

# The Story of Prudential Standing

by S. TODD BROWN\*

## Introduction

Imagine that you have been injured. Federal law clearly provides a remedy. You commence suit in a federal court with jurisdiction over the dispute, and your claims satisfy the requirements of Article III. The court acknowledges all of these factors and its obligation to hear and determine the merits of your suit. Yet the court decides, in its sole discretion, that it would not be prudent to recognize your standing. Your case is dismissed. Why? Perhaps you were denied prudential standing due to your nationality or residential status, or maybe the court applied a test that was not designed with claims like yours in mind, or maybe the judge crafted a novel prudential rule for your case.<sup>1</sup>

Prudential standing—“prudential rules of self-restraint” that bar standing to those “ill-suited to litigate the claims they assert”<sup>2</sup>—lies at the heart of a “confusing tangle of jurisprudential concepts.”<sup>3</sup> Although “not exhaustively defined,”<sup>4</sup> the doctrine has, until recently, incorporated three core principles: (i) generalized grievances; (ii) the zone of interests; and (iii) third-party standing.<sup>5</sup> It is treated as distinct from constitutional standing, which, at a minimum, requires the plaintiff to “demonstrate that he has suffered ‘injury in fact,’ that

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1. See *infra* Part I.A.
2. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 119 (1979).
3. *Ass’n of Battery Recyclers v. EPA*, 716 F.3d 667, 678 (D.C. Cir. 2013) (Silberman, J., concurring).
4. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).
5. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (prudential standing includes: “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”). These principles are outlined more fully in Part I.B, *infra*.

the injury is ‘fairly traceable’ to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.”<sup>6</sup>

Yet the place of standing—and prudential standing in particular—is perplexing. If the court has the power (i.e., jurisdiction) to adjudicate, it has a “virtually unflagging obligation” to do so.<sup>7</sup> Constitutional standing, which is jurisdictional,<sup>8</sup> speaks directly to the court’s power to adjudicate, but prudential standing does not.<sup>9</sup> Technically speaking, prudential standing is not really “standing” at all; it is merely a judicially crafted set of exceptions to the obligation to hear and decide matters that are within the court’s jurisdiction.<sup>10</sup>

Consider a few more points. Sometimes, a constitutional standing rule is declared prudential; other times, a prudential standing rule is declared constitutional.<sup>11</sup> A rule might appear once and only once, or it might evolve into something far removed from its origins over a short period of time.<sup>12</sup> And as of this writing, nobody can say for certain whether the third party standing principle is prudential, constitutional, or something else.<sup>13</sup>

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6. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The Court has characterized these as the “irreducible constitutional minimum” of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Others have argued constitutional standing is not as “irreducible” as it is made out to be. *See, e.g.*, Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 171 (2012) (“Although it is hardly obvious from analysis of the constitutional text, the Supreme Court has long held that Article III compels most of the requirements of the standing doctrine. But for years now, the Justices and the cognoscenti of federal practice have known that this is not true—and that the Court’s own decisions prove the point.”); Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 728 (2009) (arguing that all standing should be considered prudential, not constitutional).

7. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 820 (1976).

8. *E.g.*, *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (noting that the Court has “always insisted on strict compliance with this jurisdictional standing requirement”).

9. *See generally* Bradford C. Mank, *Is Prudential Standing Jurisdictional*, 64 CASE W. RES. L. REV. 413 (2013) (approaching the question from different perspectives and concluding that prudential standing is sufficiently distinct from constitutional standing to be considered nonjurisdictional).

10. *See* *ACLU v. NSA*, 493 F.3d 644, 677 (6th Cir. 2007) (“Because these prudential principles are ‘limits’ on standing, they do not themselves create jurisdiction; they exist only to remove jurisdiction where the Article III standing requirements are otherwise satisfied.”).

11. As outlined in Parts I.B.1 and II.B, the Court reclassified the formerly prudential generalized grievances principle as constitutional and the formerly constitutional question of adverseness as prudential.

12. *See infra* Part II.A (discussing *ad hoc* prudential rules and the evolution of the substantial prior connections test and pecuniary interest test).

13. *See infra* Part I.B.3.

To some extent, this captures the gist of the criticism of standing doctrine generally. Critics argue that the doctrine finds little support in the language of Article III and early American legal history.<sup>14</sup> Its “tortured constitutional discourse”<sup>15</sup> has been characterized, among other things, as permeated with “doctrinal confusion,”<sup>16</sup> “hopelessly incoherent and subject to manipulation,”<sup>17</sup> a “pointless constraint on the courts,”<sup>18</sup> and driven by substantive or normative assessments masquerading as threshold jurisdictional inquiries.<sup>19</sup> Members of the Court have criticized standing as<sup>20</sup> a “word game played by secret rules,”<sup>21</sup> and “cover” for dubious analysis.<sup>22</sup> Collectively, these critiques suggest that “standing can apparently be either rolled out or ignored in order to serve unstated and unexamined values.”<sup>23</sup>

Given the limited attention it receives in its own right, however, prudential standing may seem to be little more than standing doctrine’s forgotten stepchild. First impressions can be deceiving. From its origins in narrow rules of self-governance to today, its evolution wreaked havoc on established justiciability concepts<sup>24</sup> and

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14. E.g., John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (“There was no doctrine of standing prior to the middle of the twentieth century.”); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizens Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 170–71 (1992) (“The first period, by far the longest, ranges from the founding era to roughly 1920. In that period, there was no separate standing doctrine at all.”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (discussing the history of standing doctrine); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224–25 (1988) (discussing the origins of standing doctrine and noting that it “is a relatively recent creation”).

15. Laura A. Cisneros, *Standing Doctrine, Judicial Technique, and the Gradual Shift from Rights-Based Constitutionalism to Executive-Centered Constitutionalism*, 59 CASE W. RES. L. REV. 1089, 1093 (2009).

16. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988).

17. Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 225–26 (2008); see also F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008) (“Although seemingly simple on its face, this doctrine [injury in fact] has produced an incoherent and confusing law of federal courts.”).

18. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007).

19. Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663–64, 699 (1977).

20. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (1966) (statement of Professor Paul A. Freund)).

21. *Flast*, 392 U.S. at 129 (Harlan, J., dissenting).

22. *Allen*, 468 U.S. at 767 (Brennan, J., dissenting).

23. Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 658 (1985).

24. See *infra* Part II.A and note 219.

the substantive development of specialized areas of law. In the process, it has become something of a jurisdictional alchemist; transforming jurisdictional considerations into “flexible rules”<sup>25</sup> and nonjurisdictional questions into pseudo-jurisdictional bars.<sup>26</sup> It deserves more attention than it receives.

This article tells the story of prudential standing, outlines its shortcomings, and frames a solution: prudential standing should be removed from standing doctrine.

Part I picks up the story as two of prudential standing doctrine’s key principles—generalized grievances and third party standing—rest comfortably in New Deal-era judicial rules of self-restraint. These and other rules were informed by the Court’s interwoven visions of the limits of judicial power and the wise use of that power; but they both spoke to the same issue: shaping the Court’s understanding of its proper role in a democratic system. The Burger Court divided this often confusing doctrine into the “constitutional” and “prudential” branches we have today. Yet the Court also recognized new prudential rules that spoke less to the judicial role than to other concerns. This section concludes by discussing recent developments that leave the future of prudential standing in doubt.

Part II analyzes the historical transformation of the meaning of “prudential standing” and the concurrent distortion of some of its principles. First, it demonstrates that the understanding of the term “prudential” has evolved, incorrectly, to suggest that courts have the power to adopt *ad hoc* and policy-driven rules. This discussion highlights the great irony of prudential standing: a doctrine developed to restrict courts to their properly limited role evolved into one that encouraged them to exceed that role. Second, this section explains how the artificial bifurcation of standing doctrine along “constitutional” and “prudential” lines breeds confusion, especially

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25. *United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013).

26. Radha Pathak expounded upon this concern with respect to “statutory standing” and the zone of interests test. *See generally* Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 111 (2009) (“One of the harms caused by the careless use of the term ‘statutory standing’ is that lower courts assume that the question of whether the plaintiff falls within the class of persons to whom Congress has extended the private right of action has some special significance. That is, lower courts often elevate the statutory standing question above other questions that should be treated similarly. They elevate the question by making it a threshold inquiry, which means it must be considered first and separate from other questions regarding whether the plaintiff may ultimately recover. Some courts not only make the statutory standing question a threshold one; they make it jurisdictional.”). As explained in Part II.A, *infra*, this occurs with other prudential standing doctrines involving statutory and constitutional causes of action.

with respect to principles that may be characterized as falling under either category.

Part III proposes the total dismantling of the prudential branch of standing and demonstrates how reframing its remaining principles will enhance clarity without disrupting the courts. This section proposes a straightforward test for distinguishing prudential rules that speak to standing and those that speak to other questions. It then explains how third party standing is not properly characterized as a distinct standing principle.

### I. The Evolution of Prudential Standing

Article III limits the judicial function to the resolution of “cases” and “controversies.”<sup>27</sup> Thus, the federal judicial power is reserved to the “adjudication of actual disputes between adverse parties,”<sup>28</sup> and “this limitation applies at all stages of review.”<sup>29</sup> Courts shape the evolution of law, but they do so only as a by-product of consideration of concrete disputes.<sup>30</sup>

Federal courts employ a range of justiciability doctrines—including standing, ripeness, mootness, political question and abstention—to limit the matters before them to cases and controversies.<sup>31</sup> These doctrines “relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”<sup>32</sup>

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27. U.S. CONST. art. III, § 2.

28. *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974).

29. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 305–06 (2000) (Scalia, J., concurring) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

30. *See, e.g., Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 489 (1982) (“Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that “cases and controversies” are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme.”); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”); Hon. Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 20 (1990) (“The proximity of the courts to discrete real-world disputes, while providing a justification for lawmaking by the courts, also forms the perimeters outside of which the judiciary may not legitimately perform this function.”).

31. *Allen*, 468 U.S. at 750.

32. *Id.* (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).

Of the two distinct forms of standing—constitutional and prudential—only the former is properly characterized as a jurisdictional doctrine.<sup>33</sup> Constitutional standing<sup>34</sup> requires that a litigant present a “case” or “controversy.”<sup>35</sup> This limitation is said to be “built on separation-of-powers principles”<sup>36</sup> and “gives meaning to these constitutional limits by ‘identifying[] those disputes which are appropriately resolved through the judicial process.’”<sup>37</sup> Thus, courts “must put aside the natural urge to proceed directly to the merits” and instead “carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.”<sup>38</sup>

Once jurisdiction is clear, however, courts have a “virtually unflagging obligation” to hear and determine the case or controversy before them.<sup>39</sup> This “heavy obligation”<sup>40</sup> stems from the courts’ roles both in checking the other branches and providing litigants with an impartial forum to petition for redress of their injuries.<sup>41</sup> Thus, as the Court noted in *Cohens v. Virginia*,<sup>42</sup> federal courts “have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution.”<sup>43</sup>

Prudential standing has been a recognized exception to this obligation.<sup>44</sup> It has captured not only generally applicable principles—the zone of interests inquiry and the prohibitions on

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33. See generally Mank, *supra* note 9, at 413 (approaching the question from different perspectives and concluding that prudential standing is sufficiently distinct from constitutional standing to be considered nonjurisdictional).

34. Although constitutional considerations may preclude standing on other grounds, at a minimum, “a plaintiff must, generally speaking, demonstrate that he has suffered ‘injury in fact,’ that the injury is ‘fairly traceable’ to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.” *Bennett*, 520 U.S. at 162.

35. E.g., *Lujan*, 504 U.S. at 559 (noting that this “core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

36. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013).

37. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560).

38. *Raines*, 521 U.S. at 820.

39. *Colo. River*, 424 U.S. at 817.

40. *Id.* at 820.

41. E.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–59 (1982).

42. *Cohens v. Virginia*, 19 U.S. 264 (1821).

43. *Id.* at 404.

44. See, e.g., *ACLU*, 493 F.3d at 677.

generalized grievances and third-party standing<sup>45</sup>—but also certain specialized tests, such as those developed in connection with Lanham Act false advertising cases<sup>46</sup> and bankruptcy appeals.<sup>47</sup> Some of these principles may reflect mere “policy considerations” that “blend into constitutional limitations.”<sup>48</sup> Others are little more than reformulations of the question of whether the litigant has a cause of action.<sup>49</sup> Prudential standing may have jurisdictional consequences inasmuch as it excuses the judicial obligation to hear and determine the matter, but its principles have been characterized collectively as “more flexible” judicial rules<sup>50</sup> that may be restricted or expanded by Congress.<sup>51</sup>

Curiously, the Court has only recently focused on the inherent contradiction in the last two paragraphs. On the one hand, a federal court has a “heavy”<sup>52</sup> and “virtually unflagging obligation”<sup>53</sup> to hear matters within its jurisdiction. On the other, it may, in its discretion, refuse to exercise jurisdiction.<sup>54</sup> How does this exception not swallow the rule? If prudence defines the line between a valid refusal and one that betrays the judicial role, what does “prudence” mean?

This section examines the origins of modern prudential standing as a distinct doctrine in the Burger Court, the evolution of its core principles over the last four decades, the Court’s abrupt removal of

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45. See, e.g., *Allen*, 468 U.S. at 751 (identifying these principles as core components of prudential standing).

46. See generally *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391–93 (2014) (discussing the various tests adopted by the lower courts to evaluate zone of interests standing under the Lanham Act).

47. See generally S. Todd Brown, *Non-Pecuniary Interests and the Injudicious Limits on Appellate Standing in Bankruptcy*, 59 BAYLOR L. REV. 569 (2007) (discussing the pecuniary interest test adopted as a prudential limit on standing to appeal in bankruptcy).

48. *Flast*, 392 U.S. at 99, 99 n.20 (using third-party standing as an example).

49. See *Lexmark*, 134 S. Ct. at 1387–88 (concluding that the zone of interests principle merely goes to whether the litigant has a cause of action); see also Fletcher, *supra* note 14, at 223, 229 (arguing that some components of standing go to whether the party has a cause of action); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974) (standing issues are best addressed as a question of the litigant’s claim for relief).

50. *Windsor*, 133 S. Ct. at 2702.

51. See, e.g., *Raines*, 521 U.S. at 830 (Congress may grant a particular right that eliminates any prudential limitations, but it “cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”); *Gladstone Realtors*, 441 U.S. at 100 (same); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (same).

52. *Colo. River*, 424 U.S. at 820.

53. *Id.* at 817.

54. See, e.g., *ACLU*, 493 F.3d at 677.

two central principles from the prudential rubric, and the implications of these opinions.

## A. Shifting Perceptions of Standing

### 1. *The Amorphous Origins of Prudential Standing*

Prudential standing limitations did not just suddenly appear in the Burger Court; they are reflected in earlier decisions that drew upon the distinction between the “limits of power and the wise exercise of power.”<sup>55</sup> When Justice Frankfurter, for example, noted the distinction between these “questions of authority and questions of prudence,” he stressed that both spoke to the proper limits of the judicial role.<sup>56</sup> The latter, in his view, “precludes the Court’s giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.”<sup>57</sup> In many respects, this mirrored Justice Brandeis’ discussion of the rules adopted by the Court, “for its own governance in the cases confessedly within its jurisdiction,” to avoid unnecessarily passing on the validity of a statute.<sup>58</sup>

Yet the lines between the limits of judicial authority and prudent self-restraint were never clearly defined. Some decisions suggested that certain rules, such as adverseness, were demanded by Article III.<sup>59</sup> Other rules, such as the bar against third-party standing, were characterized as judicially self-imposed but difficult to distinguish

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55. *Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting).

56. *Id.*

57. *Id.*

58. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–46 (1936) (Brandeis, J.) (also noting that declaring a statute invalid was one of “great gravity and delicacy” and limited, in part, by the “rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies”). Two of these rules—the limitation on hearing friendly suits and the requirement that the plaintiff have an injury—focused on considerations that implicate constitutional standing today. *Id.* at 346–48.

59. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151–52 (1951) (Frankfurter, J., concurring) (noting that Article III and regard for separation of powers “restricts the courts of the United States to issues presented in an adversary manner”). In the midst of this discussion of the requirements, he observed that these injuries must be personal, not a generalized grievance. *Id.* at 151. He would reiterate this point a decade later in *Poe v. Ullman*, 367 U.S. 497, 503–04 (1961) (standing and other justiciability doctrines “are but several manifestations—each having its own ‘varied application’—of the primary conception that the federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.”).



from the constitutional limitations on the courts' power.<sup>60</sup> For the most part, drawing a clearer distinction was unnecessary because both spoke to the limits of the judicial power.

The distinction would be critical, however, in *Flast v. Cohen*.<sup>61</sup> Both *Flast* and *Frothingham v. Mellon*<sup>62</sup> involved similar taxpayer standing questions,<sup>63</sup> and the *Frothingham* Court had previously determined that mere status as a taxpayer did not confer standing to challenge the constitutionality of a statute.<sup>64</sup> The Court questioned whether *Frothingham* expressed a constitutional bar to taxpayer standing or merely imposed a “rule of self-restraint which was not constitutionally compelled.”<sup>65</sup> *Frothingham* was unsurprisingly unclear, blurring its constitutional and policy justifications for the rule.<sup>66</sup> Ultimately, the Court concluded that the taxpayer standing rule was not required by the Constitution; it was merely one that guided the inquiry into whether the taxpayer had a sufficient personal stake and interest to satisfy Article III.<sup>67</sup> After finding that each citizen has a right to challenge expenditures that are inconsistent with

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60. In *Barrows v. Jackson*, Justice Minton noted that third-party standing limitation is grounded in Article III and, citing Brandeis's concurrence in *Ashwander*, characterized the limitation as a “complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation).” *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). In *United States v. Raines*, Justice Brennan similarly grounded the rule as one of self-restraint but grounded in constitutional concerns. *United States v. Raines*, 362 U.S. 17, 21 (1960) (noting that the rule was grounded in the case or controversy requirement).

61. *Flast*, 392 U.S. at 92–97.

62. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

63. In both cases, the litigant challenged the validity of congressional expenditures and claimed standing solely as taxpayers. *Flast*, 392 U.S. at 92; *Frothingham*, 262 U.S. at 486.

64. *Frothingham*, 262 U.S. at 486–89.

65. *Flast*, 392 U.S. at 92.

66. *Id.* at 97 (citing *Barrows* and *Ashwander* to emphasize the tendency to blur these considerations).

67. *Id.* at 101 (“A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer qua taxpayer consistent with the constitutional limitations of Article III.”). This distinction between a constitutional limit on the judicial power and a rule of self-restraint, and specifically the courts' discretion to ignore the latter, would be mirrored in the bifurcation of standing doctrine into constitutional and prudential doctrines under the Burger Court.

the Establishment Clause, the Court found that the litigants had standing.<sup>68</sup>

## 2. *The Burger Court*

The standing doctrine inherited by the Burger Court was thus unified in purpose—shaping the courts’ visions of their role—but amorphous in practice.<sup>69</sup> As a practical matter, the Court was in the awkward position of defining the reach of its own power. Standing and other principles, then, were “rules of self-restraint,” because they spoke to matters where the risk of encroachment into the proper roles of the other branches by judicial fiat was high.<sup>70</sup> Yet this led to an amorphous doctrine because different judges emphasized different considerations.<sup>71</sup>

The first Burger Court opinion to focus on the parameters of standing, *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>72</sup> thus framed a familiar and succinct generalization about standing: “Generalizations about standing to sue are largely worthless as such.”<sup>73</sup> After concluding that the former “legal interest” test for standing “goes to the merits,” Justice Douglas reframed the inquiry as whether the interest the litigant sought to protect was “arguably within the zone of interests” protected by the statute.<sup>74</sup> From that point on, the Court evaluated the question in that case as whether the litigant had a protected interest under the statute.<sup>75</sup>

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68. *Id.* at 101–06 (adopting the “nexus test” and concluding that a taxpayer has standing to challenge expenditures that are inconsistent with the Establishment Clause).

69. *See Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (1966) (statement of Professor Paul A. Freund).

70. *See, e.g., Trop*, 356 U.S. at 120 (Frankfurter, J., dissenting).

71. *See, e.g., Flast*, 392 U.S. at 97 (discussing tendency to blur the two visions of the limitation on the courts’ authority).

72. *Ass’n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

73. *Id.* at 151. This observation, however, does not appear to suggest that standing is incapable of being framed in useful generalizations. Rather, it is more likely that it reflects the state of standing jurisprudence at the time, which, as noted, frequently referenced both the constitutional and the policy concerns implicated by the cases under consideration.

74. *Id.* at 153 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

75. The Court subsequently characterized *Data Processing* as addressing the standing to review federal agency action under the APA. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). *Accord Investment Co. Institute v. Camp*, 401 U.S. 617, 641 (1971) (Harlan, J., dissenting) (“*Data Processing* held that, aside from ‘case-or-controversy’ problems not present here, the crucial question in ruling on a challenge to standing is ‘whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’”).

The first signs of a clear bifurcation between constitutional and prudential standing did not appear until Justice Powell's concurrence in *United States v. Richardson*.<sup>76</sup> In this opinion, he outlined several critiques of *Flast*, including that it “purports to separate the question of standing from the merits, yet it abruptly returns to substantive issues.”<sup>77</sup> Moreover, although *Flast* distinguished “between constitutional and prudential limits on standing,” Justice Powell found it “impossible” to determine whether the nexus test adopted in that case was a constitutional or a prudential limitation.<sup>78</sup> In a footnote, he ultimately suggested that the nexus test in *Flast* and the zone of interests test in *Data Processing* were “prudential” limitations on standing.<sup>79</sup>

Writing for the majority in *Warth v. Seldin*<sup>80</sup> exactly one year later, Justice Powell built upon his *Richardson* concurrence by formally bifurcating standing into constitutional and prudential categories.<sup>81</sup> He famously characterized “both dimensions” as “founded in concern about the proper—and properly limited—role of the courts in a democratic society.”<sup>82</sup> From there, he noted that two concepts—generalized grievances and third-party standing—are prudential limits on standing.<sup>83</sup>

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76. *United States v. Richardson*, 418 U.S. 166 (1974).

77. *Id.* at 180–81 (Powell, J., concurring).

78. *Id.* at 181.

79. *Id.* at 196 n.18. He made a similar reference in a dissenting opinion two years later. *Singleton v. Wulff*, 428 U.S. 106, 123 n.2 (1976) (Powell, J., dissenting) (“The [prudential] inquiry also has been framed, in appropriate cases, as whether a person with Art. III standing is asserting an interest arguably within the zone of interests intended to be protected by the constitutional or statutory provision on which he relies, or whether a person should be allowed to attack a statute, not on the ground that it is unconstitutional as applied to him, but that it would be unconstitutional as applied to third parties.”). In another case decided the same day as *Richardson*, however, Justice Brennan questioned whether the zone of interests test went to standing. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 236 (1974) (Brennan, J., dissenting) (“The Court’s further inquiry, in each of these cases, into the connection between ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question’ and the ‘interest sought to be protected by the complainant’ is relevant, not to ‘standing’ but, if at all, only to such limitations on exercise of the judicial function as justiciability.”).

80. *Warth v. Seldin*, 422 U.S. 490 (1975).

81. *See id.* at 498 (concluding that the standing “inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise”).

82. *Id.* at 499–500. This, as noted, was clearly a fair generalization about standing doctrine at the time.

83. *Id.* at 500 (stressing the separation of powers concern, Justice Powell noted that without the bar against asserting generalized grievances and the rights of other parties “courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions

The zone of interests inquiry, which had not been expressly characterized as a standing inquiry in *Data Processing*, soon found its way into the prudential rubric as well. Writing for the majority in *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>84</sup> Justice Powell stated that *Data Processing* “established” the zone of interests test as a “nonconstitutional standing requirement.”<sup>85</sup> In *Gladstone Realtors v. Village of Bellwood*,<sup>86</sup> Justice Powell, again writing for the majority, reiterated that generalized grievances and third-party standing were prudential limitations on standing.<sup>87</sup> In a footnote, he characterized the zone of interests inquiry as another “nonconstitutional limitation” on standing,<sup>88</sup> and much of the remaining opinion centered on whether the petitioners fell outside the zone of interests protected under the statute.<sup>89</sup> Three years later, then-Justice Rehnquist’s majority opinion in *Valley Forge Christian College v. Americans United for Separation of Church & State*<sup>90</sup> expressly incorporated the zone of interests test into the list of commonly applicable prudential standing principles.<sup>91</sup>

To summarize, *Warth* incorporated two distinct concepts—requiring litigants to assert only their own rights and the bar against hearing generalized grievances—into a single “prudential standing” doctrine. *Simon* and *Gladstone* drew upon Justice Powell’s belief that it was “undoubtedly true”<sup>92</sup> that the zone of interests test was a prudential limit on standing, but the Court never explained why this

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and even though judicial intervention may be unnecessary to protect individual rights.”). By contrast, constitutional standing centered on “whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Id.* at 498–99.

84. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

85. *Id.* at 39 n.19.

86. *Gladstone Realtors*, 441 U.S. 91.

87. *Id.*

88. *Id.* at 100 n.6.

89. *Id.* at 100–09.

90. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982).

91. *Id.* 474–75.

92. *Richardson*, 418 U.S. at 196 n.18 (Powell, J., concurring). This view was never fully explained, but it appears to have been grounded in the conceptual similarities between the challenge to agency decision-making at issue in *Data Processing* and cases involving constitutional challenges to Congressional action, which typically involved consideration of the generalized grievances and third-party standing principles.

was a standing question as opposed to a straightforward cause of action inquiry.<sup>93</sup>

Incorporating the zone of interests test was the final step in a remarkable transformation of standing doctrine. *Flast* had already suggested that some standing rules were flexible and could thus be ignored or modified.<sup>94</sup> Treating the zone of interests test as one of standing took that suggestion one step further: courts could look to the policies advanced by the substantive law as a basis for denying standing.<sup>95</sup> With the Court's subsequent formulation of the primary prudential standing principles in *Valley Forge*,<sup>96</sup> the bifurcation of standing and incorporation of the right of action inquiry into a distinct prudential standing doctrine was complete.

### **B. Prudential Principles after the Burger Court**

Although the Court's characterization of standing principles has changed over time,<sup>97</sup> its basic summary of the components of prudential standing in *Valley Forge* has guided the lower courts for more than three decades.<sup>98</sup> The underlying questions concerning this

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93. Other have questioned the wisdom of blurring the two concepts. *E.g.*, Hon. William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403, 417 (1985) ("The question of reviewability should in principle be distinguished from the standing requirement. Likewise, questions as to the existence of a private right of action should be conceptually separate from the standing inquiry. These distinctions, however, have not been uniformly observed, and the question of the existence of a private right of action or an action for judicial review has affected the standing analysis in some cases.").

94. A thorough summary of the academic and judicial criticism of *Flast* might require a footnote longer than the typical treatise. With respect to this discussion, however, the opinion has been criticized for marginalizing the separation of powers concerns reflected in other opinions. *E.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 611 (2007) ("By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* "failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-a-vis the other branches, concrete adverseness or not.") (quoting *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996)). It has also been criticized for recognizing the "taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner" as an injury sufficient to establish a "sufficient stake in the outcome" to satisfy Article III. *Hein*, 551 U.S. at 619, 623 (Scalia, J., dissenting) (also noting that *Flast* was not distinguishable from *Frothingham* because, by *Flast's* logic, *Frothingham* had a direct interest in challenging congressional expenditures under the "very provision creating the power to tax and spend").

95. See *Simon*, 441 U.S. at 99–100, 100 n.6.

96. See *Valley Forge*, 454 U.S. at 474–75.

97. See *infra* Parts I.B.1-3.

98. *E.g.*, *Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 290 (1st Cir. 2013) (employing the *Valley Forge* formulation of the standard); *Servicios Azucareros De*

formulation of prudential standing<sup>99</sup> remained, even if the Court glossed over them.<sup>100</sup> Prudential standing doctrine has been called “a twentieth-century invention of highly dubious character”<sup>101</sup> and, like standing generally, “amorphous.”<sup>102</sup> Its expansion and application in discrete cases has been characterized as “confused, confusing, and potentially detrimental;”<sup>103</sup> “inconsistent with any coherent constitutional philosophy;”<sup>104</sup> and a tool for avoiding consideration of the merits.<sup>105</sup>

In recent years, however, members of the Court have attempted to “bring some discipline”<sup>106</sup> to the jurisdictional label generally and the law of standing in particular.<sup>107</sup> Many lower courts, by contrast, have not only continued to apply the principles outlined in *Valley Forge*,<sup>108</sup> but have also developed distinct standing rules of their own. These rules build upon their perceived prudential authority to decline jurisdiction for constitutional or pure policy reasons.

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Venezuela, C.A. v. John Deere Thibodeaux, Inc., 702 F.3d 794, 801 (5th Cir. 2012) (same); Lewis v. Alexander, 685 F.3d 325, 340 (3d Cir. 2012) (same); Mulhall v. Unite Here Local 355, 618 F.3d 1279, 1290 (11th Cir. 2010) (same); Bishop v. Bartlett, 575 F.3d 419, 423 (4th Cir. 2009) (same); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1122 (9th Cir. 2009) (same).

99. See *infra* Parts I.B.1-3 and III.B for a detailed discussion of the disputed foundations of each of these prudential principles.

100. See Parts I.B.1-3 (discussing the Burger Court’s treatment of each principle).

101. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 218 (2001).

102. Jim Wedeking, *Addressing Judicial Resistance to Reciprocal Reliance Standing in Administrative Challenges to Environmental Regulations*, 14 N.Y.U. ENVTL. L.J. 535, 544 (2006).

103. David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79, 88 (2004).

104. Jeffrey Kahn, *Zoya’s Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 676 (2010).

105. *Elk Grove*, 542 U.S. at 18 (Rehnquist, J., concurring).

106. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (observing that “a rule should not be referred to as jurisdictional unless it governs a court’s adjudicatory capacity, that is, its subject-matter or personal jurisdiction”).

107. See generally *id.* at 1202–03 (“Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term. We have urged that a rule should not be referred to as jurisdictional unless it governs a court’s adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand.”); *Lexmark*, 134 S. Ct. at 1377 (questioning the suggestion that mere prudence is a sufficient basis to refuse to hear and determine matters within a court’s jurisdiction).

108. See *supra* note 92.

### 1. *Generalized Grievances*

Although it unquestionably has “a lengthy pedigree,”<sup>109</sup> the precise foundation of the generalized grievances principle has been a source of confusion historically.<sup>110</sup> The Burger Court’s attempt to gloss over the lingering question of its constitutional and prudential foundations in *Warth* did not fully resolve the dispute.<sup>111</sup> This uncertainty, however, may be grounded more in the lingering differences in judicial philosophy than in the doctrine’s ambiguous history.<sup>112</sup>

In any case, those who took the Court’s categorization of the principle as “prudential”—and thus subject to modification by Congress—would be sorely disappointed by *Lujan v. Defenders of Wildlife*.<sup>113</sup> The case involved an appeal of a citizen suit under the Endangered Species Act, which authorized “any person” to commence suit to enjoin violations.<sup>114</sup> Thus, the only standing question was whether the plaintiffs had constitutional standing, which the divided panel decided in favor of the plaintiffs.<sup>115</sup> The Court reversed, holding that the plaintiffs failed to establish “actual or imminent” injury.<sup>116</sup> Writing for the majority, Justice Scalia concluded that “raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no

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109. *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

110. *See supra* Part I.A.

111. *See Warth*, 422 U.S. at 500.

112. *See* Robert J. Pushaw Jr., *Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Cases*, 45 GA. L. REV. 1, 18–19 (2010) (“The Court has struggled to balance two competing forces. On the one hand, Article III judges must fulfill their constitutional duty to exercise their jurisdiction to remedy violations of federal law. On the other hand, federal courts must stay within the bounds of truly ‘judicial’ power—a deliberative decisionmaking process that requires keeping dockets at a manageable size. Liberal Justices emphasize the first consideration and conservatives the second one; moderates seek a middle ground. Consequently, the content of standing law and its application have changed depending on the composition of the Court, the majority’s view of the proper judicial role, the perceived importance of the federal law at issue, and assorted pragmatic factors.”).

113. *Lujan*, 504 U.S. 555.

114. *Defenders of Wildlife, Friends of Animals & Their Env’t v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988) (concluding that this language was intended to extend standing to the full limits of Article III).

115. *Id.*

116. *Lujan*, 504 U.S. at 564–67. Justice Scalia also opined, in a portion of the opinion that did not draw a majority, that the respondent’s failed to satisfy the redressability prong of constitutional standing. *Id.* at 568–71.

more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”<sup>117</sup>

Writing for the Court in *Lexmark International, Inc. v. Static Control Components*<sup>118</sup> more than two decades later, Justice Scalia noted that *Lujan* demonstrates that generalized grievances “are barred for constitutional reasons, not ‘prudential’ ones.”<sup>119</sup>

## 2. Zone of Interests

As noted, the zone of interests principle quickly followed the generalized grievances principle as one of the core components of prudential standing. Justice Powell’s concurrence in *Richardson* characterized the principle as “undoubtedly”<sup>120</sup> part of prudential standing, and the Court accepted this classification for nearly four decades.<sup>121</sup> Under this test, the court looks to “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>122</sup> This test was initially limited to review of administrative decisions under section 10 of the Administrative Procedure Act (“APA”),<sup>123</sup> but it has also been applied to other claims.<sup>124</sup> Defining the scope of protected interests under this test has historically hinged upon the statute or constitutional right in question, with the “generous” review provisions of the APA warranting broader prudential standing than questions involving other statutory or constitutional interests.<sup>125</sup>

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117. *Id.* at 573–74.

118. *Lexmark*, 134 S. Ct. 1377.

119. *Id.* at 1387 n.3.

120. *Richardson*, 418 U.S. at 197.

121. *See, e.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (characterizing the test as prudential); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010) (same); *Elk Grove*, 542 U.S. at 12 (same); *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002) (same); *FEC v. Akins*, 524 U.S. 11, 19 (1998) (same); *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 (1991) (same); *Allen*, 468 U.S. at 751 (same); *Valley Forge*, 454 U.S. at 475 (same); *Gladstone Realtors*, 441 U.S. at 100 n.6 (same); *Simon*, 426 U.S. at 39 n.19 (same).

122. *Data Processing*, 397 U.S. at 153.

123. 5 U. S. C. § 702 (2012).

124. *See, e.g.*, *Bennett*, 520 U.S. at 162; *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992); *Air Courier Conference*, 498 U.S. at 523; *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320–21 n.3 (1977).

125. *Bennett*, 520 U.S. at 163; *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987).



In *Lexmark*, however, the Court unanimously concluded that the zone of interests test does *not* speak to standing.<sup>126</sup> The dispute involved Lexmark, a company that manufactures and sells printers that work only with its own style of cartridges, and Static Control, a company that manufactures and sells components that allow third parties to remanufacture Lexmark cartridges. Lexmark adopted a “Prebate” program, under which the company gave customers a 20-percent discount if they agreed to return the cartridges once they were empty. In addition, Lexmark sent notices to remanufacturers, in which the company advised that it was illegal to sell refurbished Prebate cartridges and to use Static Control’s products to do so.

Lexmark sued Static Control, alleging violations of the Copyright Act of 1976 and the Digital Millennium Copyright Act. Static Control countersued, alleging that Lexmark was guilty of false advertising under 15 U.S.C. § 1125(a) (“the Lanham Act”).<sup>127</sup> Specifically, Static Control alleged that Lexmark: (a) purposely misled consumers into thinking that the “Prebate” terms were legally binding and (b) materially misrepresented “the nature, characteristics, and qualities” of its own and Static Control’s properties in the notice sent to remanufacturers.<sup>128</sup> After the district court concluded that Static Control lacked prudential standing to bring the Lanham Act claim, the Sixth Circuit Court of Appeals reversed.<sup>129</sup> The Supreme Court granted certiorari to address “the appropriate analytical framework for determining a party’s standing to maintain an action for false advertising under the Lanham Act.”<sup>130</sup>

At the outset, the Court questioned federal courts’ authority to “decline to adjudicate” cases within their jurisdiction for prudential

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126. *Lexmark*, 134 S. Ct. at 1387.

127. In relevant part, 15 U.S.C. § 1125(a) provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

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(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

128. *Lexmark*, 134 S. Ct. at 1384.

129. *Id.* at 1385.

130. *Id.*

reasons.<sup>131</sup> Moreover, the Court concluded that *Data Processing* “rested on statutory, not ‘prudential,’ considerations.”<sup>132</sup> Although the Court acknowledged that it treated the test as part of prudential standing in the past, the Court concluded that the test “does not belong there.”<sup>133</sup> Quoting Judge Silberman, the Court explained “‘prudential standing’ is a misnomer” as applied to the zone-of-interests analysis, which asks whether “this particular class of persons ha[s] a right to sue under this substantive statute.”<sup>134</sup>

*Lexmark* thus establishes that the zone of interests principle only speaks to whether the litigant has a cause of action under the statute—a question that is not jurisdictional.<sup>135</sup> If the principle goes to the statutory cause of action, the court does not have the authority to substitute its policy judgment concerning that right for Congress.<sup>136</sup> As the Court explained:

That question requires us to determine the meaning of the congressionally enacted provision creating a cause of action. In doing so, we apply traditional principles of statutory interpretation. We do not ask whether in our judgment Congress should have authorized Static Control’s suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that

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131. *Id.* at 1386 (observing that *Lexmark*’s request that the Court “decline to adjudicate Static Control’s claim on grounds that are ‘prudential,’ rather than constitutional” was “in some tension with our recent reaffirmation of the principle that a federal court’s ‘obligation’ to hear and decide cases within its jurisdiction is ‘virtually unflagging’”) (internal citations omitted). In another unanimous opinion, the Court stressed this tension with respect to prudential ripeness later in the term. *Susan B. Anthony*, 134 S. Ct. at 2347, 2341 (“To the extent respondents would have us deem petitioners’ claims nonjusticiable on grounds that are ‘prudential,’ rather than constitutional, that request is in some tension with our recent reaffirmation of the principle that a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging.’”) (internal citations omitted).

132. *Lexmark*, 134 S. Ct. at 1386.

133. *Id.* at 1387.

134. *Id.* (quoting *Battery Recyclers*, 716 F.3d at 675–76 (Silberman, J., concurring)).

135. *Lexmark*, 134 S. Ct. at 1388 n.4. This conclusion reflects the Roberts Court’s ongoing effort to “bring some discipline” to the use of the term “jurisdictional,” which it has limited to questions concerning the court’s subject-matter or personal jurisdiction. *Henderson*, 131 S. Ct. at 1202–03.

136. *Lexmark*, 134 S. Ct. at 1387.

Congress has created merely because “prudence” dictates.<sup>137</sup>

Having excised the principle from the prudential standing doctrine, the Court further clarified the principle’s place in the cause of action inquiry. The Court recognized that a literal reading of the statute “might suggest that an action is available to anyone who can satisfy the minimum requirements of Article III.”<sup>138</sup> However, it reasoned that this reading is limited by two considerations. First, “Congress is presumed to ‘legislat[e] against the background of’ the zone-of-interests limitation, ‘which applies unless it is expressly negated.’”<sup>139</sup> Second, “we generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute.”<sup>140</sup>

In sum, *Lexmark* returns the zone of interests inquiry to its origins.<sup>141</sup> After *Richardson*<sup>142</sup> and prior to *Lexmark*, it served as a standalone prudential limitation on standing. After *Lexmark*, it should be considered little more than one component of the presumptive limits of a statutory cause of action.<sup>143</sup> In the process, however, the Court also demonstrated that one of the underlying purposes of recognizing the zone of interests inquiry as a component of prudential standing—inferring limits on who may obtain relief under the law when the statute is silent—is appropriate as part of the cause of action inquiry.<sup>144</sup> The implications for similar prudential standing tests have not been fully examined by the courts to date.

### 3. Third-Party Rights

The only remaining common component of prudential standing after *Lexmark* is third-party standing.<sup>145</sup> This principle is

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137. *Id.* at 1387–88.

138. *Id.* at 1388.

139. *Id.* (internal citations omitted).

140. *Id.* at 1390.

141. See *infra* Part I.A.1 (noting that *Data Processing* focused on interpreting the statutory right of action without expressly characterizing the test as a standing inquiry).

142. *Richardson*, 426 U.S. at 39 n.19 (recognizing and applying the zone of interests test as a standing test).

143. *Lexmark*, 134 S. Ct. at 1387.

144. *Id.* at 1388–90.

145. See *Chandler & Newville v. Quality Loan Serv. Corp.*, 2014 U.S. Dist. LEXIS 76179, 11–12 (D. Or. Apr. 18, 2014) (of prudential standing’s original core components, only the third-party standing principle remains part of prudential standing). Cf. *Calista Enters. v. Tenza Trading Ltd.*, 2014 U.S. Dist. LEXIS 100923 (D. Or. July 24, 2014).

straightforward: a litigant “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”<sup>146</sup> Its place in standing doctrine, however, is not so straightforward.

The Court has long referred to third-party standing as a prudential limitation rather than a constitutional or statutory one. In *Barrows v. Jackson*,<sup>147</sup> the Court referred to third-party standing as a “complementary rule of self-restraint for its own governance.”<sup>148</sup> Similarly, in *Warth*, the Court characterized the “third-party standing” inquiry as a “rule of self-governance . . . subject to exceptions,”<sup>149</sup> and in *Phillips Petroleum Company v. Shutts*<sup>150</sup> and other cases, the Court referred to it simply as one of the “prudential limits on standing.”<sup>151</sup> As Justice Brennan observed, the Court has frequently based its allowance or rejection of third-party standing on the perceived “prudence of exercising jurisdiction rather than the content of substantive federal law.”<sup>152</sup>

Nonetheless, in *Lexmark*, the Court suggested that this principle, much like the zone of interests principle, goes to whether the litigant has a cause of action under applicable law.<sup>153</sup> This dicta certainly captures the tenor of some of the Court’s precedent,<sup>154</sup> but, as the

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(acknowledging that the Court has not expressly removed third-party standing from the prudential rubric and thus evaluating the question as one of prudential standing).

146. *Warth*, 422 U.S. at 499; *see also* *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 644 (2d Cir. 1988) (noting narrow exceptions to the general rule that “a litigant is restricted to asserting his own constitutional and statutory rights”).

147. *Barrows*, 346 U.S. 249.

148. *Id.* at 255.

149. *Warth*, 422 U.S. at 509; *see also* *Raines*, 362 U.S. at 22 (characterizing the understanding that “a litigant may only assert his own constitutional rights or immunities” as one of the “rule[s] of practice, albeit weighty ones” that are subject to exceptions) (internal citations omitted).

150. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

151. *Id.* at 804; *see also* *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 557–58 (1996); *Franchise Tax Bd. v. Alcan Aluminum*, 493 U.S. 331, 336–37 (1990). As the Second Circuit recently observed, the third-party standing doctrine “imposes only a prudential, not a constitutional, limitation” on standing. *Pierre v. Holder*, 738 F.3d 39, 57 n.12 (2d Cir. 2013).

152. *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 737 n.3 (1990) (Brennan, J., statement).

153. *Lexmark*, 134 S. Ct. at 1387 n.3 (“The limitations on third-party standing are harder to classify; we have observed that third-party standing is ‘closely related to the question whether a person in the litigant’s position will have a right of action on the claim,’ but most of our cases have not framed the inquiry in that way. This case does not present any issue of third-party standing, and consideration of that doctrine’s proper place in the standing firmament can await another day.”) (internal citations omitted).

154. *Triplett*, 494 U.S. at 721 (1990); *Warth*, 422 U.S. at 500 n.12.

Court observed, “most of our cases have not framed the inquiry in that way.”<sup>155</sup> At this point, third-party standing remains grounded in the prudential standing doctrine and is being treated as such in the lower courts.<sup>156</sup>

## II. Analysis: Prudential Alchemy and the Courts

To shape the remaining discussion, let us return to and recast a few fundamental points. Exercising the judicial role is limited to<sup>157</sup>—and an obligation of<sup>158</sup>—the court’s jurisdiction. The court’s jurisdiction—its power—is limited to cases or controversies.<sup>159</sup> Standing doctrine, like other justiciability concepts, relies upon an understanding of what a case or controversy is; in this case, by identifying the qualities that the litigant must possess.<sup>160</sup> Yet it also speaks to what the judicial power is not; specifically, by reference to the broader role of the courts in a democratic society.<sup>161</sup> These are distinct but overlapping concepts that are grounded in the Constitution.

Viewed in this way, the early “rules of self-restraint” were *all* focused on remaining within the limits of the judicial power.<sup>162</sup> The generalized grievances principle, for example, spoke to the role of the courts in our system of governance.<sup>163</sup> It respected individuals’ right to petition the government for redress, but it limited access to the courts to those whose grievances were properly steered to the Judiciary as opposed to Congress or the Executive.<sup>164</sup> Such a rule was viewed as prudent because it went to the core of standing inquiry: Is this litigant properly invoking the court’s jurisdiction?<sup>165</sup>

Yet these rules were flexible because they could never fully capture all circumstances and all considerations that might go to the underlying questions of the judicial power and the proper role of the Judiciary. The understanding that the judicial power is limited was (and is) immutable; but the principles guiding the understanding of

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155. *Lexmark*, 134 S. Ct. at 1387 n.3.

156. *See, e.g., Calista*, 2014 U.S. Dist. LEXIS 100923, 17–18 n.7.

157. *See supra* notes 28–29.

158. *See, e.g., Colo. River*, 424 U.S. at 817.

159. *See, e.g., Lujan*, 504 U.S. at 559.

160. *See id.* at 560.

161. *Allen*, 468 U.S. at 750.

162. *See supra* Introduction.

163. *Id.*

164. *Id.*

165. *See Warth*, 422 U.S. at 500–01.

those limits were not. Beyond the need to draw upon different principles to address the specific concerns in a given case, reasonable judges could reach different results due to (i) the ambiguous meaning of “case” and “controversy” and (ii) distinct differences of opinion concerning specific limits on the judiciary’s role.<sup>166</sup> All we could hope for is that prudent judgment would lead courts to avoid overreaching,<sup>167</sup> though this hope hardly inspired confidence in standing doctrine.<sup>168</sup>

The categorization of these principles as constitutional and prudential components of standing, however, did not solve the problem; it transformed interpretive principles into rules of a different character. Some principles were deemed the “irreducible constitutional minimum of standing.”<sup>169</sup> Others were merely flexible prudential rules subject to modification by the courts and Congress.<sup>170</sup> The limits of the former in capturing the underlying questions of standing were glossed over. The latter, at times, became untethered from their origins, and the courts’ presumed power to erect prudential rules spawned new pseudo-jurisdictional barriers to adjudication.<sup>171</sup> And if these principles were *merely* prudential, what power did the courts have to adopt them at all?<sup>172</sup>

Standing’s doctrinal foundations are arguably muddier today than they were four decades ago. Specifically, this history suggests two drawbacks of the modern bifurcation and categorization of

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166. See Pushaw, *supra* note 106, at 18–19.

167. See *Trop*, 356 U.S. at 120 (Frankfurter, J., dissenting).

168. See Kenneth E. Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 HARV. L. REV. 645, 645 & n.1 (1970) (noting that “the doctrine of standing has never been very well regarded by judges or legal scholars” and surveying criticism of the pre-Burger Court doctrine).

169. *Lujan*, 504 U.S. at 560; see also *Valley Forge*, 454 U.S. at 488 n.24 (“Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.”); John G. Roberts, Jr., Article III Limits on Statutory Standing, 42 DUKE L.J. 1219, 1226 (1993) (“If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional.”).

170. See *Windsor*, 133 S. Ct. at 2702 (noting that prudential rules were flexible and non-binding on the courts); *Raines*, 521 U.S. at 830 n.1 (noting that Congress may eliminate prudential rules within a statute); *Gladstone Realtors*, 441 U.S. at 100 (same); *Warth*, 422 U.S. at 490, 501 (same).

171. See *infra* Part II.A.

172. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (characterizing the bifurcation between constitutional and prudential standing as unsatisfying, in part, “because it leaves unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate” and suggesting that the Court “must always hear the case of a litigant who asserts the violation of a legal right”).

standing doctrine: (i) generating an expansive vision of the courts' prudential authority to create artificial barriers to adjudication and (ii) the potential to confuse standing doctrine by shifting its principles from one category to the other (the "wandering principle" problem).

### A. Creating Novel Barriers to Adjudication

Whatever "prudence" may have meant to the Court before and during the Burger Court, it surely did not mean a free-floating judicial power to carve out exceptions to rights of action under the rubric of standing.<sup>173</sup> In the time since, however, the label has assumed a broader meaning. Characterizing some principles as "constitutional" and others as "prudential" suggested not only that some were more fundamental than others, but also that courts had the right to create new principles that ostensibly limit justiciability based on something other than the idea of the proper and properly limited role of the courts.<sup>174</sup>

Three examples illustrate the different ways in which this has occurred. The first involves a federal district court's *ad hoc* improvisation of a prudential rule to deny standing to litigants whose injuries were tied to their ongoing violation of federal immigration law. The second discusses the evolution of the prior substantial connections test to shield the federal government from liability to foreign citizens. The third outlines the widespread adoption of a prudential test to limit bankruptcy appeals.

#### 1. *Henry's Unclean Hands*

In *Henry*, immigrants who were in the country illegally challenged the constitutionality of a state law that, among other things, precluded them from obtaining drivers' licenses and denied them access to certain healthcare and educational benefits.<sup>175</sup> The court found that several individual plaintiffs had standing under

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173. See *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 196 (2d Cir. 2002) (Sotomayor, J.) ("[T]he prudential requirements of standing have been developed by the Supreme Court on its own accord and applied in a more discretionary fashion as rules of judicial self-restraint further to protect, to the extent necessary under the circumstances, the purpose of Article III.") (internal quotation marks omitted).

174. E.g., *Servicios Azucareros*, 702 F.3d at 797 (discussing lower court order denying prudential standing because the plaintiff was a foreign citizen suing a United States citizen); *EEOC v. Bailey Co.*, 563 F.2d 439, 441 (6th Cir. 1977) (discussing lower court order finding white plaintiff lacked standing to sue under Title VII); *Nat'l Coalition of Latino Clergy, Inc. v. Henry*, 2007 U.S. Dist. LEXIS 91487, 22–23 (N.D. Okla. Dec. 12, 2007) (immigrants in the country illegally denied standing based on an "unclean hands" prudential theory).

175. *Henry*, 2007 U.S. Dist. LEXIS 91487, at 2–5.

Article III.<sup>176</sup> However, drawing upon the unclean hands doctrine,<sup>177</sup> the court adopted a “a new, and narrow, prudential limitation on standing”:<sup>178</sup>

An illegal alien, in willful violation of federal immigration law, is without standing to challenge the constitutionality of a state law, when compliance with federal law would absolve the illegal alien’s constitutional dilemma—particularly when the challenged state law was enacted to discourage violation of the federal immigration law.<sup>179</sup>

No other court has adopted this rule to date.

## 2. *Prior Substantial Connections and Foreign Citizens*

A prudential rule that has gained more traction—the prior substantial connections test—expressly targets foreign citizens who have been harmed by American officials outside of the United States. In *Atamirzayeva v. United States*,<sup>180</sup> for example, Zoya Atamirzayeva alleged that her cafeteria in Tashkent, Uzbekistan was razed by local authorities at the request of United States embassy officials so they could build a security checkpoint.<sup>181</sup> After being denied remuneration for her losses, she sued in the Court of Federal Claims. The court framed the issue as “whether a foreign plaintiff or owner has standing to assert a claim for just compensation based on the Takings Clause of the Fifth Amendment for an alleged taking by the United States of property located abroad.”<sup>182</sup> Drawing upon the application of the “prior substantial connections” test in *United States v. Verdugo-Urquidez*<sup>183</sup> and cases involving Takings Clause claims by foreign

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176. *Id.* at 19.

177. *Id.* at 24–25.

178. *Id.* at 28.

179. *Id.*

180. *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (Fed. Cl. 2007).

181. *Id.* (plaintiff alleged that embassy officials were also present and oversaw the destruction).

182. *Id.* at 384.

183. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (defendant, a Mexican resident and citizen, did not have a Fourth Amendment right to suppress evidence seized from a warrantless search of his home because he had no “previous significant voluntary connection with the United States”).



citizens,<sup>184</sup> the court found that the plaintiff lacked standing.<sup>185</sup> As Jeffrey Kahn recently opined, the evolution of this prudential standing test has been remarkable:

The “prior substantial-connections” test is an example of doctrinal metamorphosis at its worst. The case that created it, *United States v. Verdugo-Urquidez*, rejected on the merits a criminal defendant’s claim that the Fourth Amendment required exclusion of incriminating evidence obtained by American officials acting abroad without a warrant. In less than twenty years that holding has “slipped the surly bonds” of constitutional criminal procedure. In Zoya’s case, and increasingly in many others, the test has been transformed into a jurisdictional inquiry into a plaintiff’s civil litigation. A starker legal transplant in such a short span of time—or one as dangerous to our system of justice—is hard to find.<sup>186</sup>

### 3. *The Bright-Line Test for Bankruptcy Appeals*

Nowhere is this tendency to modify substantive rights through prudential standing doctrine more obvious than the widespread adoption of the pecuniary interest test for bankruptcy appeals. Federal law provides clear guidance concerning the appellate process in bankruptcy,<sup>187</sup> but it places few explicit statutory limits on the right to appeal bankruptcy orders.<sup>188</sup> Bankruptcy proceedings “typically involve a ‘myriad of parties . . . indirectly affected by every bankruptcy court order,’” and it “could be argued that all of the

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184. See *Hoffmann v. United States*, 17 Fed. App’x 980 (Fed. Cir. 2001) (German citizens did not have rights under the Takings Clause to recover photographic archives and paintings seized by the United States Army during World War II); *Rosner v. United States*, 231 F. Supp. 2d 1202, 1204 (S.D. Fla. 2002) (plaintiffs were not U.S. citizens at the end of World War II, when their valuables or ancestors’ valuables were seized, so they had no right to compensation under the Takings Clause); *Ashkir v. United States*, 46 Fed. Cl. 438, 444 (Fed. Cl. 2000) (foreign citizen lacked standing to seek compensation for the occupation and destruction of his property in connection with United States military operations in Mogadishu, Somalia).

185. *Atamirzayeva*, 77 Fed. Cl. at 387 (noting that employing the standing test rather than consideration of the merits promoted “the efficient disposition of this case.”).

186. Kahn, *supra* note 104, at 676 (citations omitted).

187. See 28 U.S.C. § 158.

188. ALAN RESNICK & HENRY SOMMER, *COLLIER ON BANKRUPTCY* § 5.07 (16th ed. 2014) (“No indication is given either in title 11 or title 28 regarding the requisites for standing to appeal an order of the bankruptcy court.”).

creditors and the debtor are parties to every order entered in a bankruptcy case[.]”<sup>189</sup> Courts and commentators have thus expressed concern that “procedural chaos” would ensue if all of these parties were free to appeal,<sup>190</sup> thereby undermining one of the objectives of bankruptcy law: expeditious case administration.<sup>191</sup>

The former Bankruptcy Act addressed this risk, in part, by limiting the right to appeal summary orders issued by the referee under section 39(c) of the Act.<sup>192</sup> Specifically, this section authorized a “person aggrieved” to petition for review of the order within 10 days after its entry.<sup>193</sup> The term “person aggrieved” was not defined in the Act,<sup>194</sup> but courts tended to interpret it broadly:<sup>195</sup> An appellant had to demonstrate that “his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed.”<sup>196</sup> In cases involving only financial disagreements, some

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189. *Id.* § 8001.5.

190. *Id.* (explaining that appellate courts adopted the person aggrieved test to avoid “procedural chaos” that might result from allowing all parties to appeal).

191. *E.g.*, *Cult Awareness Network v. Martino* (*In re Cult Awareness Network*), 151 F.3d 605, 609 (7th Cir. 1998) (The bankruptcy “system works because it processes debtors and their creditors in, we hope, an expeditious manner.”).

192. Chandler Act, ch. 575, § 39(c), 52 Stat. 840, 855 (1938) (amended 1960, repealed 1978) (“A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as the court may for cause shown . . . file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing . . . . Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.”).

193. *Id.* Courts interpreting this section most often focused on whether the 10-day limitation was jurisdictional. *See, e.g.*, *Pfister v. N. Ill. Fin. Corp.*, 317 U.S. 144, 153 (1942) (discussing the circuit split on the question and concluding that it was not). Congress amended the rule in 1960 to make the rule mandatory rather than permissive. *See In re Best Distrib. Co.*, 576 F.2d 1360, 1363 (9th Cir. 1978) (discussing the legislative history of the amendment and noting that it was intended to provide certainty and finality with respect to bankruptcy orders).

194. *Brown*, *supra* note 46, at 603 (“The term ‘person aggrieved’ was not defined in the Act, and General Order XXVII [which governed bankruptcy appeals prior to the Chandler Act] did not expressly require a pecuniary interest to appeal an order of the referee.”).

195. *E.g.*, *In re Record Club of America, Inc.*, 28 B.R. 996, 997 (M.D. Pa. 1983) (characterizing “person aggrieved” as “broadly defined”). *Accord Akins*, 524 U.S. at 19 (“History associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested.”).

196. *In re Michigan-Ohio Bldg. Corp.*, 117 F.2d 191, 193 (7th Cir. 1941); *see also In re E. C. Ernst, Inc.*, 2 B.R. 757, 760 (S.D.N.Y. 1980) (same); *In re Capitano*, 315 F. Supp. 105 (E.D. La. 1970) (same); *In re Terrace Superette, Inc.*, 229 F. Supp. 371, 375 (W.D. Wis. 1964) (same). *Cf. In re First Colonial Corp.*, 544 F.2d 1291, 1296 (5th Cir. 1977) (“only

courts reasoned that “to be a ‘person aggrieved’ one must be directly and adversely affected pecuniarily by the order of the referee which is challenged.”<sup>197</sup> Whatever the test, courts were largely focused on limiting the right to appeal to those whose interests were protected under the statute and directly implicated by the order appealed.<sup>198</sup>

Although Congress considered and decided against including a similar restriction on bankruptcy appeals in the Bankruptcy Code,<sup>199</sup> district and circuit courts nonetheless concluded that they had the prudential authority to limit appellate standing to “persons aggrieved” in cases under the Bankruptcy Code as well.<sup>200</sup> These

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those who have a ‘direct and substantial interest in the question appealed from’ are ‘aggrieved’”).

197. *Hartman Corp. of America v. United States*, 304 F.2d 429, 431 (8th Cir. 1962) (“It is safe to say that to be a ‘person aggrieved’ one must be directly and adversely be affected pecuniarily by the order of the referee which is challenged. After all, practical common sense need not be entirely divorced from bankruptcy proceedings.”); *see also* *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 706 (8th Cir. 1979) (employing similar language); *In re J.M. Wells, Inc.*, 525 F.2d 329 (1st Cir. 1978) (employing similar test and finding debtor suffered no injury in fact to warrant standing to appeal fee award to estate counsel because his “assets were substantially exceeded by his debts”). These cases consistently involved purely financial disputes. *Hartman*, for example, involved an out-of-the-money debtor’s appeal concerning the allowance of a tax claim. 304 F.2d at 430–31.

198. *See, e.g., Imperial Bowl of Miami, Inc. v. Roemedmeyer*, 368 F.2d 323 (5th Cir. 1966) (bankrupt and a prospective bidder lacked standing to appeal sale order because the law governing asset sales was not designed to protect their interests); *Castaner v. Mora*, 216 F.2d 189 (1st Cir. 1954) (debtor was not aggrieved by sale of assets that belonged to the estate because that section focused on creditor protection); *In re Rea Holding Corp.*, 447 F. Supp. 167, 169 (S.D.N.Y. 1978) (unsuccessful bidder lacked standing to contest order approving sale because the law was designed to protect creditors of the estate, not bidders for estate assets).

199. *See Brown, supra* note 46, at 594–95 (demonstrating that different limitations were considered and dropped from the legislation). *Accord* Richard B. Levin, *Bankruptcy Appeals*, 58 N.C. L. REV. 967, 976 (1980) (“Undoubtedly, Congress’s intent to make the new bankruptcy courts more like the federal district courts, the absence of any statutory standing definition for ordinary civil appeals, and the extensive case law construing ‘person aggrieved’ led Congress to omit a statutory standing definition. Whatever the reason, the omission appears deliberate. No other explanation seems plausible in view of the detailed character of the remainder of the law.”). This is most likely due not only to a transformation of bankruptcy courts’ roles but also the fact that the Bankruptcy Code protects a broader range of rights and interests than the Act. *See Brown, supra* note 46, at 593–600.

200. *See, e.g., Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988) (“Although the present Bankruptcy Code does not contain any express restrictions on appellate standing, courts have uniformly held that the ‘person aggrieved’ standard is applicable to cases under the Code.”); *In re L.T. Ruth Coal Co.*, 1986 U.S. App. LEXIS 30813 (6th Cir. Sept. 17, 1986) (“The general consensus among courts that have considered the matter seems to be that the former Bankruptcy Act’s ‘person aggrieved’ test should be applied as a matter of judge-made law.”); *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 513 (2d Cir. 1985) (adopting standard as a prudential limit on standing); *In re Fondiller*, 707 F.2d 441, 443 (1983) (same); *In re Multiple Servs. Indus., Inc.*, 46 B.R. 235,

courts referenced the different approaches to interpreting the term under the Act,<sup>201</sup> but most latched onto the “directly and adversely affected pecuniarily” language.<sup>202</sup>

Recognizing this pecuniary interest requirement as a component of prudential standing may not have seemed like a significant transformation. By 1978, the Court’s characterization of the zone of interests inquiry as one of prudential standing was already well-established.<sup>203</sup> Moreover, shortly after *Data Processing*, some courts either read the requirements of section 39(c) as prudential limits on standing or applied the zone of interests test as a distinct limitation on bankruptcy standing.<sup>204</sup> Thus, by the time the Bankruptcy Code went into effect, the courts had ample support for their authority to craft prudential standing rules grounded in the zone of interests protected by the law and the view that the pecuniary interest test was a prudential standing inquiry under the Act. It was merely a matter of shifting from one source of prudential authority to limit standing to another.

Even if this final step was modest, the transformation of the pecuniary interest test over time was remarkable. Specifically, the test began as (i) one consideration in (ii) the interpretation of

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236 (E.D. Wis. 1985) (“The prevailing opinion among courts and commentators who have addressed this issue is that the ‘person aggrieved’ standard is still valid even though section 39(c) has been repealed.”).

201. See, e.g., *In re El San Juan Hotel*, 809 F.2d 151, 154–55 (1st Cir. 1987) (limiting appeals to “those persons whose rights or interests are ‘directly and adversely affected pecuniarily’ by the order or decree of the bankruptcy court.”) (“A litigant qualifies as a “person aggrieved” if the order diminishes his property, increases his burdens, or impairs his rights.”).

202. See, e.g., *Kane*, 843 F.2d at 642 (“A person who seeks to appeal an order of the bankruptcy court must be ‘directly and adversely affected pecuniarily’ by it.”); *Fondiller*, 707 F.2d at 442 (“Only those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have been held to have standing to appeal that order.”); *In re Revco, D.S., Inc.*, 99 B.R. 778, 779 (N.D. Ohio 1989) (applying the test and denying standing to the United States Trustee); *Behling v. M & I Marshall & Ilsley Bank Silver Spring Div.*, 86 B.R. 144, 146 (W.D. Wis. 1988) (applying the test and denying standing to an insolvent debtor); *In re Smith-Douglass, Inc.*, 75 B.R. 994, 996 (E.D.N.C. 1987) (applying the *Fondiller* formulation of the test).

203. See, e.g., *Simon*, 426 U.S. at 39 n.19; *Singleton*, 428 U.S. at 123 n.2 (Powell, J., dissenting); *Richardson*, 418 U.S. at 196 n.18 (Powell, J., concurring).

204. See, e.g., *In re Harwald Co.*, 497 F.2d 443, 444–45 (7th Cir. 1974) (referencing section 39(c) in connection with the zone of interests inquiry to determine whether a losing bidder had standing to question the structure of the sale); *In re De Gelleke Co.*, 411 F. Supp. 1320, 1324 (E.D. Wis. 1976) (evaluating standing in bankruptcy matter as a zone of interests question); *In re Kundert*, 401 F. Supp. 822, 825 (D.N.D. 1975) (applying the zone of interest test to an equal protection challenge concerning a homestead exemption in bankruptcy); see also *In re Beck Indus., Inc.*, 605 F.2d 624, 634 (2d Cir. 1979) (citing *Harwald* and adopting the same rule).

statutory language (iii) concerning who has a right to appeal (iv) an order of the bankruptcy referee (v) concerning summary matters. Within a few years of the Bankruptcy Code's adoption, the pecuniary interest inquiry was (i) the primary, if not exclusive, test (ii) of a judicially created prudential limitation (iii) concerning who has standing to appeal (iv) an order issued by the bankruptcy court or district court (v) concerning any matter. This transformation has arguably undermined the interwoven protections incorporated into the Bankruptcy Code, generated conflicting standing precedent concerning these protections, and delayed the administration of cases where those with protected non-pecuniary interests were forced to pursue additional appeals to protect them.<sup>205</sup>

The issue for the purposes of this discussion is not the wisdom of the policy judgments<sup>206</sup> guiding the development and evolution of these rules. Rather, it is the fact that the power to decline jurisdiction may be driven by such policy concerns at all. Courts “have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given”<sup>207</sup> for a reason: They play an essential role in vindicating individual rights. Yet, as these cases suggest, the power to create new standing rules that are grounded solely in a judge's conception of good policy also carries with it the power to create or destroy these rights at will.

### **B. Wandering Principles: When Jurisdictional Rules Become Non-Jurisdictional and Vice-Versa**

The “wandering principle” problem arises when courts revisit and transfer a standing principle from one category—“constitutional” or “prudential”—to the other. This reclassification of a principle as one or the other may have significant implications because, as noted

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205. For a detailed discussion of these issues, *see* Brown, *supra* note 46 (discussing cases demonstrating the potential for the rule to distort the application of bankruptcy law, conflicting circuit court opinions where one court applied the test as a bright-line rule and the other found the rule in conflict with the objectives of the Code, and the costs and delays associated with appeals challenging the application of the test to non-pecuniary issues).

206. However, others have advanced compelling critiques of some of these choices elsewhere. *Id.* (discussing and criticizing use of “prior substantial connections” prudential standing test to refuse consideration of foreign citizen claims); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1096–97 (2010) (“Excluding foreign plaintiffs based on standing similarly evokes both prudential and policy considerations. By excluding a particular class of litigants, the doctrine indeed reduces the administrative burden of the courts. But the policy questions are even more central: by adopting such a doctrine, the court is also affecting economic, political, and regulatory interests in ways that may have substantial ramifications.”).

207. *Cohens*, 19 U.S. at 404.

previously, the former is treated as jurisdictional and the latter is not.<sup>208</sup>

For example, the generalized grievances principle was one of the two original “prudential” principles identified by the Burger Court.<sup>209</sup> In *Lujan*, however, the Court said it was mistaken: the rule is really constitutional.<sup>210</sup> Thus, a rule that federal courts could previously choose to disregard and Congress could write out of the statute became presumably unassailable.

The ambiguities of modern standing doctrine are also captured in *United States v. Windsor*,<sup>211</sup> albeit in the other direction. There, the Court was asked to consider the constitutionality of Section 3 of the Defense of Marriage Act (“DOMA”).<sup>212</sup> Edith Windsor, whose partner died in 2009, was denied the estate tax exemption under DOMA and commenced suit, contending that DOMA was a violation of the guarantee of equal protection under the law. While the suit was pending, the Executive Branch elected to no longer defend DOMA in the courts, but it continued to enforce its provisions. Thereafter, the Bipartisan Legal Advisory Group (“BLAG”) of the House of Representatives intervened as an interested party. The district court ruled in favor of Windsor, and the Second Circuit affirmed. The Court affirmed.

To address the first consideration of standing doctrine<sup>213</sup>—whether the party invoking the judicial power presents a case or

208. See *supra* notes 157–58.

209. See *supra* Part I.A.2.

210. See *Lujan*, 504 U.S. at 555.

211. *Windsor*, 133 S. Ct. 2675.

212. That section of the act provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2012) and 1 U.S.C. § 7).

213. The Court’s treatment of the second consideration of standing doctrine—the broader role of the courts in our system of governance—is not relevant to this part of the discussion, but it nonetheless provides some insight into the justices’ distinct visions of the role of the Judiciary. The majority took what might charitably be described as a broad view. “[I]f the Executive’s agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court’s primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President’s.” *Windsor*, 133 S. Ct. at 2688 (majority opinion) (emphasis added). In the majority’s view, recognizing

controversy—the majority framed adverseness as “flexible” and “subject to ‘countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.’”<sup>214</sup> The United States had a “stake sufficient to support Article III jurisdiction” because it had a financial interest; albeit an interest it refused to defend before the Court.<sup>215</sup> This refusal, the majority held, could be corrected by the presence of an interested bystander who defended the law vigorously.<sup>216</sup>

In his dissent, Justice Scalia was astounded by the majority’s approach; reasoning that it “bears no resemblance to our jurisprudence” and was “incomprehensible”<sup>217</sup> because adverseness is a necessary element of having an actual case or controversy as required by Article III.<sup>218</sup> “Relegating a jurisdictional requirement to

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standing conformed to “the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.” *Id.*

Justice Scalia, however, found this characterization of the Judiciary’s role “jaw-dropping” and “unrecognizable to those who wrote and ratified our national charter.” *Id.* at 2698 (Scalia, J., dissenting). Specifically, the judicial role, Justice Scalia noted, has always been understood to be limited to resolving disputes, not “say[ing] what the law is.” *Id.* at 2699. This limitation on the judicial role was adopted to guard democratic self-rule against “black-robed supremacy,” even if “some questions of law will never be presented to this Court.” *Id.* at 2698, 2699. Thus, instead of respecting separation of powers, Justice Scalia noted that the majority’s reasoning “envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere ‘primary’ in its role.” *Id.* at 2698.

214. *Id.* at 2687.

215. *Id.* at 2686 (financial interest in not paying a tax refund to the plaintiff was a sufficient “personal stake” for the Article III standing purposes).

216. *Id.* at 2687–88.

217. *Id.* at 2701 (Scalia, J., dissenting).

218. *Id.* (“A plaintiff (or appellant) can have all the standing in the world—satisfying all three standing requirements of *Lujan* that the majority so carefully quotes—and yet no Article III controversy may be before the court. Article III requires not just a plaintiff (or appellant) who has standing to complain but an opposing party who denies the validity of the complaint.”).

Has adverseness actually been treated as a component of constitutional standing? One of the cases cited by both the majority and the dissent, *Camreta v. Greene*, might be read either way:

Article III of the Constitution grants this Court authority to adjudicate legal disputes only in the context of “Cases” or “Controversies.” To enforce this limitation, we demand that litigants demonstrate a “personal stake” in the suit. The party invoking the Court’s authority has such a stake when three conditions are satisfied: The petitioner must show that he has “suffered an injury in fact” that is caused by “the conduct complained of” and that “will be redressed by a favorable decision.” And the opposing party also must have an ongoing interest

‘prudential’ status is a wondrous device, enabling courts to ignore the requirement whenever they believe it ‘prudent’—which is to say, a good idea.”<sup>219</sup>

In this respect, *Lujan* and *Windsor* highlight an intrinsic problem with the categorical application of standing principles: Prudential principles are flexible until they are deemed inflexible; and seemingly constitutional principles are unchanging until they are changed. Their categorization as one on Tuesday and the other on Wednesday supports the perspective that standing may “apparently be either rolled out or ignored in order to serve unstated and unexamined values.”<sup>220</sup>

More to the point, *Lujan* and *Windsor* highlight a problem with the current bifurcation and categorization of standing doctrine: The principles employed to understand the judicial power and the Judiciary’s role are less than absolute yet grounded in something more than mere prudence.<sup>221</sup> This may explain why, notwithstanding its characterization as the “irreducible constitutional minimum,”<sup>222</sup>

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in the dispute, so that the case features “that concrete adverseness which sharpens the presentation of issues.” To ensure a case remains “fit for federal-court adjudication,” the parties must have the necessary stake not only at the outset of litigation, but throughout its course.

131 S. Ct. 2020, (2011) (internal citations omitted). On the one hand, it states that concrete adverseness is necessary throughout the dispute. On the other, the reason for this is to sharpen presentation of the issues, which seems merely prudential.

Digging further, the phrase that explains the need for concrete adverseness quotes *Los Angeles v. Lyons*, which explained: “Plaintiffs must demonstrate a ‘personal stake in the outcome’ in order to ‘assure that concrete adverseness which sharpens the presentation of issues’ necessary for the proper resolution of constitutional questions.” 461 U.S. 95, 101 (1983) (quoting *Baker*, 369 U.S. at 204). That opinion, in turn, quoted *Baker*, which couched concrete adverseness as “the gist” of the Court’s power to declare a statute unconstitutional. 369 U.S. at 204 (“A federal court cannot ‘pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.’ Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.”). One could be forgiven, then, for understanding continuing concrete adverseness to be more than merely prudential.

219. *Windsor*, 133 S. Ct. at 2701 (Scalia, J., dissenting).

220. Nichol, *supra* note 23, at 658. *Accord* Tushnet, *supra* note 19, at 699 (arguing that the standing principles adopted by the Burger Court “have more than an air of arbitrariness about them.”).

221. Others have suggested that there is no practical distinction between prudential standing and constitutional standing. *See, e.g.*, Sohn, *supra* note 6, at 728.

222. *Lujan*, 504 U.S. at 560.



constitutional standing has proven reducible.<sup>223</sup> It may explain why the majority in *Windsor* could proceed to the merits notwithstanding the absence of traditional adverseness; the requirement's foundations were sufficiently ambiguous to support classifying adverseness as merely prudential.<sup>224</sup> In sum, debates over the classification of specific principles mask underlying differences in judicial philosophy<sup>225</sup> and, accordingly, appear to add unnecessary confusion to an already amorphous area of law.

### III. Proposal: A Prudent Demise

“[W]hat courts have created, courts can modify,”<sup>226</sup> and the Court's recent opinions challenge the very foundations of prudential standing as a distinct doctrine.<sup>227</sup> The Court has not gone far enough.

My proposal contains two elements. First, standing doctrine should be limited to constitutionally oriented interpretive principles that are recognized as such. Put simply, there should be no distinct prudential branch of standing doctrine. Second, and relatedly, principles that are currently characterized as prudential should be reconsidered. And to the extent they do not provide a unique function in addressing the constitutional purposes of standing doctrine, they should be reclassified or abandoned entirely; not treated as pseudo-jurisdictional limits on standing.

#### A. A Uniform Approach to Constitutionality

All standing rules originated in the same basic objective: shaping the understanding of the role of the Judiciary. Some were designed to capture what is meant by “case” or “controversy.” Others reflected different conceptions of the relative role of the Judiciary to the other branches. Some touched upon both. And as guideposts for

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223. See generally Lee & Ellis, *supra* note 6 (discussing the erosion of standing doctrine).

224. See *Windsor*, 133 S. Ct. at 2687.

225. See Pushaw, *supra* note 106, at 18–19.

226. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1937 (2013) (Scalia, J., dissenting) (discussing prudential barriers to habeas relief).

227. See *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A.*, 758 F.3d 592, 603 n.34 (5th Cir. 2014) (questioning viability of the doctrine); *W. Va. Auto. & Truck Dealers Ass'n v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 73452, 11 n.5 (N.D. W. Va. May 30, 2014) (noting that *Lexmark* “calls into doubt whether prudential standing remains a viable concept”); see also *Ky., Educ. & Workforce Dev. Cabinet, Office for the Blind v. United States*, 2014 U.S. App. LEXIS 13801, 14–15 n.3 (6th Cir. 2014) (after *Lexmark* and *Driehaus*, “the continuing vitality of the prudential aspects of standing and ripeness” are “in doubt”).

understanding the role of the Judiciary, they could not capture every circumstance.

If standing is limited to these questions, which—if any—of the remaining prudential principles warrant inclusion? I propose shaping this inquiry by reference to the origins of standing doctrine. First, does the principle add any unique value in determining whether the litigant advances a case or controversy beyond the core standing inquiry? If not, does it uniquely address “weightier considerations of constitutional adjudication”?<sup>228</sup>

With respect to the first question, some guiding principles—such as those that comprise the current Article III standing rule—are said to speak directly to the case or controversy requirement. Some principles, however, may only reframe others.<sup>229</sup> To that end, they are not properly characterized as distinct rules but should be referenced, if at all, only to the extent they provide value in understanding those other principles. And if grounded in the suspicion that the litigant has no cause of action after a “peek at the merits,”<sup>230</sup> the answer is not to toss the action out; it is to consider and address the merits in full.

The second question focuses on how the principle captures other concerns that *uniquely* limit the Judiciary’s role for two reasons. First, it distinguishes justifications that have their origins in Article III—for example, rules that implicate separation of powers only because the litigant lacks Article III standing—from those that are based on other separation of powers considerations.<sup>231</sup> Looking to separation of powers as an independent justification just muddies the discussion.

Second, it highlights the distinction between standing and inquiries that go to other justiciability questions. It may be that some of these weightier considerations are already captured by other

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228. *Colo. River*, 424 U.S. at 818.

229. *See infra* Part III.B.

230. *Accord* Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of the Treasury, 545 F.3d 4, 11 (D.C. Cir. 2008) (Silberman, J.) (noting that courts “peek at the merits, at least insofar as is necessary to determine whether the petitioner has an arguable claim that falls within the zone-of-interests protected.”).

231. These other separation of powers functions have been characterized as the “pro-democracy” and “anti-conscription” functions of standing. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 467 (2008) (distinguishing these functions from the “concrete adverseness” function). The former limit standing where the Court concludes the issues are better left to the other branches, and the latter “prevent Congress from conscripting the courts to fight its battles against the executive branch.” *Id.*

principles, so a distinct standing doctrine is superfluous and adds an unnecessary layer to the analysis.<sup>232</sup>

### B. The Third-Party Rights Principle

The third-party rights principle has consistently been identified as discretionary but guided by constitutional concerns.<sup>233</sup> The rationale begins with a common presumption: parties “usually will be the best proponents of their own rights.”<sup>234</sup> To that end, it is said that denying standing to assert the rights of others “assures the court that the issues before it will be concrete and sharply presented,” which “is not completely separable from Article III’s requirement that a plaintiff have a ‘sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy.’”<sup>235</sup> Thus, the limitation “frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.”<sup>236</sup>

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232. Heather Elliott, for example, has proposed supplanting standing doctrine altogether with “a vibrant abstention doctrine that permits it to pursue separation-of-powers goals without the obfuscation caused by standing doctrine.” *Id.* at 464. Moreover, it may be that some of these questions are answered through the political question doctrine rather than standing, especially given the degree to which the generalized grievances test has altered the underlying question of the relative roles of the branches. See generally Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002) (discussing the two doctrines).

233. E.g., *Shutts*, 472 U.S. at 804; *Valley Forge*, 454 U.S. at 474–75; *Gladstone Realtors*, 441 U.S. at 99; *Warth*, 422 U.S. at 498; *Raines*, 362 U.S. at 21; *Barrows*, 346 U.S. at 255.

Beyond the institutional concern, the Court has, at times, invoked a private one: “the third-party rightholder may not, in fact, wish to assert the claim in question[.]” *Miller v. Albright*, 523 U.S. 420, 446 (1998) (O’Connor, J., concurring); see also *Singleton*, 428 U.S. at 113–14 (“courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not”); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 794 (7th Cir. 2013) (“The principal objection to third-party standing is that it wrests control of the lawsuit from the person or persons primarily concerned in it.”). Under the circumstances, it is difficult if not impossible to know if the litigant will advance the injured party’s interests. At the extreme, the litigant may pursue the matter to achieve results that harm the party the law seeks to protect. I do not consider this separately because (i) the Court has never suggested that this implicates the judicial power and (ii) the analysis is ultimately the same as with the institutional concerns.

234. *Singleton*, 428 U.S. at 114.

235. *Sec’y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 n.5 (1984); see also *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 409–10 (1980) (Powell, J., dissenting) (discussing the constitutional and prudential dimensions of third-party standing).

236. *Raines*, 362 U.S. at 22.

The difficulty in examining the third-party rights principle lies in its diverse application.<sup>237</sup> Litigants raise the interests of others in public and private disputes, and the institutional concerns may vary from one case to another.<sup>238</sup> At most, the only common institutional question across cases is whether a litigant who asserts the rights of others presents a case or controversy.

Looking to the case and controversy question, the third-party rights inquiry is clearly not independent; it is a reformulation of Article III standing principles. For example, in connection with discussing Article III standing, the Court stated that a litigant must have a sufficient personal stake to “warrant *his* invocation of federal-court jurisdiction,” and this must be demonstrated “for each type of relief sought.”<sup>239</sup> The third-party standing principle assumes that the inverse must also be true: The litigant may not advance another’s right of action.<sup>240</sup> Thus, interested bystanders are typically excluded on constitutional standing grounds.<sup>241</sup>

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237. Cf. Scott, *supra* note 159, at 646 (making a similar observation about standing generally).

238. The separation of powers concern may be clear, for example, when a litigant invokes the rights of others to challenge the constitutionality of the law. It is far less clear when Bob asserts Sue’s contract rights in a lawsuit against Joe. Likewise, the private autonomy concern is understandable when the litigant is a stranger or clearly adverse to the right-holder. It is less clear when the party asserting the right-holders’ right of action is a fiduciary acting in his personal capacity, a spouse, or other party whose interests appear to be aligned with the absent parties.

239. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (Scalia, J.).

240. Although this may be the basic premise, others may have standing to assert the rights of third parties where: (i) the party asserting the right has a ‘close’ relationship with the person who possesses the right” and (ii) “there is a ‘hindrance’ to the possessor’s ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004).

241. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (opponents of same-sex marriage lacked standing to appeal order holding Proposition 8—which amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California”—unconstitutional); *Diamond v. Charles*, 476 U.S. 54, 56 (1986) (“conscientious objector” to abortions had no cognizable interest in upholding state abortion law); see also *Olick v. City of Easton (In re Olick)*, 2014 U.S. App. LEXIS 12603, 6–7 (3d Cir. July 3, 2014) (trustee could not assert the due process rights of the trust in his personal capacity); *Wilderness Soc’y v. Kane County*, 632 F.3d 1162, 1170–71 (10th Cir. 2011) (en banc) (environmental groups may have advanced a cognizable Article III injury, but they could not assert the federal government’s interest in its property rights in an action against a local government where applicable law did not create a private right of action); *N’Jai v. U.S. EPA*, 2014 U.S. Dist. LEXIS 75712 (W.D. Pa. June 3, 2014) (plaintiff lacked standing to assert negligence claim on behalf of an unrelated child who moved into her former apartment after she moved out); *Trans-Lines W., Inc. v. Lines*, 203 B.R. 653, 660 (Bankr. E.D. Tenn. 1996) (trustee of a corporate debtor lacked standing to challenge validity of revocation of Subchapter S status because that right belonged to shareholders, not the estate).

However, the inverse is *not* always true; litigants invoke the rights of others for a variety of reasons. For example, litigants: (i) assert rights that are disputed;<sup>242</sup> (ii) advance rights that are derivative of the rights of third parties;<sup>243</sup> or (iii) invoke third parties' rights as a component of their own asserted right of action.<sup>244</sup> With few exceptions, these cases will not have any preclusive effect on an absent third-party.<sup>245</sup> Assuming the litigant has standing under the core Article III standing inquiry, what other questions must be addressed?

All three scenarios require more than a “peek at the merits”<sup>246</sup> to understand the parties' respective rights. In the first scenario, the court must evaluate the ownership question to determine whether the litigant is asserting another party's rights. The second scenario hinges upon the legal question of whether derivative rights are sufficient to support a cause of action. In the third, the question is whether the

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242. See, e.g., *Dexter v. Freddie Mac*, 2014 U.S. Dist. LEXIS 83077, 7–8 (E.D. Mich. May 30, 2014) (plaintiff lacked standing to advance mortgage fraud claim because she had no interest in the mortgage or property and, at most, was advancing the rights of the property owner).

243. See, e.g., *Kowalski*, 543 U.S. at 130–31 (attorneys lacked third-party standing to assert the rights of future, as yet unascertained clients with whom “they ha[d] no relationship at all”); *Craig v. Boren*, 429 U.S. 190 (1976) (licensed beer vendor asserting potential customers' equal protection rights); *JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, 2014 U.S. App. LEXIS 12519, 17–20 (6th Cir. July 2, 2014) (nonparty to a settlement may have had an indirect interest in the settlement's effect, but it lacked standing to challenge the parties' interpretation of the settlement); *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank*, 747 F.3d 44, 48–49 (2d Cir. 2014) (“We conclude that Hillside does not have prudential standing in this case because it cannot enforce the terms of the [contract], as to which it is neither a party nor a third-party beneficiary, but the enforcement of which is a necessary component of its claim.”); *Critical Nurse Staffing, Inc. v. Four Corners Health Care Corp.*, 2014 U.S. Dist. LEXIS 82857 (D. Utah June 17, 2014) (healthcare provider lacked standing to sue competitor for fraud that lured away former clients because the right of action belonged to former clients, not the healthcare provider); *Steverson v. Dantone*, 2014 U.S. Dist. LEXIS 79238, 4–5 (D. Md. June 9, 2014) (“Nor does Plaintiff Steverson, the coach of the girls' basketball team, have standing to bring a Title IX sex discrimination claim against Defendant Imagine for discrimination against the female players of the girls' basketball team.”); *Cnty. County Day Sch. v. Sch. Dist. of Erie*, 2014 U.S. Dist. LEXIS 97300 (W.D. Pa. May 20, 2014) (school lacked standing to assert interests of students and parents in statutory reimbursements for special education and healthcare services).

244. See, e.g., *Powers v. Ohio*, 499 U.S. 400 (1991) (criminal defendant invoking rights of prospective jurors to not be excluded on the basis of race); *Sec'y of Md.*, 467 U.S. 947 (1984) (fundraiser asserting constitutional rights of charity as part of his defense); *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972) (distributor of contraceptives asserting constitutional rights of unmarried persons as part of his defense).

245. See generally *Taylor v. Sturgell*, 553 U.S. 880 (2008) (rejecting the “virtual representation” doctrine and discussing the narrow exceptions to non-party preclusion).

246. *Emergency Coal.*, 545 F.3d at 11.

third-party rights are relevant considerations in the litigant's cause of action.

What do these scenarios tell us? If these claims ultimately fail, it will be because the litigant is unable to prove the merits of his case. At a minimum, it *is* proper to invoke the court's authority to answer *these* questions. And if the court rules unfavorably, the case will ultimately be dismissed because it fails on the merits. Standing has nothing to do with it.

### Conclusion

Established doctrines die hard. For all the criticism of the standing doctrine generally and prudential standing specifically over the last four decades, it may be difficult to accept that prudential standing is a misnomer. It may be harder still to accept that constitutional and prudential standing are one in the same. Barring further action by the Court, however, it may be easier for lawyers and the lower courts to cling to the now familiar rules that remain untouched.

Nonetheless, I have demonstrated that it is time to write the epilogue for the story of prudential standing. A doctrine that originated in rules demanding respect for the limits of the judicial power became a source of authority for erecting pseudo-judicial bars when courts felt it made sense. At the same time, the term labeled some rules that historically guided the courts' understanding of their proper role as discretionary (prudential) and others as irreducible (constitutional), suggesting that prudential rules could be ignored when the court felt it was a "good idea."

By contrast, a unified standing doctrine that is grounded solely in shaping the courts' proper and properly limited role should resolve these issues. This change would bring further discipline to a doctrine that goes to the heart of the judicial role. And in setting firm limits on the reach of standing doctrine, it may return us to a vision of judicial prudence as a desirable quality rather than a justification for refusing to hear and decide difficult or undesirable cases.