

Far from a “Moot” Issue: Addressing the Growing Problem of Lower Courts’ Presumption of Governmental “Good Faith” in Voluntary Cessation Cases

Jonathan M. Janssen*

ABSTRACT: The mootness doctrine is a constitutional justiciability principle which restricts the Court from ruling on issues that, due to the passage of time, do not have a present, live debate. However, since the mootness doctrine’s inception, the Court has repeatedly alluded to its flexible prudential origins (as opposed to its rigid Article III origins) in carving out certain exceptions, such as the voluntary cessation exception. As its name implies, the voluntary cessation exception applies when a defendant ceases its challenged conduct but would be free to return to the conduct after the Court ruled the case as moot. In this instance, the Court will refuse to find the case moot, unless the defendant can prove that it cannot return to the challenged conduct—a high burden. However, district courts, circuit courts, and recently the Supreme Court, have ignored or lowered this burden when a government enactment is constitutionally challenged and the government repeals the enactment prior to a court ruling. This Note argues that governmental defendants should not receive a lowered burden due to Supreme Court precedent and the structural and historical benefits enjoyed by governments regarding constitutional litigation. Lastly, the Note proposes voluntary cessation approaches the Court could and should adopt to correct this jurisprudential error.

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I. INTRODUCTION: PUTTING THE “DEBATE” BACK INTO “MÖTIAN”

Tucked far away in a cozy corner of the ever-evolving realm of the English language lies a linguistic oddity: Janus words. Defined as “words that are their own opposites,” Janus words are words that, over time, have developed linguistic meanings that directly contradict the original meaning.¹ Often, this phenomenon occurs through “semantic broadening”—the process by which “a word that has a more specific meaning gains a broader and more general meaning later on in its life”—or the opposite, semantic narrowing.² Popular examples of Janus words include: “sanction” (meaning both approval and disapproval), “oversight” (meaning both supervision and lack thereof), “cleave” (“to split” and “to adhere”), and “clip” (“to attach” and “to cut off”).³ Another Janus word, while less popularly regarded, is *moot*.

Deriving from the Old English word “mōt,” meaning “assembly or meeting,” and “mōtian,” meaning “to converse,” the word “moot”—used as an adjective—originally denoted that an issue was “[s]ubject to debate, dispute, or uncertainty.”⁴ Used as a noun, “moot” was a historical “assembly held for debate” or “[a] regular gathering of people having a common interest.”⁵ Then, in North America in the sixteenth and seventeenth centuries, the word came to refer to an issue “[h]aving little or no practical relevance, typically because the subject is too uncertain to allow a decision.”⁶ This meaning has pervaded the popular understanding of the word, with law students joining *moot court* in which they argue over fictional cases and lawyers *mooting* cases before oral argument, in which they attempt to conceive of and answer hypothetical questions which the court may ask of them. Eventually, the

1. *Janus Words*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/words-own-opposites> [<https://perma.cc/L3EX-AJEP>].

2. *Id.*

3. *Id.*

4. *Moot*, LEXICO [hereinafter LEXICO], <https://www.lexico.com/en/definition/moot> [<https://perma.cc/J366-5FUJ>].

5. *Id.*

6. *Id.*

Supreme Court adopted the word, refusing to find jurisdiction under the U.S. Constitution for any federal court to preside over a *moot* case—one that has been rendered non-adversarial by actions of one or both of the parties.⁷

The Supreme Court's conception of mootness is the focal point of this Note. Repeatedly, the courts have used the North American definition of *moot* or *mootness* as a reason to dismiss cases without ever reaching the merits of the arguments. However, the Supreme Court has also looked to the original European meaning of the word when carving out several exceptions to its mootness doctrine for situations when an argument itself is of such importance that the case cannot truly be described as “[h]aving little or no practical relevance.”⁸ Part II of this Note gives an overview of the background and evolution of the mootness doctrine under this perspective. Part III analyzes a disturbing, growing practice in lower federal courts—according different treatment to public and private actors when it comes to constitutional challenges—and identifies the problems with this approach. Part III also references *New York State Rifle and Pistol Association v. City of New York*,⁹ in which the Supreme Court could have rectified the situation but did not. Lastly, Part IV proposes three new approaches that the Court could adopt and analyzes the strengths and weaknesses of each approach.

II. SETTING THE STAGE: A CONSTITUTIONAL OVERVIEW OF JUSTICIABILITY, THE MOOTNESS DOCTRINE, AND THE VOLUNTARY CESSATION EXCEPTION

Before arriving at the voluntary cessation exception, a brief overview of the various constitutional principles at play will help contextualize the rest of this Note's discussion. To this end, Sections II.A through II.D will describe, in narrowing fashion, the Supreme Court's established jurisprudence regarding justiciability, the mootness doctrine, sources of constitutional review, and the various exceptions to the mootness doctrine. At the end, Section II.E will arrive at the main topic at hand: the voluntary cessation exception.

A. THE JUSTICIABILITY PRINCIPLE

Article III of the U.S. Constitution provides the judicial branch express jurisdiction over cases “arising under” the laws of the United States.¹⁰

7. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 123–24 (6th ed. 2019).

8. LEXICO, *supra* note 4.

9. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (per curiam).

10. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—[between a State and Citizens of another State;—] between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.]”).

However, Article III also limits federal court jurisdiction in two ways, one plainly textual and one born out of judicial interpretation. First, textually, Article III reduces federal courts' jurisdiction "to cases which either raise certain subjects or involve certain parties,"¹¹ such as constitutional challenges and interstate lawsuits.¹² Secondly, the Supreme Court derives from its Article III power jurisdiction over "cases" and "controversies"—"two words hav[ing] an iceberg quality."¹³ This fact restricts the types of cases the Court has subject matter jurisdiction to hear and is termed "justiciability."¹⁴ The justiciability requirement limits federal courts to "adjudicat[ing] only actual, ongoing cases or controversies,"¹⁵ meaning they are restricted to resolving "real and substantial controvers[ies]" rather than "advising what the law would be upon a hypothetical state of facts."¹⁶ From this requirement comes five doctrines that capture, each in their own way, the essence of the Court's purpose: ruling with finality on live issues between two or more interested parties. The doctrines are (1) the prohibition against advisory opinions; (2) standing; (3) ripeness; (4) mootness; and (5) the political question doctrine.¹⁷ This Note concerns only one of these doctrines: mootness.

B. THE MOOTNESS DOCTRINE

Mootness has been described as "the doctrine of standing set in a time frame."¹⁸ In other words, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."¹⁹ Thus, the doctrine of ripeness, which asks whether a legal challenge "[is] premature for review"²⁰ and mootness, which asks whether "events subsequent to the filing of the case resolve the dispute,"²¹ are

11. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 311 (3d ed. 2000).

12. See U.S. CONST. art. III, § 2, cl. 1.

13. *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

14. See *id.* at 94–95 ("Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.").

15. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990).

16. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

17. CHEMERINSKY, *supra* note 7, at 49.

18. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

19. *Id.* (quoting Monaghan, *supra* note 18, at 1384).

20. CHEMERINSKY, *supra* note 7, at 112.

21. *Id.* at 123.

essentially inverse.²² Put another way, a case is moot, and thus not justiciable, if it has “lost its character as a present, live controversy” over time.²³

Mootness can occur for a variety of reasons.²⁴ For instance, a case may be rendered moot by the death of a criminal defendant²⁵ or the death of a civil plaintiff when the cause of action dies with the plaintiff.²⁶ A case is also generally moot if the parties settle the case.²⁷ Finally, the repeal or expiration of a challenged law during the course of its litigation will generally moot a case.²⁸ If a case’s facts change, such that the adverse controversy ceases to exist, courts will not rule on the issue.²⁹

C. ARTICLE III VS. PRUDENTIAL FOUNDATIONS

While mootness is numbered among the Article III justiciability doctrines, its true source is disputed. On the one hand, early Supreme Court opinions interchangeably refer to mootness as a constitutional limitation—a mere prudential concern. The Court has “dismissed moot cases using language suggesting an exercise of discretion,”³⁰ such as “*are not inclined*”³¹ and “*would not*,”³² justifying its decisions “not on constitutional text, but on instrumental concerns, such as conservation of judicial resources, preservation of judicial authority, the desire to ensure that issues are litigated by properly motivated parties, and the desire to prevent collusive cases.”³³

On the other hand, the Court’s language also indicates that mootness is a mandatory rule. For example, in *St. Pierre v. United States*, a 1943 criminal embezzlement case, the Court dismissed the case as moot, concluding that “there was no longer a subject matter on which the judgment of this Court *could* operate. A federal court is *without power* to decide moot questions

22. See, e.g., *Geraghty*, 445 U.S. at 395–97; *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969).

23. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

24. See *TRIBE*, *supra* note 11, at 346.

25. See, e.g., *United States v. Johnson*, 319 U.S. 503, 520 n.1 (1943).

26. See, e.g., *Dove v. United States*, 423 U.S. 325, 325 (1976) (per curiam).

27. See, e.g., *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120, 120 (1985) (per curiam); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 400 (1977) (Powell, J., dissenting) (“The settlement of an individual claim typically moots any issues associated with it.”).

28. See, e.g., *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *U.S. Dep’t of Treasury v. Galioto*, 477 U.S. 556, 559–60 (1986); *Kremens v. Bartley*, 431 U.S. 119, 127–28 (1977). *But see, e.g., City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 288 (1982).

29. See *TRIBE*, *supra* note 11, at 346–47.

30. Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 569 (2009); see, e.g., *Allen v. Georgia*, 166 U.S. 138, 140 (1897); *Smith v. United States*, 94 U.S. 97, 97 (1876).

31. *Smith*, 94 U.S. at 97 (emphasis added) (“[W]e *are not inclined* to hear and decide what may prove to be only a moot case.” (emphasis added)).

32. *Allen*, 166 U.S. at 140 (emphasis added) (“[W]e have repeatedly held that we *would not* hear and determine moot cases . . .” (emphasis added)).

33. *Hall*, *supra* note 30, at 569–70 (footnotes omitted) (collecting cases).

... which cannot affect the rights of the litigants in the case before it."³⁴ Later, in 1964, around the same time the Court was increasingly "grafting . . . Article III rationale onto . . . existing doctrine,"³⁵ the Court in *Liner v. Jafco, Inc.* cursorily designated Article III of the U.S. Constitution as the mootness doctrine's foundation.³⁶ The Court further developed its mootness doctrine, defining it as a "constitutional rule" in *Sibron v. New York*,³⁷ and solidified that decision in *DeFunis v. Odegaard*.³⁸

The prudential-to-constitutional shift is by no means, however, secure. In the late 1970s, the Court still "indicated that mootness is one of the rules that 'find their source in policy, rather than purely constitutional, considerations.'"³⁹ And, as discussed below in Section III.D.1, Chief Justice Rehnquist has specifically called for reconsideration of the Court's mootness jurisprudence.⁴⁰ Such indications point to an acknowledgment of the Supreme Court's century-old precedent, singling out mootness as the loosest of the five justiciability principles. In fact, most scholars speak of mootness's doctrinal underpinnings by first acknowledging the Court's repeated declarations of mootness as an unwavering Article III restriction, and then

34. *St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (per curiam) (emphasis added); see also *United States v. Hamburg-American Co.*, 239 U.S. 466, 475 (1916) ("[T]he court is not empowered to decide moot questions or abstract propositions . . ." (quoting *California v. San Pablo & Tulare R.R.*, 149 U.S. 308, 314 (1893))).

35. Hall, *supra* note 30, at 571 n.35; see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992).

36. See *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964) (first citing Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1946); and then citing Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955)). The Court cites *St. Pierre*, 319 U.S. at 42, but, in turn, this citation from *St. Pierre* merely states the prudential purpose for the mootness doctrine—not its actual derivation—and no more. *Liner*, 375 U.S. at 306; see Hall, *supra* note 30, at 571–72 ("The Court then opined—in a thirty-four-word footnote—that the mootness bar was a jurisdictional rule derived from Article III's Case or Controversy Clause. . . . The Court offered no explanation for this novel pronouncement, and cited no case authority in support of its transformation of mootness doctrine into a constitutional requirement . . . and none existed. The sole authority cited consisted of two lightly-reasoned scholarly works that had been published eighteen and nine years earlier in the *University of Pennsylvania Law Review*." (footnotes omitted)).

37. *Sibron v. New York*, 392 U.S. 40, 57 (1968); see also *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (requiring, rather than suggesting, consideration of mootness principles); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976) (same). See generally 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 272–73 (5th ed. 2012) (describing how the Supreme Court has stated that the mootness doctrine is a "constitutional limitation").

38. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) ("The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" (quoting *Liner*, 375 U.S. at 306 n.3)).

39. TRIBE, *supra* note 11, at 345 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 756 n.8 (1976)).

40. *Honig v. Doe*, 484 U.S. 305, 329 (1988) (Rehnquist, C.J., concurring).

clarifying that the Court has frequently broken its own rule by relaxing its mootness analysis to achieve further prudential ends.⁴¹

D. EXCEPTIONS TO THE APPLICATION OF THE MOOTNESS DOCTRINE

Whether a justiciability doctrine is rooted in Article III of the Constitution or merely a prudential concern recognized by the Court matters for two reasons. First, “Congress, by statute, may override prudential, but not constitutional, restrictions.”⁴² Second, whereas the Court has interpreted Article III to restrict its ability to hear issues, it *can* (and *has*) carved out numerous exceptions to its prudential rules. It is worth recognizing the confusing and somewhat-circular procedure the Court has established for declaring a justiciability doctrine as an Article III or prudential rule. After all, “both constitutional and prudential limits on justiciability are the product of Supreme Court decisions.”⁴³ This procedural situation may explain why the Court often seems so willing to carve out exceptions for rules by declaring them *prudential* in one opinion but rigidly holding to their *constitutionality* in others.

The Supreme Court has recognized the following exceptions to its mootness doctrine: (1) “wrong[s] capable of repetition yet evading review”; (2) secondary legal consequences; (3) class actions; and (4) voluntary cessation.⁴⁴ The final exception is the primary concern of this Note, but the others will be briefly summarized in turn.

1. Wrongs Capable of Repetition, Yet Evading Review

Considered as “[p]erhaps the most important exception,” the exception for wrongs capable of repetition yet evading review covers situations where “injuries occur and are over so quickly that they always will be moot before the federal court litigation process is completed.”⁴⁵ This exception has two components: “First, the injury must be of a type likely to happen to the plaintiff again. . . . Second, it must be a type of injury of inherently limited duration so that it is likely to always become moot before federal court litigation is completed.”⁴⁶ One of the first cases introducing this exception was

41. See, e.g., TRIBE, *supra* note 11, at 345; CHEMERINSKY, *supra* note 7, at 124–25 (explaining the two different perspectives the Court has taken on the underlying basis of the mootness doctrine).

42. CHEMERINSKY, *supra* note 7, at 50; see also Warth v. Seldin, 422 U.S. 490, 501 (1975) (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”).

43. CHEMERINSKY, *supra* note 7, at 50.

44. *Id.* at 124–25.

45. *Id.* at 128.

46. *Id.* at 129; see, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973) (concerning a pregnant woman challenging state law prohibiting abortion after child was delivered); Neb. Press Ass’n v. Stuart, 427 U.S. 539, 546–47 (1976) (concerning a media association challenging court order restricting freedom of speech after order had expired); Moore v. Ogilvie, 394 U.S. 814, 816

Southern Pacific Terminal Co. v. Interstate Commerce Commission,⁴⁷ in which the Court “allow[ed] a challenge to an Interstate Commerce Commission order that had expired because the Court concluded that consideration of such orders should not be defeated, ‘as they might be, . . . by short term orders, capable of repetition, yet evading review.’”⁴⁸

2. Secondary or “Collateral” Legal Consequences

The Supreme Court has also recognized an exception for secondary or “collateral” legal consequences. This exception applies if “a secondary . . . injury survives after the plaintiff’s primary injury has been resolved.”⁴⁹ In the criminal context, this exception often applies when the defendant has served his or her sentence and been released yet is still experiencing residual damages from the original injury caused, such as former criminal defendants challenging the *constitutionality* of evidence seized during a *Terry* stop.⁵⁰ In the civil context, this exception applies when a favorable decision would still remedy some tangential harm suffered by the plaintiff,⁵¹ such as an award of back pay,⁵² overpayment,⁵³ or even the possibility of liquidated damages⁵⁴ that would have been owed had the defendant been found liable. Practically speaking, this exception merely acknowledges the *continuation* of an injury. In

(1969) (concerning a political candidate challenging state law requiring mandatory signature amount requirement to get onto ballot after election had concluded). *But see, e.g.*, *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187–88 (1979) (finding the case moot because the election at issue had concluded); *Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969) (finding political activist challenging state law prohibiting distribution of handbills which did not identify the author moot because the election had concluded); *DeFumis v. Odegaard*, 416 U.S. 312, 314, 316–19 (1974) (per curiam) (finding white male law school applicant challenging University of Washington Law School’s alleged favoritism towards minority applicants moot after the trial court issued an injunction allowing applicant into the school and he was in his final year anticipating graduation with no pushback). Due to *DeFumis*’s holding, some critics have deemed this exception the “[d]ifficult cases are moot” exception. *See* CHEMERINSKY, *supra* note 7, at 132 (quoting DAVID P. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 77 n.3 (4th ed. 1990)).

47. *S. Pac. Terminal Co. v. Interstate Com. Comm’n*, 219 U.S. 498, 514–15 (1911).

48. CHEMERINSKY, *supra* note 7, at 128 n.32 (second alteration in original) (quoting *S. Pac. Terminal Co.*, 219 U.S. at 515).

49. *Id.* at 126.

50. *See* *Sibron v. New York*, 392 U.S. 40, 54–56 (1968); *see also, e.g.*, *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968) (allowing former criminal defendant’s petition for habeas corpus on *constitutional* grounds to proceed because “[i]n consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror” (footnotes omitted)). *See generally* CHEMERINSKY, *supra* note 7 (providing an overview of the doctrinal exception due to collateral consequences in criminal cases).

51. CHEMERINSKY, *supra* note 7, at 127.

52. *See, e.g.*, *Firefighters Loc. Union No. 1784 v. Stotts*, 467 U.S. 561, 568–71 (1984).

53. *See, e.g.*, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 393 (1981).

54. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 370–71 (1982).

fact, cases with collateral damages are not even technically moot in the first place.⁵⁵

3. Class Actions Where the Named Party Ceases to Represent the Class

In “a particularly flexible approach” for plaintiffs, the Court has repeatedly held that if a Rule 23 class action suit has been brought in “a properly certified” manner and “the named plaintiff’s claims are rendered moot,”⁵⁶ but the “plaintiff may continue to pursue the class claim in a representative capacity.”⁵⁷ Introducing this exception, the Court in *Sosna v. Iowa* stated: “the ‘class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the [plaintiff],’ and thus so long as the members of the class have a live controversy, the case can continue.”⁵⁸

E. THE VOLUNTARY CESSATION EXCEPTION

Most important for purposes of this Note, the voluntary cessation exception applies in cases where “the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time.”⁵⁹ In one of the Supreme Court’s earlier mootness cases, *Mills v. Green*, the Court ended up dismissing a voting rights complaint as moot because the contested election had already concluded,⁶⁰ but it stated, in passing, that “the court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit.”⁶¹ A half of a century later, in 1953, the Court solidified the voluntary cessation exception in *United States v. W.T. Grant Co.*⁶² In *W.T. Grant Co.*, the United States sought an injunction against the antitrust-violative practices of several corporations.⁶³ In response, the corporations argued that the case was moot as the illegal antitrust practices had ceased and the defendant corporations had no intention of restarting them.⁶⁴ The Court held that even though a “case may . . . be moot if the defendant can demonstrate that ‘there is no reasonable expectation that the wrong will be repeated,’” the defendant faces a “heavy” burden in proving its case.⁶⁵

55. See CHEMERINSKY, *supra* note 7, at 126.

56. *Id.* at 137.

57. TRIBE, *supra* note 11, at 350.

58. CHEMERINSKY, *supra* note 7, at 137 (alteration in original) (quoting *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)).

59. *Id.* at 133.

60. See *Mills v. Green*, 159 U.S. 651, 657–58 (1895).

61. *Id.* at 654.

62. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

63. *Id.* at 630.

64. *Id.* at 633.

65. *Id.* (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945)).

Nearly 50 years after *W.T. Grant Co.*, the Court reiterated its strong commitment to the voluntary cessation exception in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*⁶⁶ In *Friends of the Earth*, environmental groups brought an action against a waste disposal company under section 505(a)⁶⁷ of the Clean Water Act,⁶⁸ claiming that the company had repeatedly violated the terms of its permit.⁶⁹ Over the course of litigation, the company fired back, advancing that (1) it had subsequently “achieve[d] . . . substantial compliance with its . . . permit” and (2) that it had recently shut down its facility.⁷⁰ Nevertheless, Justice Ginsburg, writing for the majority, pointed to the significant “sunk costs” when “the case has been brought and litigated” and is subsequently “abandon[ed] . . . at an advanced stage.”⁷¹ Because the company still “retain[ed] its . . . permit,” it was thus free to return to its practices.⁷²

These examples show an underlying concern of the Court: Mootness dismissals are not ideal. Thus, the Court places a heavy burden on the defendant (not the plaintiff) to prove that the defendant *cannot* return to the challenged conduct.⁷³ This instinct also explains the Court’s frequent allusions to the “sunk costs,”⁷⁴ reflecting an exasperation with the practicality of the mootness doctrine itself.

III. THE SPREADING PROBLEM: DEFERENCE FOR GOVERNMENTAL DEFENDANTS, NONE FOR PRIVATE DEFENDANTS

Part III will analyze the problem at the heart of this Note: Lower federal courts have developed a growing body of precedent that excuses governmental defendants from the rigorous requirement of overcoming the voluntary cessation presumption, while not excusing private defendants in a similar fashion. Sections III.A and III.B of this Note detail the growth of this jurisprudence, and Section III.C discusses the Supreme Court’s recent decision in *New York State Rifle & Pistol Association v. City of New York*,⁷⁵ in which

66. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000) (“[T]he standard for determining whether a case has been mooted by the defendant’s voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”).

67. *Id.* at 174–75; see 33 U.S.C. § 1365 (2018).

68. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387.

69. *Friends of the Earth*, 528 U.S. at 176–77.

70. *Id.* at 189.

71. *Id.* at 191–92 (citing *Honig v. Doe*, 484 U.S. 305, 329–32 (1988) (Rehnquist, C.J., concurring)).

72. *Id.* at 193–94.

73. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

74. See *Friends of the Earth*, 528 U.S. at 191–92. The “sunk costs” problem is described further in Section III.D.1.

75. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1526–27 (2020) (*per curiam*).

the Court seems to accept this premise. Lastly, Section III.D overviews four major problems with this jurisprudence, based on different constitutional principles.

A. *THE SUPREME COURT'S PRECEDENT FOR CONSTITUTIONAL CHALLENGES*

Mootness arguments are frequently advanced during litigation over the constitutionality of official governmental statutory enactments. In these cases, “a statutory change is [usually] enough to render a case moot, even though the legislature possesses the power to reinstate the allegedly invalid law after the lawsuit is dismissed.”⁷⁶ On the other hand, “the Court also has held that a repeal of a challenged law does not render a case moot if there is a reasonable possibility that the government would reenact the law if the proceedings were dismissed.”⁷⁷ For example, in *City of Mesquite v. Aladdin's Castle, Inc.*, a city ordinance restricting certain gaming and arcade machines was challenged as unconstitutional and was subsequently repealed and replaced with a new statute.⁷⁸ The district court still struck a phrase in the statute as unconstitutionally vague, and the Fifth Circuit affirmed.⁷⁹ On appeal by the City to the Supreme Court, Justice Stevens, writing for the majority, cited the “well settled” voluntary cessation rule:

In this case the city's repeal of the objectionable language *would not preclude it* from reenacting precisely the same provision if the District Court's judgment were vacated. The city followed that course with respect to the age restriction, which was first reduced for Aladdin from 17 to 7 and then, in obvious response to the state court's judgment, the exemption was eliminated. There is *no certainty* that a similar course would not be pursued if its most recent amendment were effective to defeat federal jurisdiction. We therefore must confront the merits of the vagueness holding.⁸⁰

Setting the bar quite high, Justice Stevens indicates that a defendant must prove with *certainty* that it will be unable to return to its previous actions.

Likewise, in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, the Court refused to find moot a constitutional challenge to a city ordinance requiring a mandatory quota on minorities hired as city contractors.⁸¹ Justice Thomas, writing for the majority, noted that

76. CHEMERINSKY, *supra* note 7, at 134–35 (first discussing *Kremens v. Bartley*, 431 U.S. 119 (1977) (challenging a statute involving involuntary commitment of juveniles); and then discussing *Massachusetts v. Oakes*, 491 U.S. 576 (1989) (litigating an overbreadth challenge to statute prohibiting nude photography of minors)).

77. *Id.* at 135.

78. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 285–87 (1982).

79. *Id.* at 288.

80. *Id.* at 289 (emphasis added) (footnote omitted).

81. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 658, 661–63 (1993).

“22 days after our grant of certiorari, the city repealed [the challenged] ordinance and replaced it with [a similar] ordinance,” and then argued that the case was moot.⁸² As Justice Thomas observed, the risk was not simply “that Jacksonville w[ould] repeat its allegedly wrongful conduct; *it ha[d] already done so.*”⁸³ Rather, regardless of whether “the new ordinance differs in certain respects from the old one,” the concern was that allowing this tactic would permit “a defendant [to] moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.”⁸⁴ Scholars have pointed to the Court’s inconsistent holdings in cases of statutory change or repeal—sometimes finding the case moot and other times applying the voluntary cessation doctrine—noting that “[i]n all instances, the legislature is free to reenact the law,”⁸⁵ even though the Court has deemed “[t]he test for mootness in cases such as this [to be] a stringent one.”⁸⁶

B. THE EMERGING PRIVATE VS. PUBLIC DISTINCTION

Some lower courts have read the Supreme Court’s inconsistent rulings as a green light to begin “appl[ying] a ‘lighter burden’ to governmental defendants,”⁸⁷ ruling that “‘government actors’ are entitled to ‘a presumption of good faith’ because ‘they are public servants, not self-interested private parties.’”⁸⁸ Others have even “flipp[ed] the burden of proof and requir[ed] the *plaintiff* to show it is ‘virtually certain’ that the *government* will reenact the challenged law.”⁸⁹ In coming to these decisions, “courts have [either] tried to reconcile their decisions with th[e] Court’s precedents,” or they “have simply declared that the relevant portions of *City of Mesquite* are ‘dicta and therefore

82. *Id.* at 660–61.

83. *Id.* at 662 (emphasis added).

84. *Id.*

85. CHEMERINSKY, *supra* note 7, at 135.

86. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (quoting *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968)).

87. Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Neither Party Respecting Mootness at 6, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280) [hereinafter *Becket Amicus Brief*] (quoting *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009)).

88. *Id.* (quoting *Sossamon*, 560 F.3d at 325) (“Thus, courts ‘assume that formally announced changes to official governmental policy are not mere litigation posturing.” (quoting *Sossamon*, 560 F.3d at 325)); *see, e.g.*, *Marcavage v. Nat’l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (“Government officials are presumed to act in good faith.” (alteration omitted) (quoting *Bridge v. U.S. Parole Comm’n*, 981 F.2d 97, 106 (3d Cir. 1992))); *Troiano v. Supervisor of Elections in Palm Beach Cnty.*, 382 F.3d 1276, 1283 (11th Cir. 2004) (“[W]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will *not* recur.”).

89. *Becket Amicus Brief*, *supra* note 87, at 7 (quoting *Chem. Producers & Distribs. Ass’n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006)).

not controlling.”⁹⁰ While a precedent that excuses governmental defendants from the voluntary cessation doctrine is nonexistent in constitutional jurisprudence, the Supreme Court’s sometimes-inconsistent application of the voluntary cessation exception has indirectly led to this precedent being created by lower courts.⁹¹

C. *EXAMPLE CASE: NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. V. CITY OF NEW YORK*

Sadly, the Supreme Court seems to have now acceded to this jurisprudential trend. On February 23, 2018, the Second Circuit, in *New York State Rifle & Pistol Association v. City of New York* (“*NYSRPA v. NYC*”),⁹² affirmed the ruling of the Southern District of New York,⁹³ which, three years earlier, dismissed a constitutional challenge to a New York City ordinance applying to “premises licenses” for firearms.⁹⁴ The contested law restricted those with firearm premises licenses from transporting handguns anywhere besides “directly to and from an authorized small arms range/shooting club, unloaded, and in a locked container” and “directly to and from an authorized area designated by the New York State Fish and Wildlife Law . . . , unloaded, in a locked container.”⁹⁵ The petitioners held premises licenses but sought to transport their weapons to areas outside of those allowed by the ordinance.⁹⁶ On appeal, the Second Circuit held that the law was constitutional.⁹⁷ As the Second Circuit summarized, “[t]he district court determined that the [law] ‘merely regulate[d] rather than restrict[ed] the right to possess a firearm in the home and [wa]s a minimal, or at most, modest burden on the right.’”⁹⁸ Thus, the law “did not violate the Plaintiffs’ Second Amendment rights[,] . . . the dormant Commerce Clause, the First Amendment right of expressive association, or the fundamental right to travel.”⁹⁹

90. *Id.* (quoting *Fed’n of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 n.5 (7th Cir. 2003)).

91. *See infra* Section III.D (discussing further occasions of various lower courts applying this jurisprudence).

92. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), *vacated and remanded per curiam*, 140 S. Ct. 1525 (2020).

93. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 86 F. Supp. 3d 249 (S.D.N.Y. 2015), *aff’d*, 883 F.3d 45 (2d Cir. 2018), *vacated and remanded per curiam*, 140 S. Ct. 1525 (2020).

94. *Id.* at 254, 268.

95. *N.Y. State Rifle & Pistol Ass’n*, 833 F.3d at 53 (quoting N.Y.C., N.Y., 38 RULES § 5-23(a) (2010)).

96. *Id.* at 54 (“All three Plaintiffs seek to transport their handguns to shooting ranges and competitions outside New York City. In addition, Colantone, who owns a second home in Hancock, New York, seeks to transport his handgun between the premises for which it is licensed in New York City and his Hancock house.” (footnote omitted)).

97. *Id.* at 68.

98. *Id.* at 54 (quoting *N.Y. State Rifle & Pistol Ass’n*, 86 F. Supp. 3d at 260).

99. *Id.* (citation omitted).

Following this decision, on September 4, 2018, the challengers petitioned the Supreme Court for writ of certiorari, advancing several of the same arguments presented in the district courts: namely, that the ordinance violated their Second Amendment rights under *District of Columbia v. Heller*, as well as the right to travel in the dormant Commerce Clause.¹⁰⁰ On January 22, 2019, the Supreme Court granted certiorari.¹⁰¹ On July 22, 2019, the City of New York filed a Suggestion of Mootness, noting that “[a]bout three months” after the Court granted certiorari, “the NYPD announced proposed amendments to its transport rules with respect to premises licenses.”¹⁰² In support of its argument, the City pointed to the fact that the amendments explicitly allowed the exact conduct sought to be conducted by the petitioners in the case.¹⁰³ In addition, the State of New York passed a bill “allow[ing] state premises licensees to transport their handguns,” which particularly corresponded to the City’s regulatory change.¹⁰⁴ Importantly, in its Suggestion of Mootness, the City asserted that “when a state or local government goes through all of the hoops necessary to bind itself to a new law, the presumption is that the new law has been enacted in good faith and is intended to be permanent.”¹⁰⁵ Thus, according to the City, the “Court ha[d] long treated a governmental defendant’s change in law as falling beyond the reach of the voluntary cessation doctrine.”¹⁰⁶ More than that, “[a]ll the circuits to address the issue’ also ha[d] agreed that a change in law ‘moots a plaintiff’s injunction request’ because governmental entities are presumed to make such changes without any intent to revert to prior law.”¹⁰⁷

Ultimately, the City’s argument won the day. On April 27, 2020, the Supreme Court issued a per curiam decision declaring the case moot.¹⁰⁸ Specifically, the opinion stated that New York’s amendment, which wholly granted the petitioners’ request, rendered the case moot¹⁰⁹ and that any

100. Petition for Writ of Certiorari at 1–3, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280).

101. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 139 S. Ct. 939 (2019) (mem.).

102. Suggestion of Mootness at 5, *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. 1525 (No. 18-280).

103. *See id.* at 6.

104. *Id.* at 7.

105. *Id.* at 17 (citing *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004)).

106. *Id.* at 18.

107. *Id.* (quoting *Fed’n of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003)). In support of its assertion, the City cites several of the Supreme Court’s previous decisions that have inadvertently led to this trend. *Id.* (first citing *U.S. Dep’t of Treasury v. Galioto*, 477 U.S. 556, 559–60 (1986); then citing *Kremens v. Bartley*, 431 U.S. 119, 126–27 (1977); then citing *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414–15 (1972) (per curiam); then citing *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 213–14 (1984); and then citing *Bd. of Pub. Util. Comm’rs v. Compania Gen. de Tabacos de Filipinas*, 249 U.S. 425, 426–27 (1919)).

108. *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. at 1525–26.

109. *Id.* at 1526 (“After we granted certiorari, the State of New York amended its firearm licensing statute, and the City amended the rule so that petitioners may now transport firearms

further claims for relief should be considered on remand. In a lengthy dissent, Justice Alito, joined by Justices Gorsuch and Thomas, accused the per curiam decision of “permit[ting] [the Court’s] docket to be manipulated in a way that should not be countenanced.”¹¹⁰ In derisive language, Justice Alito pointed to the contrast between “the City[’s] vigorous[] and successful[] defen[se] [of] the constitutionality of its ordinance” in the lower courts versus its obfuscating conduct upon Supreme Court grant of review as proof that the City did not change its statute in good faith:

One might have thought that the City, having convinced the lower courts that its law was consistent with *Heller*, would have been willing to defend its victory in this Court. But once we granted certiorari, both the City and the State of New York sprang into action to prevent us from deciding this case. Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed its ordinance. And for good measure the State enacted a law making the old New York City ordinance illegal.¹¹¹

Justice Alito then noted the “heavy burden” placed on defendants who try to argue mootness after voluntarily ceasing their challenged conduct.¹¹² He concluded that the case was not moot, because “a case ‘becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party. As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.”¹¹³

In Justice Alito’s view, because there was still possible injunctive relief or damages for a constitutional violation, the case was not moot.¹¹⁴ As will be argued in the rest of this Note, Justice Alito’s dissent aligns with the Court’s historical jurisprudence and should be reconsidered as the correct decision, should the Court face this issue again.

D. PROBLEMS WITH THE LOWER COURTS’ APPLICATION OF DIFFERING STANDARDS

There are several problems with the idea of granting a governmental defendant an increased benefit of the doubt when it changes the regulation

to a second home or shooting range outside of the city, which is the precise relief that petitioners requested in the prayer for relief in their complaint.”). Ironically, the per curiam opinion directly points to the fact that New York amended the statute and then argued mootness directly after the Supreme Court granted review, but it does not express concern or skepticism at this order of events.

110. *Id.* at 1527 (Alito, J., dissenting).

111. *Id.* at 1527–28.

112. *Id.* at 1528 (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam)).

113. *Id.* (citation omitted) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

114. *Id.*

being challenged, particularly after the Supreme Court’s grant of review.¹¹⁵ As will be discussed: (1) the Supreme Court has previously expressed concerns about potential court abuse due to governmental chicanery;¹¹⁶ (2) a historical analysis looking back to foundational constitutional concerns would not allow for such a conclusion;¹¹⁷ (3) governmental defendants have certain advantages that make this conclusion counterintuitive;¹¹⁸ and (4) governments, in particular, due to their natural turnover, cannot overcome the strong presumptions in the voluntary cessation exception.¹¹⁹

1. Past Supreme Court Opinions: Chief Justice Rehnquist’s Questioning of Mootness’s Derivation and Justice Ginsburg’s Concern About Sunk Costs

The first problem with an approach that prizes mootness rulings in governmental-defendant cases is that it ignores prior Supreme Court concerns regarding the true derivation of the mootness doctrine and the Court’s aversion to sunk costs in the judicial system. While the Court has not ruled on any governmental and private distinction, at least one major figure of the Court has discussed a potential issue with its current mootness jurisprudence. In a concurring opinion in *Honig v. Doe*, Chief Justice Rehnquist recounted the Court’s historically inconsistent statements regarding the source of the mootness doctrine, contrasting the numerous times the Court had recently stated that mootness was founded upon Article III, with *Mills v. Green* being the “earliest case” he could find “discussing mootness.”¹²⁰ In *Mills*, the Court did not premise its decision to dismiss the case as moot on any constitutional concerns, referring, instead, to prudential language alone.¹²¹ Chief Justice Rehnquist determined that “[t]he logical conclusion . . . is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.”¹²²

Chief Justice Rehnquist next suggested a new exception “for those cases where the events which render the case moot have supervened since our grant

115. Fragments of the problems identified in this Section can be found in cases and scholarship such as the Becket Amicus Brief, *supra* note 87, and Matthew I. Hall’s *George Washington Law Review* article, *The Partially Prudential Doctrine of Mootness*, *supra* note 30. *See infra* Sections III.D.3–4.

116. *See infra* Section III.D.1.

117. *See infra* Section III.D.2.

118. *See infra* Section III.D.3.

119. *See infra* Section III.D.4.

120. *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (citing *Mills v. Green*, 159 U.S. 651 (1895)).

121. *See id.*

122. *Id.* at 331 (referencing the Court’s willingness to place prudential concerns aside when the injury is capable of repetition yet evading review, or the voluntary cessation doctrine applies).

of certiorari or noting of probable jurisdiction in the case.”¹²³ Referencing the hundreds of cases found nonjusticiable each year, Chief Justice Rehnquist questioned whether judicial economy was actually served in many of these cases:

But these unique resources—the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring—are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me the unique and valuable ability of this Court to decide a case—we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts—is a sufficient reason *either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine of mootness . . .*¹²⁴

Chief Justice Rehnquist was sure to note that the normal mootness doctrine would apply “in full force and effect when applied to the earlier stages of a lawsuit,”¹²⁵ implicitly drawing the line between cases in which the issue is *innocently* mooted due to its nature and those in which the issue is *strategically* mooted by one party in order to avoid a final ruling—“the last word,” as Chief Justice Rehnquist quoted from the former Chief Justice Taft¹²⁶—against its interest. Litigants undoubtedly realize that the higher the court, the more likely the judges will stray from the narrow topic at issue.¹²⁷

While Chief Justice Rehnquist’s desired exception clearly comes from one side of the broader critical debate surrounding mootness’s derivation,¹²⁸ his reasoning holds power, as it was cited by Justice Ginsburg 12 years later writing for the majority and applying the voluntary cessation doctrine against

123. *Id.* at 331–32.

124. *Id.* at 332 (emphasis added).

125. *Id.*

126. *Id.*

127. *See, e.g.,* Mitchell v. Wisconsin, 139 S. Ct. 2525, 2551 (2019) (Gorsuch, J., dissenting) (“We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute. . . . But the Court today declines to answer the question presented. Instead, it upholds Wisconsin’s law on an entirely different ground . . . proceeding solely by self-direction . . .”).

128. CHEMERINSKY, *supra* note 7, at 125 (“On the one hand, critics of these exceptions might argue that expediency does not justify a departure from Article III and that the Court wrongly has been much more flexible in carving exceptions to mootness than it has been in dealing with parallel doctrines such as standing. But others might argue that important policy objectives are served by the exceptions and that the exceptions effectuate the underlying purpose of Article III in ensuring judicial review of allegedly illegal practices.”). Chief Justice Rehnquist’s opinion is, after all, only a concurring opinion in a case in which Justice Brennan, writing for the majority, cites Article III as the first piece of law in his discussion. *See Honig*, 484 U.S. at 317 (“Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies.”).

Laidlaw Environmental Services.¹²⁹ Particularly concerned about judicial economy, Justice Ginsburg argued that standing and mootness achieve diametrically opposed outcomes. These differing outcomes are especially evident when applied to a context in which one party attempts to strategically moot the case before it can reach Supreme Court review. As Justice Ginsburg observed:

Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated . . . for years.¹³⁰

Abandoning a case on mootness grounds thus may often lead to significant “sunk costs,” making “abandon[ment] . . . more wasteful than frugal.”¹³¹

Justice Ginsburg’s and Chief Justice Rehnquist’s arguments point out structural flaws in the mootness doctrine’s rigid application. Particularly after the Supreme Court has granted certiorari, it does not make historical or economic sense to dismiss a case on mootness grounds.

2. Giving Governments a Good-Faith Benefit of the Doubt Flies in the Face of the Historical Perception of the Struggle Between the Government and the Governed

The second issue with a potential increased deference to governmental actors lies not with law or policy, but with worldview—a worldview which was fundamental during the founding of the American government. As James Madison famously wrote in *Federalist No. 51*, “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”¹³² To rein in the government’s power,

129. See *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000) (citing *Honig*, 484 U.S. at 329–32 (Rehnquist, C.J., concurring)).

130. *Id.* at 191.

131. *Id.* at 192.

132. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009). The quotation in context is even more evocative of Madison’s distrust of any perceived good faith of the government:

The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Id.

Madison, during the First Congress in 1791, defied his *Federalist* co-author Alexander Hamilton and pushed for the passage of the first ten constitutional amendments that would become the Bill of Rights.¹³³ This objective was also sought by the Anti-Federalist party, which was predominantly concerned about the government's potential for tyranny and domination.¹³⁴ Seeking to protect individual rights against federal and state governments, Madison thought that by listing specific rights, the public would embrace them as absolute and judges would voraciously defend them.¹³⁵

Seventy-five years after the ratification of the Bill of Rights, the federal legislature again sought to protect the individual from federal and state government overreach with the passage of the Fourteenth Amendment.¹³⁶ Vital in its protections, the Fourteenth Amendment stated unequivocally that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”¹³⁷ Drafted and approved in the middle of the Reconstruction Era, the Fourteenth Amendment was largely meant to “provid[e] an unquestionable constitutional base for the 1866 Civil Rights Act,”¹³⁸ which was being challenged by President Johnson's administration.¹³⁹ In turn, the second section of the Civil Rights Act of 1866 was “[t]he model for”¹⁴⁰ the first section of the Civil Rights Act of 1871, which itself proclaimed its goal as “enforc[ing] the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.”¹⁴¹

The aforementioned sections would be familiar to any civil rights lawyer, as section one of the Civil Rights Act of 1871 became codified at 42 U.S.C.

133. See ANDREW BURSTEIN & NANCY ISEBERG, MADISON AND JEFFERSON 195–99 (2010) (noting that Madison studied over 200 proposed amendments in refining them into ten).

134. See *id.* at 197–98; NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 267 (2017).

135. See FELDMAN, *supra* note 134, at 264, 267, 272–74.

136. U.S. CONST. amend. XIV.

137. *Id.* § 1.

138. Patrick Kelley, *The Heritage Guide to the Constitution: State Action*, HERITAGE FOUND., <https://www.heritage.org/constitution/#!/amendments/14/essays/168/state-action> [<https://perma.cc/C7RZ-XVPS>]; see Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (“An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.”).

139. Kelley, *supra* note 138 (“Soon after Congress had overturned President Andrew Johnson's veto of the Civil Rights Act of 1866, it passed the Fourteenth Amendment and sent it to the states for approval. This was to counter President Andrew Johnson's claim when he vetoed the Civil Rights Act that it was beyond Congress's constitutional powers. The drafters of Sections 1 and 5 of the Fourteenth Amendment understood Section 5 as providing an unquestionable constitutional base for the 1866 Civil Rights Act . . .”).

140. CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (statement of Rep. Samuel Shellabarger).

141. Civil Rights Act of 1871, ch. 22, 17 Stat. 13, 13.

§ 1983,¹⁴² which grants private citizens a “[c]ivil action for deprivation of rights.”¹⁴³ Section 1983 is perhaps *the* fundamental tool for American citizens to give teeth to the enforcement of their rights against state actors as Madison and the drafters of the Civil Rights Act envisioned.¹⁴⁴ Section 1983’s importance is further enhanced by the government’s other advantages in litigation, as discussed in the following two Sections.¹⁴⁵

This historical analysis serves two purposes. First, it shows, broadly, the structure of accountability built into the United States’ system of government. While governments are free to act within the scope of their power, this freedom ends when they seek to curb the rights of their citizens, and the citizens accordingly must have a recourse for holding these governments accountable. Second, a tracing of the history of concern for government accountability from the Founding Era to the current day indicates that constitutional jurisprudence should not be predisposed to grant governments any higher benefit of the doubt than ordinary citizens are afforded. Frankly, America’s history is rife with politicians acting against its interests and the interests of its people.¹⁴⁶ This observation accords exactly with what the

142. 42 U.S.C. § 1983 (2018) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”).

143. *Id.*; see *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (“Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.”).

144. CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (statement of Rep. Samuel Shellabarger) (stating that the Civil Rights Act of 1871 “not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship”); *id.* at 335 (statement of Rep. George Hoar) (“The principal danger that menaces us to-day is from the effort within the States to deprive considerable numbers of persons of the civil and equal rights which the General Government is endeavoring to secure to them.”).

145. See *infra* Sections III.D.3–4.

146. It is impossible to encapsulate the sheer volume of governments and governmental actors caught acting corruptly. See *generally* *United States v. Edwards*, 303 F.3d 606 (5th Cir. 2002) (affirming conviction of Louisiana Governor Edwin Edwards); *United States v. Edwards*, 442 F.3d 258 (5th Cir. 2006) (declining to vacate the sentence of Louisiana Governor Edwin Edwards); *United States v. Dwyer*, 855 F.2d 144 (3d Cir. 1988) (*per curiam*) (denying motion to abate guilty verdict of Pennsylvania Treasurer R. Budd Dwyer); *United States v. Blanton*, 719 F.2d 815 (6th Cir. 1983) (*en banc*) (upholding conviction of Tennessee Governor Ray Blanton); *United States v. Hall*, 536 F.2d 313 (10th Cir. 1976) (affirming conviction of Oklahoma Governor David Hall); Richard Sandomir, *George Beall, Prosecutor Who Brought Down Agnew, Dies at 79*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/us/george-beall-dead-prosecuted-agnew.html> [<https://perma.cc/YB63-3GUV>] (discussing conviction of U.S. Vice President Spiro Agnew). For an illustrative example, three out of the nine categories of crime and violations that the U.S.

Supreme Court identified as Congress's rationale for the passage of Section 1983:

Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; *it realized that state officers might, in fact, be antipathetic to the vindication of those rights*; and it believed that these failings extended to the state courts.¹⁴⁷

The idea that governments and government officials may be antagonistic to citizens' constitutional rights is far from novel. For instance, in the realm of policing, courts are endlessly faced with balancing whether criminal defendants' assertions of police violations of their Fourth Amendment rights withstand police and prosecutors' arguments against such violations, or even arguments proposing further Fourth Amendment exceptions. This balancing act leads to different conclusions, as in, for instance, the legitimacy of the evidence-gathering rationale for warrantless vehicle searches incident to arrest.¹⁴⁸

Furthermore, the history of constitutional law is drenched with states and localities enacting measures designed to curb constitutional rights for personally beneficial or vindictive reasons. For instance, a compilation on the legal information retrieval website *Justia*, under its annotation of the U.S. Constitution, lists a staggering 968 Supreme Court cases, ranging from 1809 to 2017, in which state laws were held unconstitutional.¹⁴⁹ According to this compilation, the Supreme Court has, between those years, struck down, on average, 4.65 state laws per year.¹⁵⁰ Another compilation ranging from 1829 to 2015 lists 126 Supreme Court cases in which local ordinances faced the

Federal Bureau of Investigation lists on its website under the heading "What We Investigate" are directly or indirectly related to governmental malfeasance: "Public Corruption," "White-Collar Crime," and, relevant here, "Civil Rights." *What We Investigate*, FBI, <https://www.fbi.gov/investigate> [<https://perma.cc/gG3L-FY7W>].

147. *Mitchum*, 407 U.S. at 242 (emphasis added).

148. Compare *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (adopting a warrant exception for vehicle searches incident to arrest if "it is reasonable to believe the vehicle contains evidence of the offense of arrest"), with *State v. Gaskins*, 866 N.W.2d 1, 15 (Iowa 2015) (rejecting *Gant*'s evidence-gathering exception prong as unconstitutional under the Iowa Constitution). Fourth Amendment jurisprudence, while outside the scope of this Note, is replete with these balancing acts.

149. *State Laws Held Unconstitutional*, JUSTIA, <https://law.justia.com/constitution/us/state-laws-held-unconstitutional.html> [<https://perma.cc/T2CY-75KR>] (discussing cases ranging from *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809), which overturned a Pennsylvania statute which sought to strip federal courts of jurisdiction, to *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), overturning an Arkansas law that violated same-sex couple rights under the Fourteenth Amendment).

150. See *id.* According to the decade breakdown, while constitutional challenges have been declining since an all-time high of 164 cases in the 1970s, there have consistently been at least 20 constitutional challenges per decade over the course of American history. See *id.*

same demise.¹⁵¹ Under a certain lens, the history of our nation is one of local, state, and federal government encroachments upon rights and privileges and citizen attempts at reclamation of these rights through legal challenges. Seen this way, it is no wonder why a government would “strategically alter its conduct in order to prevent or undo a ruling adverse to its interest.”¹⁵² Setting aside other types of relief sought by plaintiffs bringing constitutional challenges in court, a governmental actor has a strong self-motivated interest in avoiding a potentially adverse ruling that would weaken its power to operate as it sees fit.

*NYSRPA v. NYC*¹⁵³ is a prime example of such a case. New York City is infamous for its strict gun ordinances, curbing gun rights further than many other states’ already-stringent laws.¹⁵⁴ Regarding the ordinance at issue, the New York City Police Department has stated that its premises license restrictions and exceptions “sought to balance public safety against the interests of licensees in maintaining proficiency in the use of their handguns and in using their handguns for hunting.”¹⁵⁵ New York City’s interest in restricting its residents from certain handgun usage is, purportedly, public safety. However, the City’s priorities in changing these restrictions after the Supreme Court granted certiorari may be broader in scope than a few provisions about premises license regulation. Perhaps the City remembered the Supreme Court’s opinion in *Heller*, which involved a similar challenge to a gun law of Washington, D.C.—a similarly strict city—in which the Court left the scope of the contested regulation to opine more broadly on the Second Amendment in general.¹⁵⁶ This idea had already crossed the minds of scholars such as Jacob Charles, executive director of the Center for Firearms Law at Duke University, who claimed “that New York City s[aw] the writing on the wall that the Supreme Court, once it takes a case, *may not be confined to just*

151. *Ordinances Held Unconstitutional*, JUSTIA, <https://law.justia.com/constitution/us/ordinances-held-unconstitutional.html> [<https://perma.cc/77KT-YJGV>] (discussing cases ranging from *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829), which overturned a Charleston ordinance that impaired the federal borrowing power under Article VI of the Constitution, to *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), overturning Gilbert’s sign code, which subjected political or ideological signs to stricter requirements than public signs).

152. *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006).

153. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (per curiam).

154. See Aditi Sangal, *New York City and Its Gun Laws: How Strict Are They?*, NY CITY LENS: GUNS OF N.Y., <http://nycitylens.com/wp-content/guns/new-york-city-and-its-gun-laws-how-strict-are-they/index.html> [<https://perma.cc/K6UJ-YS69>]; Yasmeen Khan & WNYC Staff, *NYC Potentially ‘Dodging a Bullet’ in Supreme Court by Easing Strict Handgun Laws*, GOTHAMIST (May 30, 2019, 10:03 AM), <https://gothamist.com/news/nyc-potentially-dodging-a-bullet-in-supreme-court-by-easing-strict-handgun-laws> [<https://perma.cc/MMW8-VZAg>] (describing New York City’s “famously strict handgun laws”).

155. Suggestion of Mootness, *supra* note 102, at app. A at 3a.

156. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the Second Amendment protects the right of individuals to possess firearms).

*narrowly ruling on the regulation at issue.*¹⁵⁷ Governments have many strong incentives—based on resources, but also more profoundly based on power concerns and perceptions of freedom—to avoid Supreme Court review in bad faith by “strategically alter[ing their] conduct” to argue that a case is moot.¹⁵⁸

3. Governmental Litigants Are Advantaged, in Comparison to Private Litigants, with Time, Resources, and Immunities

The third issue with a potential increased deference to governmental actors is that governments are repeat litigants with outsized time and resources to field litigation. After all, the United States’ largest employer is the federal government, employing, as of 2016, approximately 2.7 million people—1.6 million more than Walmart, the nation’s leading private employer.¹⁵⁹ State governments tend to be similarly situated.¹⁶⁰ With such an influence on the American workforce, as well as the nation-at-large, governments naturally tend to have immense legal agencies and offices.¹⁶¹ These legal structures field a litany of lawsuits that threaten to alter or even restrict the governments’ modus operandi. As the Becket Fund for Religious Liberty explained in its amicus brief in *NYSRPA v. NYC*, governments “have a powerful incentive to pick and choose their cases—strategically mooting cases that would set bad precedent, while fully litigating cases that would set helpful precedent.”¹⁶²

One area in which governments frequently exercise their vast legal resources in this manner is in prisoner litigation over constitutional rights, such as in Florida, where “the state prison system was one of the last large

157. Khan & WNYC Staff, *supra* note 154 (emphasis added) (quoting Jacob Charles).

158. *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006). Notably, power and freedom concerns are not tethered to any political value or ideology. Rather, these concerns pervade the broadest political spectrums of our society. The following Sections explore other contexts in which governmental abuse occurs.

159. See GraphiqNewsdesk, *Who’s the Largest Employer in the U.S.? Hint: It’s a Government Agency*, BELLEVILLE NEWS-DEMOCRAT (May 24, 2016, 10:03 AM), <https://www.bnd.com/living/article79507112.html>; Michael B. Sauter & Grant Suneson, *Who is the Largest Employer in Your State? Walmart Top in Nation with Amazon Second.*, USA TODAY (May 28, 2019, 4:29 PM), <https://www.usatoday.com/story/money/business/2019/03/30/largest-employer-each-state-walmart-top-us-amazon-second/39236965> [<https://perma.cc/2FE4-FPYW>].

160. See Sauter & Suneson, *supra* note 159 (“State governments tend to be the largest employers in each state. There are over 5 million state government employees nationwide.”); Michael B. Sauter, *States Where the Most People Work for the Government*, 24/7 WALL ST. (Jan. 11, 2020, 11:12 PM), <https://247wallst.com/special-report/2018/05/24/states-where-the-most-people-work-for-the-government-2> (“In some states, federal workers, as well as state and local government employees, account for anywhere between 12% and 25% of total employment.”).

161. For instance, the New York City Law Department boasts of “approximately 1,000 lawyers and 890 support professionals” who “represent[] the City, the Mayor, other elected officials, and the City’s many agencies in all affirmative and defensive civil litigation.” *About the Law Department*, N.Y.C. L. DEP’T, <https://www1.nyc.gov/site/law/about/about-the-law-department.page> [<https://perma.cc/45U4-FQ5S>].

162. Becket Amicus Brief, *supra* note 87, at 8.

prison systems to refuse kosher diets to Orthodox Jewish prisoners.”¹⁶³ Against pro se plaintiffs, “[o]ver the course of nearly a decade, [Florida] litigated several cases to judgment” and won.¹⁶⁴ However, when “an Orthodox Jewish prisoner represented by counsel” challenged its anti-kosher policies, Florida “attempted to moot the case on the eve of oral argument in the Eleventh Circuit by announcing a new kosher dietary policy that would be implemented only at the plaintiff’s prison unit.”¹⁶⁵ The Eleventh Circuit rejected “this transparent attempt to evade its jurisdiction”;¹⁶⁶ however, “the point remains: Governmental defendants are sophisticated, repeat litigators that will strategically use voluntary cessation to try to pick and choose their cases.”¹⁶⁷

While the Eleventh Circuit did not fall for the mootness enticement, other courts have not been as vigilant. For example, in *Guzzi v. Thompson*, another case involving prisoner kosher diet rights, the First Circuit dismissed the prisoner’s case as moot and vacated the district court’s judgment, which had denied the defendants’ motions to dismiss.¹⁶⁸ The First Circuit explained its decision concisely—asserting that “[t]he defendants-appellees ha[d] provided the plaintiff the relief he requested in his complaint”—and even continued to reject the voluntary cessation doctrine’s application on the theory that “‘there [wa]s no reasonable expectation . . .’ that the alleged violation w[ould] recur.”¹⁶⁹ Apparently, the fact that the prison–defendant and the inmate–plaintiff had come to a private unilateral agreement that the inmate would be allowed a kosher diet was enough for the court to avoid ruling on the merits of the case. However, the court overlooked the potential, for instance, for the prison to deny the inmate kosher food the day after litigation ended. Furthermore, nowhere in *Guzzi* does the First Circuit mention anything more than a private, out-of-court agreement between the

163. *Id.* at 9. “This is particularly common in the prison context, where state prison systems often litigate cases to judgment against pro se prisoners while attempting to moot cases brought by competent counsel.” *Id.* at 8.

164. *Id.* at 9; see, e.g., *Gardner v. Riska*, 444 F. App’x 353, 355 (11th Cir. 2011); *Linehan v. Crosby*, No. 4:06-cv-00225-MP-WCS, 2008 WL 3889604, at *2 (N.D. Fla. Aug. 20, 2008).

165. Becket Amicus Brief, *supra* note 87, at 9; see *Rich v. Sec’y, Fla. Dep’t of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013).

166. Becket Amicus Brief, *supra* note 87, at 9.

167. *Id.*; see also *Baranowski v. Hart*, 486 F.3d 112, 116 (5th Cir. 2007) (reflecting full litigation of Texan pro se inmate’s kosher case, to inmate’s losing judgment); *Moussazadeh v. Tex. Dep’t of Crim. Just.*, 703 F.3d 781, 786 (5th Cir. 2012) (reflecting Texas Criminal Justice Department’s attempt to argue that the case was moot when faced with a represented kosher inmate). Interestingly, in the procedural history of *Moussazadeh*, prior to the case being determined moot by the lower court, “[t]he parties did not settle . . . because [the Texas Criminal Justice Department] refused to meet *Moussazadeh’s* demand for a guarantee that it would not ever deny him kosher food.” *Moussazadeh*, 703 F.3d at 786 (emphasis added).

168. *Guzzi v. Thompson*, No. 07-1537, 2008 WL 2059321, at *1 (1st Cir. May 14, 2008), *vacating as moot* 470 F. Supp. 2d 17 (D. Mass. 2007).

169. *Id.* (quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)).

individual parties to offer the plaintiff a kosher diet as the basis for its decision to find the case moot. The implications are obvious: What is to stop a government from using narrow, plaintiff-specific concessions to avoid large-scale rulings of unconstitutionality—and thus undermine the rights of those not involved in the case?

The problem is that prisoners (and all individuals and private entities, by extension) by nature, might have limited chances at constitutional challenges. While governments have teams of litigators to field these challenges and alert lawmakers when they foresee a potential adverse ruling, private individuals are generally not afforded this luxury. By granting governments a benefit of the doubt when they change laws pending appellate review, courts only succeed in giving them a further advantage above the rights of ordinary citizens. As Justice Alito argued in his dissent in *NYSRPA v. NYC*, “[r]elief would [have been] particularly appropriate . . . because the City’s litigation strategy caused petitioners to incur what are surely very substantial attorney’s fees in challenging the constitutionality of a City ordinance that the City went to great lengths to defend.”¹⁷⁰ Furthermore, when private individuals are the defendants, an adverse ruling is often much more devastating. Without the seemingly endless resources of a government, a private entity is typically in a much more precarious position. The monetary and reputational cost of defense litigation can be extensive on its own, but an adverse ruling could be the final nail in the coffin for a private litigant who has already attempted to rectify the situation by voluntarily ceasing its challenged conduct.¹⁷¹ Yet, as seen, the Court has been unwavering in its strict adherence to the voluntary cessation exception for private defendants.¹⁷² Fairness dictates that a similar strictness should apply to governmental defendants.

After all, given the Supreme Court’s high burden in overcoming the voluntary cessation exception, it is astonishing that the First Circuit in *Guzzi* accepted the prison’s simple single-person exemption of its ongoing policy regarding religious diets as enough.¹⁷³ From all appearances, the prison’s ostensible change in conduct does not even approach the level of change demanded by the Supreme Court in cases such as *Friends of the Earth*, in which the Court applied the voluntary cessation exception even though “after the Court of Appeals issued its decision but before [the Supreme] Court granted certiorari, the entire incinerator facility in Roebuck was permanently closed,

170. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1538 (2020) (Alito, J., dissenting).

171. See generally *Litigation Cost Definition: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/litigation-cost-definition> [<https://perma.cc/Y4XU-4HMJ>] (explaining different aspects of litigation costs).

172. See *supra* Section III.A.

173. See *Guzzi*, 2008 WL 2059321, at *1.

dismantled, and put up for sale, and all discharges from the facility permanently ceased.”¹⁷⁴

Similarly, in *City of Erie v. Pap’s A.M.*,¹⁷⁵ the Supreme Court held that a strip club owner had not overcome the presumption of voluntary cessation after it had closed the strip club and sold the property on which it had stood.¹⁷⁶ The strip club owner had challenged the constitutionality of the City of Erie’s ordinance banning public nudity and won in the Pennsylvania Supreme Court.¹⁷⁷ On appeal, the Supreme Court reversed the district court’s decision, finding that Erie’s ordinance was content-neutral and satisfied constitutional muster.¹⁷⁸ When the strip club owner tried to argue mootness because the strip club had already closed, the Court did not let him off the hook: “Simply closing Kandyland is not sufficient to render this case moot, however. Pap’s is still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie.”¹⁷⁹ In a moment of irony given contemporary developments in the doctrine of voluntary cessation, Justice O’Connor, writing for the majority, determined that “[t]he city ha[d] an ongoing injury because it [was] barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance [was] found constitutional, then Erie [could] enforce it, and the availability of such relief [was] sufficient to prevent the case from being moot.”¹⁸⁰ Reverse the polarity of the parties and, put another way, the Court might have said, *private citizens have an ongoing injury because they are barred from exercising their constitutional rights. If the challenged law is found unconstitutional, then citizens can enforce it, and the availability of such relief is sufficient to prevent the case from being moot.* After all, the Supreme Court’s ruling to reinstate Erie’s ordinance implicitly authorized all other jurisdictions to enact a similar law. In the same manner, when the Supreme Court overturns an ordinance or law as

174. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 179 (2000).

175. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 288–89 (2000).

176. Justice Scalia, arguing that the case is moot in a concurrence, lists the following facts in favor of finding mootness:

Petitioners do not dispute that Kandyland no longer exists; the building in which it was located has been sold to a real estate developer, and the premises are currently being used as a comedy club. We have a sworn affidavit from respondent’s sole shareholder, Nick Panos, to the effect that Pap’s “operates no active business,” and is “a ‘shell’ corporation.” More to the point, Panos swears that neither Pap’s nor Panos “employ[s] any individuals involved in the nude dancing business,” “maintain[s] any contacts in the adult entertainment business,” “has any current interest in any establishment providing nude dancing,” or “has any intention to own or operate a nude dancing establishment in the future.”

Id. at 302 (Scalia, J., concurring) (alterations in original).

177. *Id.* at 282–83 (majority opinion).

178. *Id.* at 283.

179. *Id.* at 287.

180. *Id.* at 288.

unconstitutional, does this ruling not apply to all U.S. citizens? Of course it applies—hence the traditionally high burden the Court has placed on defendants in overcoming the voluntary cessation presumption.

If governments' incredible abilities to endure the time and cost of litigation are not enough, these same governments are granted a further advantage through various statutory and constitutional immunities to lawsuits. The federal and state governments have sovereign immunity from suit, unless they have waived immunity or consented to be sued.¹⁸¹ Government officials enjoy qualified immunity from paying damages.¹⁸² These advantages place governments squarely above private entities in voluntary cessation litigation.

4. Even if a Government Agency Can Prove That It Will Not Return
to Its Previous Ways, the Nature of Government Turnover
All-but-Abolishes This Idea as a Farce

The final issue with granting governmental defendants a higher benefit of the doubt lies in a major structural difference between private and public actors. This structural difference reveals a fundamental defect in the notion of granting governments a benefit of the doubt concerning voluntary cessation and mootness. Namely, the continuous cycle of government turnover necessarily diminishes any government's appeal to its post-certiorari actions which would moot a case. The City of New York's Suggestion of Mootness in *NYSRPA v. NYC* provides a potent illustration of this point. Addressing the Association's argument that a future government could reenact the laws at issue, New York City conceded that "[i]t [was] always theoretically possible for a legislature or administrative body to revert sometime in the future to a prior law."¹⁸³ But it went on to suggest that "sustaining jurisdiction to decide a case simply because a law might be passed in the future would be the *essence* of issuing an advisory opinion."¹⁸⁴ A contradiction arises here. On the one hand, the City is correct in pointing out that a possible advisory opinion issue could be at issue. On the other hand, the City's own description of its powerlessness to bind a future administration to its repealed and replaced policy does not meet the high burden required by the Supreme Court throughout its voluntary cessation jurisprudence. After all, the City's use of language like "theoretically possible" and "a law *might* be passed in the future"¹⁸⁵ clearly does not rise to the high demands of Justice Stevens in *Aladdin's Castle*: The city's repeal of an ordinance "*would not preclude it* from reenacting precisely the same provision," and "[t]here is no *certainty* that" the

181. *Price v. United States*, 174 U.S. 373, 375-76 (1899).

182. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

183. Suggestion of Mootness, *supra* note 102, at 20.

184. *Id.*

185. *Id.* (emphasis added).

law would not be reenacted.¹⁸⁶ The Court demands certainty, but no government can enact irrevocable laws, regulations, or ordinances, as the Supreme Court has repeatedly required.¹⁸⁷

The private sector does not face this unique problem. Even if a government actor does not cease its conduct in “bad faith” (by, for example, strategically evading a possible Supreme Court loss), a government that ceases its conduct for completely altruistic reasons (such as a sudden “see-the-light” moment regarding constitutional infringement) still cannot guarantee that a future administration will not reverse course, particularly to the level the Court has historically demanded. Private individuals or entities generally *do* have the power to make irrevocable, unchangeable unilateral decisions, such as, in the corporate context, boards of private corporations making decisions that will restrict the corporation in the future.¹⁸⁸ However, a government *always* has the potential to change the law, one way or another. The stark difference between the abilities of private entities and governments to truly ensure that they have not just voluntarily ceased their challenged conduct cuts against extending government actors the benefit of the doubt. If anything, private entities that have made irrevocable agreements or policies are the ones that can realistically argue that they have exhausted every avenue to ensure that they will not go back to the challenged conduct after successfully mooting the case in court.¹⁸⁹

IV. THE THREE PROPOSALS: POSSIBLE SOLUTIONS FOR THE COURT TO ADOPT

There are three possible approaches the Court could adopt to give clarity to the lower courts and resolve the problem of courts giving excessive deference to governments when applying the voluntary cessation doctrine.

186. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982) (emphasis added).

187. *See Dorsey v. United States*, 567 U.S. 260, 274 (2012) (“[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (“[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and . . . one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted.”).

188. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93 (2013) (“The breadth of this covenant suffices to meet the burden imposed by the voluntary cessation test. The covenant is unconditional and irrevocable. Beyond simply prohibiting Nike from filing suit, it prohibits Nike from making any claim *or* any demand. It reaches beyond *Already* to protect *Already*’s distributors and customers. And it covers not just current or previous designs, but any colorable imitations.”).

189. *See* the Becket Amicus Brief for an in-depth analysis of one particularly egregious, yet illustrative example involving government turnover causing a policy reversal, a holding of mootness in the First Circuit due to the new policy, another government turnover reversing the policy again, and a new lawsuit—all causing the case to “not [be] resolved until almost a decade after the first lawsuit was filed.” Becket Amicus Brief, *supra* note 87, at 13 (first discussing *ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013); and then discussing *ACLU of N. Cal. v. Azar*, No. 16-CV-03539-LB, 2018 WL 4945321 (N.D. Cal. Oct. 11, 2018)).

The first option of applying voluntary cessation unequivocally to governmental defendants, while following from the previously mentioned problems, is more radical. The second option of refusing to find a case moot after Supreme Court grant of certiorari, which has been suggested by the Court in the past, would be a more measured approach. The third option of simply applying the voluntary cessation equally to private and governmental defendants, while weaker than the previous two options, would most likely be more palatable to those on the Court who are not totally swayed by the perceived problems with the lower courts' deference to governmental actors. Regardless of its choice, the Court *should* adopt one of these options to fix the issues identified throughout this Note.

A. THE "RADICAL" APPROACH: APPLY VOLUNTARY CESSATION EXCEPTION
UNEQUIVOCALLY TO CONSTITUTIONAL CHALLENGES
AGAINST GOVERNMENT ENACTMENTS

The first possible—albeit radical—approach would be to change the mootness doctrine to *never* allow a governmental defendant to escape litigation by arguing mootness. Under this rule, if a governmental actor were sued on constitutional grounds, regardless of the stage of litigation, he or she would face the prospect of litigation as far as the plaintiff pushed the case. Obviously, there would be several benefits and problems with this approach. For instance, a rule that outright *disadvantages* a government would be balanced against the heavy advantage in litigation already granted the government, as discussed above in Section III.D.3. Seen from a power structure perspective, such a disadvantage would even the playing field while keeping intact the government's various protections and advantages, such as immunities and routineness in litigation.

From the citizenry's perspective, this rule would also fix several of the disadvantages that private entities face in challenging the constitutionality of government acts. First, it would encourage governmental agencies to exercise due diligence before passing statutes and regulations that have the potential to unconstitutionally burden citizens' rights. If a government knows that it will have no chance to repeal a law and avoid expensive litigation, it will surely exercise more care in making sure the laws it introduces are constitutionally sound.¹⁹⁰ The natural corresponding result is that more constitutional issues would reach the Supreme Court—a court that can rule with finality. While the Court can still exercise discretion by granting or denying certiorari, because the Supreme Court's exercise of this right is often used as persuasive argument when citing lower court opinions, the Court would be more likely

190. One cannot help but be reminded, here, of the 1,094 cases in which federal and state statutes and regulations, as well as local ordinances, were overturned by the Supreme Court as unconstitutional since the beginning of the nineteenth century. See *State Laws Held Unconstitutional*, *supra* note 149; *Ordinances Held Unconstitutional*, *supra* note 151.

to grant certiorari on issues of great importance—the greatest of which involve constitutional infringements.¹⁹¹ Regardless of the outcome of the case, this result would, perhaps, alleviate the anxiety felt by the citizenry when the protection of their constitutional rights is perpetually held in limbo by a Supreme Court that refuses to sink its claws into a case and rule upon the issue.¹⁹²

Another potential benefit to this approach would be that the Supreme Court Justices would not have the possibility to exercise hidden political, instead of legal, judgment by selectively shrouding their political inclinations in the cloak of jurisdiction-stripping mootness. Critics have long derided the Court for abusing the mootness doctrine in this way.¹⁹³ After all, many already viewed the Court’s consideration of the mootness doctrine in *NYSRPA v. NYC* as completely political,¹⁹⁴ so an unequivocal rule that would deem all constitutionality cases non-moot would allow the Court to sidestep political subterfuge and rule on the merits of each case.

Admittedly, however, depending on one’s view of the purpose of the Supreme Court, some of these “advantages” could be seen as disadvantages. For those deeply steeped in the tradition of constitutional avoidance set forth by Circuit Justice Marshall in *Ex parte Randolph*,¹⁹⁵ famously argued by Justice Brandeis in his concurrence in *Ashwander v. Tennessee Valley Authority*,¹⁹⁶ and subsequently adopted by both “conservative”¹⁹⁷ and “liberal”¹⁹⁸ Justices, the

191. See generally Michael C. Dorf, *A Mootness Dismissal Illustrates the Supreme Court’s Split Personality: Is It a Constitutional Court or a Court of Error?*, FINDLAW (June 6, 2007), <https://supreme.findlaw.com/legal-commentary/a-mootness-dismissal-illustrates-the-supreme-courts-split-personality-is-it-a-constitutional-court-or-a-court-of-error.html> [https://perma.cc/U3B7-EFPL] (“The Justices have nearly complete control over their own docket and they exercise their discretion by choosing not those cases that seem ripe for error-correction, but those that present issues of national importance.”).

192. See Becket Amicus Brief, *supra* note 87, at 13 (describing *Catholic Bishops*, 705 F.3d 44, which went unresolved for more than a decade due to strategic mootting).

193. See CHEMERINSKY, *supra* note 7, at 52–53, 123–25.

194. See Linda Greenhouse, *The Supreme Court’s Second Amendment Appetite*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/opinion/guns-supreme-court.html> [https://perma.cc/LW88-GCH7] (arguing throughout an article on *NYSRPA v. NYC* that politics is *the* deciding factor over the mootness question: “There’s a fascinating transparency to the evident stalemate over whether to keep the case or dismiss it. Plainly, the conservative justices don’t want to throw away their shot.”).

195. *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558).

196. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

197. See Erwin Chemerinsky, *Judicial Activism by Conservatives*, L.A. TIMES (June 27, 2008, 12:00 AM), <https://www.latimes.com/la-oe-chemerinsky27-2008jun27-story.html> [https://perma.cc/Z53S-LF5M] (“If the terms ‘judicial activism’ and ‘judicial restraint’ have any meaning, it is that a court is activist when it is invalidating laws and overruling precedent, and restrained when deferring to popularly elected legislatures and following prior decisions.”).

198. Linda Greenhouse, *A Sense of Judicial Limits*, N.Y. TIMES (July 22, 1993), <https://www.nytimes.com/1993/07/22/us/the-supreme-court-a-sense-of-judicial-limits.html> [https://perma.cc/5ZHR-GRH5] (referring to Justice Ginsburg’s nomination and noting surprise at a “liberal” jurist espousing techniques of judicial restraint).

idea of courts being granted the authority to wax poetic on their various understandings of constitutional law would contradict a rich history of judicial restraint. Furthermore, if governments are *never* allowed to moot their cases by changing their laws, there is a significant risk of hyper-litigious entities bringing any and all challenges against government enactments, overburdening the courts in the process. This rule would also overlook a government's true "change of heart" in the early litigation, and even pre-litigation, stages. One could foresee a situation where political activists wait for a "favorable" Court and then launch a bevy of constitutional challenges to move the case up the chain, abusing the new voluntary cessation construction. In a bizarre circumstance, governments would, presumably, be forced to litigate issues in which they no longer have any personal stake.

B. THE "MEASURED" APPROACH: A MODIFIED VERSION OF CHIEF JUSTICE REHNQUIST'S EXCEPTION—REFUSE TO APPLY THE MOOTNESS DOCTRINE TO GOVERNMENTAL DEFENDANTS POST-SUPREME COURT GRANT OF CERTIORARI

The "measured" approach would be to adopt Chief Justice Rehnquist's exception from *Honig* and refuse to find a case moot if the government changes the law *after* the Court has granted certiorari on the issue.¹⁹⁹ This result would alleviate many of the problems with the "radical" approach, as outlined above. For example, rather than hampering judicial economy, requiring the case to be non-moot *only* after certiorari has been granted by the Supreme Court would alleviate the cost on the judicial system as perceived by Chief Justice Rehnquist and Justice Ginsburg in *Friends of the Earth*.²⁰⁰ At that point, the parties have expended significant time and resources in litigating the case all the way to the court of final resort, and preventing the case from being mooted would save the system from wasting the time and resources previously used. At a deeper level, depriving the Court of jurisdiction by ceasing the challenged conduct does not reach a result of finality: It creates *uncertainty*. In many cases, the Court clearly recognized a potential issue with the lower courts' decisions, or it would not have granted certiorari. However, because the Court is stripped of jurisdiction to rule on the issue, the lower courts' prior decisions, while not necessarily considered precedent, are essentially the definitive decisions until the Court can find another hook upon which it does not have its jurisdiction removed. Under the "measured" approach, the Court would be able to reach the issue on the first attempt, solving this problem.

In addition, the "measured" approach would solve the apparent problem in *NYSRPA v. NYC*. In that case, basic inferences from the City of New York's conduct—repealing the regulation three months after the Court granted

199. See *supra* Section III.D.1.

200. See *supra* Section III.D.1.

certiorari;²⁰¹ replacing it with a similarly restrictive regulation, granting NYSRPA *exactly* what they sought (without an inch more);²⁰² and coordinating with the State of New York to change state law to bind the City’s hands²⁰³—pointed to the conclusion that the New York City government did not have a sudden recommitment to constitutional protections. Rather, it appears that the City recognized the recent shifts on the Court may not have been favorable to its entire firearm regulatory scheme and thus decided to avoid the Court’s review. By disallowing governmental defendants from using bad-faith strategic moves to ensure mootness, the “measured” approach would solve this potential problem as well.

On the other hand, this approach still suffers, to a smaller extent, from some of the same conceptual problems as the “radical” approach. For instance, an unequivocal rule does not leave open the possibility for a governmental defendant to prove that it has had a change of heart. While this was not an issue in *NYSRPA*, with Justice Alito sarcastically calling the City’s hollow concessions “an epiphany of sorts,”²⁰⁴ it does mean that governments in other cases could be penalized unfairly. Another problem with this approach is that, by recognizing yet another exception to the mootness doctrine, the Court would be further weakening its commitment to Article III principles of justiciability. For many on the Court who, like Chief Justice Rehnquist,²⁰⁵ do not hold mootness as strictly an Article III issue, this is not a concern. However, many on the Court (such as Justice Scalia in *Friends of the Earth*²⁰⁶) have either indicated that they view the voluntary cessation doctrine as an Article III requirement or as “nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist.”²⁰⁷ For those that still hold strong to the Article III-derivation view, *yet another* exception would be a hard pill to swallow.

C. *THE “PALATABLE” APPROACH: HOLD GOVERNMENTAL ACTORS TO THE SAME STANDARD AS PRIVATE CITIZENS IN VOLUNTARY CESSATION DETERMINATION*

Alternatively, the Court could adopt the “palatable” approach, which would merely overrule the growing precedent of granting governmental defendants a benefit of the doubt when they try to argue mootness after changing their conduct. Instead, it would hold them to the same standard under voluntary cessation as private entities. Under Supreme Court

201. Suggestion of Mootness, *supra* note 102, at 5–6.

202. See Response to Respondents’ Suggestion of Mootness at 7–9, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280).

203. See *id.* at 25–31.

204. *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. at 1528 (Alito, J., dissenting).

205. See *supra* Section III.D.1.

206. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 213–14 (2000) (Scalia, J., dissenting).

207. *Id.* at 213.

precedent, then, this would mean applying a “heavy” burden²⁰⁸ on governmental defendants—a *stringent* test²⁰⁹ to make them prove that it is *certain*²¹⁰ that they cannot return to the challenged conduct. It would also mean considering the “sunk costs”²¹¹ of lengthy litigation.

From a practical standpoint, this approach would be the simplest to implement. The Court would merely need to rule that governmental defendants should be subjected to the exact same standard as private entities when courts are deciding mootness questions. Then, the normal voluntary cessation analysis can begin. One tantalizing aspect of this approach is that it would most likely have the highest buy-in by members of the Court, while still rectifying most of the problems identified by this Note. Because it does not require an added exception, the “palatable” approach should satisfy the Justices on the Court who are worried about the judiciary overstepping its Article III jurisdiction. It would also level the playing field in constitutional litigation: Governments could still exercise the many benefits and immunities they normally enjoy, but they would be encumbered by the naturally heavy burden of proving that they have not voluntarily ceased the challenged action.

V. CONCLUSION

With a strong, modern concern over constitutional infringement coming from those of every political persuasion, it would be fair to say that issues of constitutionality pose an important concern to Americans nationwide. At the same time, by granting governmental defendants a benefit of the doubt that they will not return to challenged conduct, lower courts are feeding into a system which places governments tasked with following the Constitution out of the reach of the courts’ rectifying grasps. The Court should not, by unduly mooting challenges to constitutional infringements, undermine the original *moot*—the “regular gathering of people having a common interest”²¹² in seeing their rights protected. Adoption of any of the three approaches offered by this Note would be a major step in such a direction. The Supreme Court must remind governments that they are not above the law and the courts that they must not be complicit in undermining the same Constitution they are tasked with protecting.

208. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

209. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982).

210. *Id.* at 289.

211. *Friends of the Earth*, 528 U.S. at 191–92.

212. LEXICO, *supra* note 4.