S. 815, 832 (1999).


216. Calvert, supra note 205, at 1–2.

217. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) ("The necessary prerequisite to the right to maintain a suit for" all equitable remedies is "the absence of an adequate remedy at law."); Thompson v. R.R. Cos., 73 U.S. (6 Wall.) 134, 137 (1867).

218. Calvert, supra note 205, at 1. It seems that the purpose behind this rule is centered on the broad ability of courts of equity to fashion the predetermined equitable remedies compared to the restrictive writ system in common-law courts. With greater latitude to fashion remedies, courts of equity ran the risk of inconsistent judgments and unforeseen consequences due to legal arguments that were not raised by the parties. West v. Randall, 29 F. Cas. 718, 721 (Story, Circuit Justice, C.C.D.R.I. 1820) (No. 17,424) (noting the need "to make a complete decree"; "prevent future litigation"; and "make it perfectly certain[ ] that no injustice shall be done[ ] to anybody "interested by a decree").

219. Ortiz, 527 U.S. at 832.
and to quiet the question.”  

If the plaintiff was not able to join all necessary parties to the action, then the case would be dismissed.  

A modern analogue to this rule is the mandatory joinder rules in Rule 19.  

And like Rule 19, courts of equity developed exceptions for convenience, or possibly political needs.  

For example, “[w]hen compliance . . . was impossible as a practical matter,” the “impossibility exception” allowed courts to hear the case anyway.  

One exception relied on the present party as a representative of the necessary—but-not-present parties, and it later became known as the modern class action. Very early on, the courts of equity found it necessary to make an exception to the rule when the number of interested parties was so great so as to make it impractical—if not impossible—to join them all. Although the chancellor would

220.  Calvert, supra note 205, at 3 (emphasis removed) (quoting Poore v. Clarke, 2 Atk. 515 (1742)). Calvert notes that there was significant uncertainty surrounding the precise nature and scope of the doctrine and the definitions of the terms “interest” and “subject to suit.” Id. at 3–18. However, the precise nature of the rule beyond the basic principle that multiple parties were permitted—and indeed required—is unnecessary to my limited purpose here.  

221.  Id. at 116 (noting that the effect of a successful objection was to grant leave to amend and dismiss only if the lacking party did not amend and add the necessary parties).  


224.  Calvert, supra note 205, at 19 (“[O]ur courts of equity . . . never allow [the necessary parties rule] to produce any inconvenience.”).  


226.  Hazard et al., supra note 225, at 1858–60.  

227.  Id. at 1860; Moffat v. Farquharon, 20 Bro. C.C. 338 (1788) (dismissing the action because “the parties did not appear on the face of the proceedings to be too numerous to be joined as plaintiffs”); Calvert, supra note 205, at 39–40 (discussing Moffat v. Farquharon). Justice Joseph Story’s commentaries seems to have catalogued “numerosity” as a distinct kind of exception to the necessary parties rule (in addition to common interest and voluntary association). See Joseph Story, Commentaries on Equity Pleadings § 97 (John M. Gould 10th rev. ed. 1892); West v. Randall, 29 F. Cas. 718, 722 (Story, Circuit Justice, C.C.D.R.I. 1820) (No. 17,424) (noting exceptions “where the parties are very numerous . . . ; or where the question is of general interest . . . ; or where the parties form a part of a voluntary association” (emphases added)). However, numerosity was a requirement of all kinds of traditional class actions; it was not its own category. Hazard et al., supra note 225, at 1880–81 (“Numerousness, however, was also a characteristic of the classes in his first two
simply allow the suit to proceed, the absent parties were considered—as a matter of legal fiction—to be “parties through the medium of representation.”

In the event the representative obtained a favorable resolution for herself and absent parties, concern about the decision’s binding effect on absent parties and preclusive effect in subsequent actions dissipated. The absent parties would be extremely unlikely to challenge the judgment if it was favorable. In fact, absent parties might even be able to use offensive nonmutual issue preclusion even if the original judgment had not legally affected those absent parties.

Conversely, in the event of an unfavorable judgment, it was much less clear when (or why) that judgment would be binding upon an absent party. But deciding whether a plaintiff could proceed without necessary parties was a fundamentally distinct inquiry from determining whether those absent parties were bound by the decree. Even today, one well-regarded article somewhat cynically concludes that “when push comes to shove, a specific class suit judgment is not binding on a member of the class who wants to relitigate.” Whether or not this assertion is true, a traditional class action could proceed even if the decree would not be binding on the class member—either by the terms of the decision itself or after it had been challenged.
The first rule governing class actions in the United States was promulgated in 1842 as Equity Rule 48, an exception to Equity Rule 47, which governed necessary parties. Equity Rule 48 specifically stated that "the decree shall be without prejudice to the rights and claims of all the absent parties." In 1912, the rules were revised, this time "excising" the portion of old Rule 48 that negated the binding nature of the class action. One drafter of the Equity Rules stated that the language was changed because, as the Supreme Court had held, despite Equity Rule 48 of 1842, that "in every true 'class suit' the decree is necessarily binding upon all parties included in the decree."

Yet, upon reflection, it is clear that not all class action decrees can be binding on absent class members. One particularly stark and disturbing example is the 1940 case of Hansberry v. Lee, a case about whether binding absent class members to a particular state court decree violated the Due Process Clause of the Constitution. A group of owners in a Chicago subdivision allegedly agreed to a restrictive covenant barring the white property owners from allowing blacks to occupy any property in the subdivision (whether renting or purchasing). The covenant would take effect only if the owners of 95% of the property signed it. In 1934 in Burke v. Kleiman, one signer brought an action in state court for an

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234. Id. at 1901. The traditional class action had been accepted in the United States through federal court decisions in the early nineteenth century. See, e.g., Joy v. Wirtz, 13 F. Cas. 1172, 1172 (C.C.D. Pa. 1806) (No. 7,553); West v. Randall, 29 F. Cas. 718, 722 (Story, Circuit Justice, C.C.D.R.I. 1820) (No. 17,424); Wood v. Dummer, 30 F. Cas. 435, 439 (C.C.D. Me. 1824) (No. 17,944); Potter v. Gardner, 25 U.S. 498, 501 (1827).


236. Id. at 1923–24 (citing RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES Rule 38, at 11, reprinted in 226 U.S. 627, 659 (1912)).

237. See Smith v. Swormstedt, 57 U.S. 288, 302 (1853) ("[A] court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.").

238. Hazard et al., supra note 225, at 1924 (quoting JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 240 (Byron F. Babbitt ed., 8th ed. 1933)).


240. Id. at 44–45 (citing Swormstedt, 57 U.S. at 288).

241. Id. at 37–38.

242. Id. at 38.

injunction against a “violation” of the covenant.244 The defendant “stipulated that owners of 95% of the frontage had indeed signed the covenant.”245 The court then recognized the validity of the covenant and issued the injunction.246

When a black family, the Hansberrys, actually wanted to purchase property in the subdivision, a class of their would-be neighbors sought to prevent them.247 Although the previous class action was blatantly collusive (and the state trial court in *Hansberry* admitted as much248), the state courts concluded that the previous judgment was binding on all class members and could not be relitigated.249

The Court reversed, articulating the basis for the circumstances under which the judgment could constitutionally be binding on absent class members: adequacy of representation.250 The Court first noted the general rule that “some members of a class may represent other members . . . where [there is a] sole and common interest of the class.”251 But apart from the procedural joinder issue, there was a constitutional limit to binding absent members. A representative “whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent[ ] does not afford that protection to absent parties which due process requires.”252 In *Hansberry*, the named plaintiff in *Burke* did not represent the interests of either the previous property owners or the Hansberrys, and the defendant did not represent a class at all.253 Thus, the judgment that the restrictive covenant had been effectuated was not binding on the Hansberrys and could in fact be challenged.254

244. *Id.* at 520–21.
250. *Id.* at 42–43; see also Hazard et al., *supra* note 225, at 1944–45.
252. *Id.* at 45.
The Federal Rules of Civil Procedure governing class actions, first enacted in 1938 at the combination of law and equity and substantively amended in 1966, substantially track the constitutional requirements set forth in *Hansberry*. Rule 23(a)(4) requires the court to ensure that the named plaintiff “will fairly and adequately protect the interests of the class”; Rule 23(c)(2) requires notice be given to all class members, the exact procedures of which depend on the type of class; and Rule 23(c)(2)(B) dictates that the absent class members must have the opportunity to opt out and pursue individual claims when claims for damages are more than incidental to any injunctive relief. Thus, if a class satisfies Rule 23, then it will most likely bind absent class members, but the analysis under Rule 23 is not the same as asking whether the class would have traditionally been permitted in a court of equity.

**B. Justiciability Independent of Procedural Rules**

To issue a judgment or preliminary order in a class action, the requirements of Rule 23 must be met. But, as I argued above in...
Part II, an action with class allegations in the complaint can still proceed so long as the court treats it as an individual or multiple-plaintiff action. As we see, the Federal Rules of Civil Procedure restrict the procedure by which a court can hear the class action, and Hansberry and subsequent cases restrict a court’s ability to bind absent class members to that judgment. But neither restrict the constitutional capacity to adjudicate a traditional class action, and there is no constitutional reason that merely the absence of necessary parties (or the failure to have the purported class certified) requires dismissal.

The Federal Rules do not dictate whether a dispute falls within the reach of Article III. Of course, this must be true, as the Federal Rules require dismissal for a host of reasons, none of which are relevant to the justiciability of the dispute. No one could rightly argue that cases in which both parties are residents of the same state disputing a federal defense to a non-federal claim—or diversity cases with less than $75,000 in controversy—are not within Article III. So, similarly, a dismissal for failure to meet the service requirements in the Federal Rules does not imply that the case is not within the “judicial power” granted to federal courts. And, as relevant here, a purported class action that is not certified under the Federal Rules does not automatically lie outside of Article III.

For example, imagine a class action that is allowed in a state court that has relaxed procedural requirements compared to Rule 23. The case subsequently requires resolution of the plaintiff’s challenge to a state law on federal grounds, and it is resolved

262. See supra note 208 and accompanying text.

263. The Court has said that the “class action is a creature of the Federal Rules of Civil Procedure.” Sanchez-Gomez, 138 S. Ct. at 1538. That statement is correct insofar as it refers to whether a district court can issue orders necessary to entertain a class action suit, but, of course, it is not correct to the extent it implies that the Federal Rules created the class action.

264. See, e.g., Fed. R. Civ. P. 4(m) (requiring dismissal if the complaint is not served within 90 days and there is no good cause for the failure).

265. Even in the unlikely event that there are no class actions that would have been allowed traditionally but are barred by Rule 23, the distinction would still matter because not every plaintiff will seek class certification. Cf. Smith v. Bayer Corp., 564 U.S. 299, 315–16 (2011) (focusing on whether the class is certified, not sought).
against the plaintiffs in state court.266 The plaintiff then appeals to the Supreme Court for discretionary review.267 Because “standing in federal court is a question of federal law, not state law,”268 this hypothetical plaintiff would be barred from appealing the state court decision if Rule 23 were determinative of whether a class action were justiciable under Article III.269 To be sure, this result would not be unique to the class action context,270 but I have found no case where the Supreme Court underwent such an analysis—comparing state class action procedure to Rule 23.271 Instead, the proper analysis would rely on determining whether the dispute was traditionally seen as capable of judicial resolution, not whether it would have counterfactually fit within Rule 23.272 And if a class

266. If the question were resolved against the defendants and sustained the challenge, the Supreme Court would (arguably) have jurisdiction founded on the harm inflicted on the defendant—who is seeking to invoke federal jurisdiction—by the adverse judgment. See ASARCO Inc. v. Kadish, 490 U.S. 605, 623–24 (1989); William A. Fletcher, The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions, 78 CALIF. L. REV. 263, 280–82 (1990). Although, it should be noted that the decision in ASARCO, even on its own terms, might be incorrect (at least under current doctrine) to have asserted that the “requisites of a case or controversy are . . . met.” ASARCO, 490 U.S. at 623–24. The defendant’s harm from the state court decision would be traceable to the decision, but it would not be traceable to the opposing party. Compare id. at 618–19 (concluding that appellants met the requisites of standing through tracing the harm to the state court’s judgment, and presumably to the state court itself), with id. at 619 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) for the proposition that the “putatively illegal conduct” must come from the other party); cf. Brief for Amici Curiae Samuel L. Bray, Michael W. McConnell, & Kevin C. Walsh in Support of Petitioners, California v. Texas, No. 19-9840, at *4 (U.S. May 13, 2020) (“Injunctions run against officials not laws . . . .”); Stephen E. Sachs, The Fifth Circuit ACA Case: The Good, the Bad, and the Ugly, THE VOLOKH CONSPIRACY (Dec. 19, 2019), https://reason.com/2019/12/19/the-fifth-circuit-aca-case-the-good-the-bad-and-the-ugly/ (“[T]he plaintiffs’ quarrel is . . . not with the defendants.”).

269. See Fletcher, supra note 266, at 281–82.
270. See id.
271. Of course, this does not conclusively determine that such an analysis would be inappropriate—perhaps because an appeal with those facts has not arisen or been brought before the Court. See generally George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984) (explaining that litigated cases are not necessarily representative of the underlying set of disputes). But it is supporting evidence.
272. The Supreme Court addressed a similar circumstance—a class of defendants—in Richardson v. Ramirez and concluded that the state “is at liberty to prescribe its own rules for class actions.” 418 U.S. 24, 59 (1974); cf. Smith v. Bayer Corp., 564 U.S. 299, 315 (2011)
action under state law requires that a named plaintiff meet only the standards established in courts of equity at the time of the Founding, the class falls within Article III and can be resolved by the Supreme Court on appeal.

Another example is when parties stipulate to prerequisites of class certification. In *Sosna*, the class of Iowa residents challenging the durational residency requirements sued, among others, an individual state court judge, who “sat in a single county or judicial district.”273 The parties stipulated to the numerosity, impracticable joinder, typicality, and adequacy of representation requirements of Rule 23(a).274 The district court accepted the stipulation and certified the class.275 Despite noting the dubious nature of the stipulation and the corresponding certification decision,276 the Supreme Court did not review or disturb the certification decision.277 In fact, it specifically called the stipulation a waiver of a “nonjurisdictional defect[ ].”278 In contrast to the mootness question, which was jurisdictional, the Court allowed the parties to “waive [the] nonjurisdictional defect[ ]” and reached the merits of the case.279 The Court would likely not have proceeded to the merits if the potentially erroneous stipulation or incorrect certification decision rendered the case nonjusticiable. If parties can stipulate to a class action,280 then the requirements in the Federal Rules are

("Federal Rule 23 determines what is and is not a class action in *federal court*, where McCollins brought his suit.” (emphasis added)).

274. *Id.* at 397.
275. *Id.* at 397–98.
276. See *id.* at 398 n.5.
277. *Id.* at 397–98.
278. *Id.* at 398 (“While the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual ‘case or controversy,’ and . . . we feel obliged to address the question of mootness before reaching the merits . . . .” (citation omitted)).
279. See *id.* at 397–98, 404–10.
280. Of course, the stipulation might hide defects in the adequacy of the representation, which would render the judgment powerless against absent class members. See supra notes 258–260 and accompanying text. This wrinkle also supports the conclusion that justiciability of a class action is separate from the question of preclusive effect (the focus of Rule 23).
not jurisdictional and failure to meet them is not fatal to Article III jurisdiction.\footnote{281}

\textbf{C. Theoretical Justification for Capable of Repetition to Others}

The “true” class action exception is an exception to the capable of repetition yet evading review exception’s requirement that the harm be capable of review to the plaintiff herself. Even if the harm is not sufficiently capable of repetition to the plaintiff, it might be ongoing to absent class members—or at least capable of repetition to others in the class.\footnote{282} So, if the constitutional model is correct, Article III allows class actions to be litigated by a class representative who initially satisfied standing but whose personal stake has since extinguished because such disputes were traditionally seen as capable of resolution through the judicial process.

Further, as I just argued,\footnote{283} the Federal Rules of Civil Procedure cannot make a justiciable case nonjusticiable. If that argument is true, then traditional class actions, which cannot bind absent class members, a similar conclusion could be reached when a district court tentatively certifies the class action. \cite[See Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982) (“Even after a[n early] certification order is entered, the judge remains free to modify it” because it is “‘inherently tentative.’” (quoting Lybrand v. Livesay, 437 U.S. 469 n.11 (1978))). Of course, at some point before sending notice to the class or entering a judgment purporting to bind the class, the judge must make a final decision. \cite[id. (noting the tentativeness of class certification orders “particularly during the period before any notice is sent to members of the class”). To the extent that “actual... conformance with Rule 23(a) remains... indispensable,” this line of reasoning is less persuasive. \cite[id. On the other hand, if some circumstances justify proceeding to the merits, a judge could effectively thwart Rule 23(c)(1) and hear a case on the merits that might or might not be within Article III. \textit{But cf. supra} note 203 (noting the consensus among several circuits that standing issues must be decided before class certification issues).]}

\footnote{284} The class action exception would not apply to what one commentator has termed “issue mootness.” \textit{Hall, supra} note 4, at 599. Issue mootness means that the issue itself has become moot, and all class members have effectively lost their personal stake because the issue is no longer consequential to anyone. For a plausible example of issue mootness, see \textit{Hall v. Beals}, 396 U.S. 45, 48-50 (1969) (refusing to decide the constitutionality of a residency requirement because the residency requirement—the underlying issue—had itself changed, and contrasting that situation with \textit{Moore v. Ogilvie}, 394 U.S. 814 (1969), in which Illinois “had adhered for over 30 years to the same... policy with no indication of change.”). While I ultimately disagree with Professor Hall’s conclusion that “personal stake mootness”—issue mootness’s counterpart—is prudential and not constitutional, the distinction itself is conceptually helpful in framing potential justifications for the exceptions.\footnote{283} \cite[See supra Part III.B.}
members or justify class-action-like orders, still provide the basis for a justiciable dispute. Specifically, the representative (here, the plaintiff excused from joining necessary parties) can continue to represent absent parties (who are joined by the theory of representation) after her personal stake in the claim is extinguished.

*Dunn* was arguably the Court’s first explicit extension of the exception to “members of the public” who are “similarly situated” to the plaintiff. Blumstein, a new law professor at Vanderbilt University, was prohibited from voting because he had not “been [a] resident[ ] of the state for a full year, and of [the] county for three months.” Blumstein filed a “class action for declaratory and injunctive relief,” challenged the constitutionally of the requirement, and ultimately prevailed. By the time the Supreme Court heard and decided his case on appeal, however, Blumstein had satisfied the residency requirements and was no longer being harmed by the statute. Tennessee had not pressed the mootness argument, but the Court addressed the issue as it was obligated to do. The Court summarily disclaimed any mootness problem, concluding that “the problem to voters posed by the Tennessee residence requirements is ‘capable of repetition, yet

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284. See Calvert, supra note 205, at 40 (“[Plaintiff] must appear on behalf of all who are interested, or else make those, on behalf of whom he does not appear, defendants.”).
286. Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975) (while acknowledging that, in theory, an individual could “suffer repeated” harms, explaining that “it is certain that other persons similarly situated” will suffer the same harm).
287. See Honig, 484 U.S. at 335–36 (Scalia, J., dissenting) (collecting decisions that had “dispens[ed] with the same-party requirement entirely,” among which *Dunn* was the earliest in time); Hall, supra note 4, at 589–93 (detailing the relaxation of the same-party requirement and listing *Dunn* first as an example of such a decision).
289. Dunn, 405 U.S. at 331–33.
291. See Hall, supra note 4, at 562, 562 n.4 (collecting sources).
evading review.”292 Thus, the Court quietly and subtly moved the goal posts from capable of repetition to the same party to Tennessee voters included in the class. It would have been completely unbelievable to suggest that Blumstein was reasonably likely to move outside of Tennessee, lose residency, return to Tennessee, and be denied the right to vote.293 And there was no indication from either party that he intended to move to another county and subject himself to the three-month waiting period before an election.

As discussed above, Sosna recharacterized this decision to be the first to have applied the true class action exception.294 To the extent that Sosna’s recharacterization is correct, Dunn would fall squarely within the class action exception, as its facts are nearly identical to Sosna.295 And that categorization would be sufficient to make it consistent with the constitutional model.

But Dunn did not actually say that the class action saved the case from dismissal. For that reason, many legal scholars and justices refuse to treat Dunn as a class action exception case, instead treating it as an illicit expansion of the capable of repetition exception and abandonment of the same-party requirement.296

292. Dunn, 405 U.S. at 333 n.2 (emphasis added) (quoting Moore v. Ogilvie, 394 U.S. 814, 816 (1969)). The Court also noted that “Blumstein [had] standing to challenge them as a member of the class of people affected by the presently written statute.” Id. However, this assertion seems to be limited to rebutting any suggestion that Blumstein could not represent the class because he was not presently affected by the statute and not a member of the class, such as was the case in Hall v. Beals. 396 U.S. 45, 48–50 (1969) (refusing to decide the constitutionality of a statute that had since been changed and no longer applied to the plaintiffs). There is no suggestion that Blumstein’s role as class representative played a special role in the mootness analysis, a conclusion supported by the fact that Sosna did not cite Dunn’s language when it recharacterized Dunn into a class action exception. See supra notes 157–163 and accompanying text.

293. See Hall, supra note 4, at 591–93.

294. Supra notes 157–163 and accompanying text.

295. In both cases, a plaintiff made a constitutional challenge to a durational residency requirement on behalf of a class of similarly situated plaintiffs. During the pendency of the case but after class certification was granted, the plaintiff satisfied the durational residency requirement, but the requirement still affected current class members and would affect future residents.

296. See Honig v. Doe, 484 U.S. 305, 335–36 (1988) (Scalia, J, dissenting) (listing Dunn as a regular capable of repetition decision that “dispens[ed] with the same-party requirement entirely”); Hall, supra note 4, at 589–93 (detailing the relaxation of the same-party requirement and listing Dunn as the hallmark decision). Professor Hall does not argue that Dunn violated the Constitution because he concludes that the mootness requirement is
There is, however, a third possibility. Even without relying on a certified Rule 23 class action, Dunn is justified by reference to the traditional class action. And further, this new justification would explain why the Court did not rely on the Rule 23 class action as the basis for its decision (as Sosna did) and why Sosna’s revisionist account killed any life the traditional class action exception might have had.

In a traditional class action, absent class members were considered to be before the court through the representation of the party as a matter of legal fiction. The party or parties who conducted the litigation must have had standing to bring the action initially because the requirement to add necessary parties was triggered by a demurrer. If the joinder of necessary parties were excused, the party served as a representative throughout the litigation. The representative nature was not as explicit as it is in a Rule 23 class action. Instead, the question of whether the representation was sufficient to render the judgment binding on absent class members was largely determined by later suits involving absent parties.

If I am right that the class action exception is consistent with the constitutional model, then recognizing a traditional class action exception is equally consistent with the constitutional model. The class action exception, and its corresponding justifications, were ultimately based on a historical conclusion that class actions at the Founding could proceed despite the mootness of the representative’s personal stake. So under these same circumstances, mootness doctrine should not bar non-Rule 23 cases that would have otherwise

merely prudential. However, he argues that under the constitutional model, the expansion makes an already unjustifiable exception even more unjustifiable. Id. at 588–89.

297. Shortly after Sosna was decided, the Court concluded that “only a ‘properly certified’ class . . . may succeed to the adversary position of a named representative whose claim becomes moot.” Kremens v. Bartley, 431 U.S. 119, 132–33 (1977) (quoting Bd. of Sch. Comm’rs of the City of Indianapolis v. Jacobs, 420 U.S. 128, 129–30 (1975)). Interestingly, unlike in Jacobs, the Kremens court refused to dismiss the case and vacate the lower-court judgment. Compare Jacobs, 420 U.S. at 130, with Kremens, 431 U.S. at 134–35. Instead, Kremens used “discretionary considerations” to “decline to pass on the merits” and remanded to the district court to “reconsider[] . . . the class definition, exclu[de] . . . those whose claims are moot, and substitu[e] . . . class representatives with live claims.” 431 U.S. at 134–135, 134 n.15. But the district court would have had jurisdiction to do so only if the case were not moot.
been considered class actions at the Founding. These cases can proceed despite not having a Rule 23 certification so long as they do not purport to bind absent class members298 or otherwise avail themselves of specialized class procedures.299

Ultimately, though, notwithstanding the procedural rules imposed by Rule 23 and the constitutional limitations on binding absent class members, a traditional class action is still justiciable under Article III. This is what Dunn represents.300 Even after Blumstein’s personal stake had become moot, the case was still justiciable because he was representing necessary parties who were not before the court. The Court had no need to reference the Rule 23 class action because Blumstein’s representation of necessary parties with an ongoing personal stake was sufficient.

Naturally, one might object that if a Rule 23 class action is unnecessary to overcome the litigating party’s moot personal stake, then the true class action exception is diminished in significance. I make no claim here about whether the traditional class action exception subsumes the true class action exception,301 or whether they are completely identical and overlapping. But even if the traditional class action exception renders the true class action exception meaningless, an increased focus on traditional class actions would be better justified under Article III. Because Sosna diverted attention from the traditional class action to a Rule 23 class

298. Smith v. Bayer Corp., 564 U.S. 299, 315 (2011) (“Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23.”).

299. See, e.g., FED R. CIV. P. 23(e) (settlement approval); 23(g) (class counsel); 24(h) (attorney’s fees).

300. I do not purport to be making a factual claim about the Dunn Court’s understanding. I am giving a revisionist account of Dunn, challenging both Sosna’s account and the conventional wisdom of what Dunn represents.

301. The true class action exception might survive in cases (if any) in which Rule 23 allows a class to proceed but in which the traditional class action would not apply, such as a common-law action for damages. Under this justification, a modern class action that would not have been traditionally recognized could be justified by analogy to traditional class actions, similar to how other procedural developments have been justified under Article III. See Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 773–74 (2000) (analogizing relators to assignor-assignee relationships); see also Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 169–73 (2016) (Thomas, J., concurring in the judgment) (analogizing rejected Rule 68 offers to tender offers).
action, the Court has relied on Rule 23 in applying the class action exception.\(^{302}\) The more justifiable theory is the traditional class action.

\textit{D. A Brief Sketch of Characteristics}

Recognizing a traditional class action exception would not open the floodgates to effectively allow “concerned bystanders” to bring suit on behalf of the public for two reasons.\(^{303}\) The plaintiff must still have been at one time an individual in the “class” whose interests are at stake.\(^{304}\)

Further, not all cases in which a judgment would affect other parties are class actions. Even in the eighteenth century, not all “interested parties,” in the broadest sense of the term, were “necessary parties.”\(^{305}\) In addition, I attempt to sketch a few broad characteristics of traditional class actions relevant to determining whether the exception should apply.\(^{306}\) I set out three such

\begin{itemize}
  \item In recent decisions, the Court has stated in dicta that a Rule 23 action is required to meet the class action exception. See, e.g., United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1538 (2018) (concluding that the class action exception “turn[s] on the particular traits of [Rule 23] civil class actions”). It is of course possible to dismiss these statements because the parties did not argue for a traditional class action exception, and the Court was not addressing that possibility. But, on the other hand, the Court has an independent duty to determine questions of justiciability.
  \item More likely, the Court has relied on \textit{Sosna}’s analysis and incorrectly assumed that non-certified class actions categorically cannot qualify for a mootness exception. But this assumption might not foreclose the traditional class action exception under current doctrine because, at least in one decision, the Court’s statement was not decisive because the traditional class action would likely not have applied anyway. Compare \textit{id}. at 1540 (rejecting the lower court’s attempt to classify the case as a “functional class action” and noting that the plaintiffs’ individual allegations would only \textit{benefit} others—not that there were class-specific allegations), with \textit{infra}, notes 316–318 and accompanying text (explaining that a traditional class action required class-like allegations).
  \item This is closely related to the first factor below: that the event extinguishing the plaintiff’s stake must not have occurred until after the moment a class would have been allowed. \textit{See infra} notes 307–311 and accompanying text.
  \item The exact confines of the law on this point were ubiquitous. \textit{See CALVERT, supra note 205, at \textit{*}1–18. But it was clear that not all actions that affected third parties must have proceeded as class actions, been dismissed, or had those individuals joined as parties.
  \item This is not an attempt to strictly define the traditional class action or even delineate the precise boundaries of each relevant characteristic. And neither will I attempt to catalogue
\end{itemize}
characteristics here: the timing of the intervening event, no requirement that the judgment be binding on absent class members, and the presence of class-like allegations in the pleadings.

First. As I argued with the true class action exception, neither the filing of the complaint nor a court’s official recognition is the relevant cutoff for a plaintiff’s personal stake. This conclusion is further supported by the fact that traditional class actions had no formal mechanism for recognizing a class action comparable to Rule 23 certification. And despite some equivocation on this issue, a defendant was probably required to raise the issue in a demurrer or in his answer; otherwise, the issue was waived. Upon a challenge alleging a failure to join necessary parties, the chancellor had to decide whether the plaintiff would represent the absent parties and, relatedly, whether a decree could be crafted to protect the interests of those parties. At that moment (or at the moment the issue was waived), the plaintiff must have had specific cases. In fact, even if I am completely wrong about each of the characteristics in this Section, that error would not undermine the proposition that the traditional class action exception is consistent with the constitutional model.

307. Supra Section II.B.

308. The traditional class action developed as a defense against a demurrer for failure to join necessary parties. CALVERT, supra note 205, at *113–16. But the chancellor was not required to make a finding that defined the absent parties, and, as discussed below, the theory might have applied even in the absence of a demurrer. See infra notes 309–311.

309. EDWIN E. BRYANT, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE 217 (1894) (“If the defect appears on the face of the complaint [which was necessary for a class action, CALVERT, supra note 205, at *57], the objection must be taken by demurrer, or it is waived.”) (emphasis added); Cunningham v. White, 45 How. Pr. 486, 491 (N.Y. Super. 1873) (failure to demur when the alleged defect was apparent waived the objection); Conklin v. Barton, 43 Barb. 435, 435 (N.Y. Gen. Term 1864) (when not apparent on the face of the complaint, the objection must be taken by answer or it is waived); Byxbie v. Wood, 24 N.Y. 607, 609 (1862) (defect of parties must either be raised by demurrer or answer or it is waived). But see CALVERT, supra note 205, at *113–16 (arguing that the objection could be raised as late as trial); STORY, supra note 227, § 75 (saying that the issue could be raised at any time, but also noting that, in response to a delayed objection, the court might choose to make the judgment nonbinding with respect to absent parties instead of ordering dismissal or joinder). Although Bryant’s treatise purports to be of general applicability, the cited decisions all arise under the New York Code of Civil Procedure known as the Field Code. But any differences under the Code from the general rules of the courts of equity should not affect Bryant’s conclusions as to waiver. See BRYANT, supra, at 101–05 (detailing the changes implemented by the code and not including any changes relevant to this rule).

310. STORY, supra note 227, § 96.
standing to bring the action because had the demurrer not been lodged, the plaintiff would have had to have proceeded on his own accord.\footnote{Cf. id. \S 95 (noting that the necessary parties rule is still binding—even if inconvenient—if the court cannot do justice to the absent parties).} But after that stage of the litigation, as a representative, the plaintiff’s personal stake could be extinguished, and she could (at least conceptionally) continue the litigation on behalf of the absent parties against a common opponent. Thus, the completion of the pleading stage when the litigation proceeds to discovery and ultimately a determination on the merits marks the latest possible time that the plaintiff must have individual standing.

Second. There is no requirement that the case satisfy the constitutional (or statutory, as applicable) standard for binding absent parties. Traditional class actions were often not binding on absent class members—indeed, they were generally not binding.\footnote{See generally, Hazard et al., supra note 225.} In the middle of the nineteenth century, the Court concluded that class actions were always binding on absent class members.\footnote{Smith v. Swormstedt, 57 U.S. 288, 303 (1853).} But that opinion was the first to have made that assertion, and multiple scholars (including Joseph Story) have concluded that class actions were often not binding.\footnote{See, e.g., Hazard et al., supra note 225, at 1881–82 (citing STORY, supra note 227); STORY, supra note 227, \S 96 (noting that absent parties can “take the benefit of [the decree], or show it to be erroneous, or entitle themselves to a rehearing.” (emphasis added)).} Because Rule 23 parallels the prerequisites for a binding class action judgment, the “binding” question has moved to the background in contemporary litigation.\footnote{For example, in two recent decisions, the Court required that a class be certified under Rule 23 for the judgment to be binding precisely because the constitutional requirements cannot be met without meeting Rule 23’s requirements. Smith v. Bayer Corp., 564 U.S. 299, 315–16 (2011); Taylor v. Sturgell, 553 U.S. 880, 900–01 (2008). In fact, some scholars have argued that even judgments in Rule 23 class actions are not necessarily binding on absent class members. Hazard et al., supra note 225, at 1947 (“[W]hen push comes to shove, a specific class suit judgment is not binding on a member of the class who wants to relitigate.”).} But there was no such limitation on courts of equity at the Founding.

Third. There must be class-like allegations in the complaint that make clear that the plaintiff is aware of the necessary parties and
the effect of a judgment on them.316 This is a significant limitation, as it prevents a plaintiff with buyer’s remorse from claiming the class action exception after having her claim mooted.317 Instead, a plaintiff must show an awareness of absent parties and the representative nature of the suit at the outset, else the claim that she can continue as a representative rings hollow. Further, this characteristic was a traditional requirement in a court of equity,318 which in turn serves the practical purposes of informing the chancellor, opposing parties, and absent parties of the nature of the suit and the potential impact on non-parties.

To reiterate, these characteristics are intended to be neither exclusive nor precisely defined.319 And even if I am incorrect to argue that these characteristics are defining of traditional class actions (and thus the traditional class action exception), the central premise of the exception is still consistent with the constitutional model.320

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316. CALVERT, supra note 205, at *31 (“The bill must contain a specific allegation that the plaintiffs are suing . . . on behalf of themselves and others.”); STORY, supra note 227, § 96 (“[The court] will generally require the bill to be filed . . . in behalf of all other persons interested, who are not directly made parties (although in a sense they are thus made so).”).

317. This principle might have been in play in United States v. Sanchez-Gomez, in which the plaintiffs tried to recharacterize their allegations as class-like merely because a judgment in the plaintiffs’ favor would positively impact other parties. 138 S. Ct. 1532, 1540 (2018); supra note 302; see also Preiser v. Newkirk, 422 U.S. 395, 404 (1975) (Marshall, J., concurring) (“I join this opinion only because for some reason respondent did not file this case as a class action.” (emphasis added)).

318. CALVERT, supra note 205, at *31.

319. Another potential characteristic might be that the suit presents a “common question.” The “common question” requirement might have only applied to certain suits at the Founding, such as those involving monetary damages, and is currently situated (at least in part) in the Federal Rules under Rule 23(b)(3). See Hazard et al., supra note 225, at 1862. Or the requirement might have been a freestanding requirement applicable to all class actions. See id. at 1900 (identifying Rule 23(b)(2) as a “‘common question’ situation”); see also STORY, supra note 227, § 97 (identifying as a distinct type of class action a case in which “the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole”).

320. One particularly interesting subject for future research is Calvert’s assertion that injunctions simply “will not be granted to restrain a person who is not a party to the suit” and thus that the “general doctrine of injunctions” is just the doctrine of “Parties to Bills for Injunction.” CALVERT, supra note 205, at *90. The general rule today about the scope of injunctions is not so clear. Compare, e.g., Mila Sohoni, The Lost History of the “Universal” Injunction, 133 HARV. L. REV. 920 (2020), with Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 HARV. L. REV. 417 (2017), and Samuel L. Bray, A Response to The
CONCLUSION

There is a persistent disconnect between the Supreme Court’s cross-ideological insistence that mootness is a constitutional bar and the academy’s unyielding criticism of that constitutional model. This Article has presented a conceptual defense of the official story of the constitutional model, forgoing a descriptive account of the Court’s practices and a justification of those practices. The exceptions are not only consistent with the constitutional model but are required by it because the cases that fall within the exception were traditionally resolved by the judicial process—or are sufficiently similar to cases that were. Viewing some exceptions through the lens of Bayes’ probability analysis, recognizing a current-to-future harm shift in others, and returning to a traditional class action exception, the doctrine withstands and is not defeated by the criticisms of its opponents.

Lost History of the “Universal” Injunction, NOTICE & COMMENT (Oct. 6, 2019). But on my first read, this debate would not affect the traditional class actions described here because even “national” or “universal” injunctions give “remedies to nonparties,” instead of issuing injunctions against nonparties. See Sohoni, supra at 925 n.23 (emphasis added) (quoting The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary, 115th Cong. 5 (2017) (statement of Samuel L. Bray, Professor, UCLA School of Law)).