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THE CASE AGAINST PRUDENTIAL STANDING: EXAMINING THE COURTS' USE OF PRUDENTIAL STANDING BEFORE AND AFTER LEXMARK

Kylie Chiseul Kim

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**THE CASE AGAINST PRUDENTIAL STANDING:
EXAMINING THE COURTS' USE OF PRUDENTIAL
STANDING BEFORE AND AFTER *LEXMARK***

*Kylie Chiseul Kim**

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Through Lujan and Lexmark, Justice Scalia constructed one of his greatest legacies: a sound and manageable definition of standing. However, a threat to this legacy, prudential standing, persists after his death. Lujan defines standing—in simplified terms—as injury, causation, and redressability. Lexmark undermines prudential standing, which exceeds Lujan's definition of standing and which encompasses the rule against assertion of a generalized grievance, assertion of an interest outside the zone of interests protected by the law invoked, and assertion of the right of a third party. Despite these cases, lower courts continue to use prudential standing, confusing standing's definition. Arguing for a definitive end to prudential standing, this article explains its creation as a misinterpretation of precedent and explains the problem inherent in each rule of prudential standing. In addition to arguing for strict adherence to Lujan and Lexmark, this article proposes other means to eliminate prudential standing—(1) using the correct definitions for jurisdiction, for standing, for a right to sue, for a cause of action, and for a claim for relief and (2) using correct procedural principles to enforce the otherwise valid rules mislabeled as prudential standing.

INTRODUCTION

Ever since jurists introduced the idea that a court must be prudent in exercising its power, courts have toiled to understand what this prudence requires. Courts have developed different definitions of prudence and classified these definitions under the single rubric of prudential standing. An investigation into the origins of prudential standing reveals that prudential standing is an anachronism, a vestige of a time before courts began attributing the requirement for a “real, earnest, and vital controversy between individuals”¹—the adverseness requirement—to Article III, Section 2 of the Constitution. During that time, courts prevented the creation of law in the absence of adverse parties in order to self-regulate, or to place a “prudential” limit on, the expansion of their power.² With time, courts began to attribute the adverseness requirement to the “case or controversy” limitation in Article III, Section 2.³ And the “standing”

1. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Chi. & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

2. *Id.* (Brandeis, J., concurring) (“The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”); *see, e.g.*, *Chandler v. Wise*, 307 U.S. 474, 477–78 (1939) (requiring adverseness without discussing the Constitution); *S. Spring Hill Gold-Min. Co. v. Amador Medean Gold-Min. Co.*, 145 U.S. 300, 301 (1892) (same); *Cleveland v. Chamberlain*, 66 U.S. 419, 426 (1861) (same); *Lord v. Veazie*, 49 U.S. 251, 255 (1850) (same).

3. *See, e.g.*, *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (“The Constitution . . . explicitly indicated the limited area within which judicial action was to move . . . by extending ‘judicial Power’ only to ‘Cases’ and ‘Controversies.’ . . . And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law.”); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 72 (1939) (stating during discussion of Article III, Section 2, “The complainant is a proper party for the determination of the controversy between the adverse claimants, citizens of different states”); *Aetna Life Ins., v. Haworth*, 300 U.S. 227, 240–41 (1937) (“The controversy [under Article III, Section 2] must be definite and concrete, touching the legal relations of parties having adverse legal interests.” (citations omitted)); *United States v. West Virginia*, 295 U.S. 463, 470–71 (1935) (“The bill of complaint must . . . present a ‘case’ or ‘controversy’ to which the state is a party, and which is within the judicial power granted by the judiciary article of the Constitution.”); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (“The judiciary clause of the Constitution . . . [requires that a case] retain the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy . . .”). *But see* James E. Pfander & Daniel D. Brik, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 125 *YALE L.J.* 1346, 1346 (2015) (“[T]he adverse-party requirement sits uneasily with the reality of federal judicial practice.”). This article proceeds under the

requirement was a means to assure this adverseness.⁴ Even after the change, however, undiscerning courts continue to use prudential

assumption that the courts correctly interpreted Article III, Section 2 as requiring adverseness; the author reserves critique of that interpretation.

4. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (describing the “irreducible constitutional minimum of standing” (internal quotation marks omitted)); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (“We have ‘an obligation to assure ourselves’ of litigants’ standing under Article III.” (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000))); *Elk Grove Unified Sch. Dist. V. Newdow*, 542 U.S. 1, 11 (2004) (“Article III standing . . . enforces the Constitution’s case-or-controversy requirement . . .” (citation omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (describing standing as “such a personal stake in the outcome of the controversy as to assure” adverseness); *Coleman*, 307 U.S. at 455 (“[O]ne who asserts the mere right of a citizen and taxpayer of the United States to complain of the alleged invalid outlay of public moneys has no standing to invoke the jurisdiction of the federal courts.”). Many scholars disagree with the courts’ attribution of the standing requirement to Article III, Section 2 of the Constitution. See, e.g., Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (noting that many scholars “insist that the law of standing is a recent invention of federal judges” (internal quotation marks omitted)); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U.L. Rev. 962, 1009 (2002) (stating that “[t]here was no doctrine of standing prior to the middle of the twentieth century” and that, although “the word ‘standing’ made scattered appearances, . . . it was unattached to any analytical framework”); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 168–69 (1992) [hereinafter Sunstein, *What’s Standing After Lujan?*] (arguing that, because “Article III contains no explicit constitutional requirement of standing,” “[i]f we are to impose additional standing requirements, we must do so on the basis not of text but of history” (internal quotation marks omitted)); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1434 (1988) [hereinafter Sunstein, *Standing and the Privatization of Public Law*] (“For most of the nation’s history, there was no distinctive body of standing doctrine.”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (“[A] painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception . . . that standing is a component of the constitutional phrase ‘cases or controversies’ . . .”); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement*, 78 Yale L.J. 816, 827 (1969) (arguing that, by reading Article III to require “a personal stake in the outcome of the controversy,” the Court “misinterpreted English history” (quoting *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942 (1968))); Louis L. Jaffe, *Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1047–48 (1968) (concluding that, “whether the analysis proceeds in terms of history, logic or policy,” a case does not require that “there be a plaintiff who proffers for judicial determination a question concerning his own legal status”). This article proceeds under the assumption that the courts correctly attributed the standing requirement to Article III, Section 2; the author reserves critique of that attribution.

standing and characterize the adverseness requirement as a prudential check on their powers.⁵

The continued use of prudential standing obscures our understanding of the words standing and jurisdiction.⁶ Courts use standing in place of right to sue or cause of action and conclude that these ideas must implicate their jurisdiction.⁷ Also, the use of

5. See, e.g., *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 586 (4th Cir.), *as amended* (June 15, 2017) (“The prudential standing doctrine includes a ‘general prohibition on a litigant’s raising another person’s legal rights.’ This ‘general prohibition’ is not implicated here, however, as Doe #1 has shown that he himself suffered injuries as a result of the challenged Order.” (citation omitted)), *vacated*, 583 U.S. ___, ___ (Oct. 10, 2017); *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013) (“Prudential considerations . . . demand that there be ‘concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” (quoting *Baker*, 369 U.S. at 204)).

6. See *Steel Co.*, 523 U.S. at 90 (“Jurisdiction, it has been observed, is a word of many, too many, meanings.” (internal quotation marks omitted)); *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 159, 176 (1970) (Brennan, J., concurring and dissenting) (“Too often these various questions [of injury in fact, reviewability, and merits] have been merged into one confused inquiry, lumped under the general rubric of ‘standing.’”); *Flast*, 392 U.S. at 99 (“Standing has been called one of the most amorphous [concepts] in the entire domain of public law.”).

7. *But see Lexmark Int’l, Inc., v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014) (“[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, *i.e.*[,] the court’s statutory or constitutional *power* to adjudicate the case.” (quoting *Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002)); *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (“Recognizing our less than meticulous use of the term in the past, we have pressed a stricter distinction between truly jurisdictional rules, which govern a court’s adjudicatory authority, and nonjurisdictional claim processing rules, which do not.” (internal quotation marks omitted)); *Bell v. Hood*, 327 U.S. 678, 682 (1946) (“Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.”). However, many scholars challenging the standing requirement argue that standing is indeed indistinguishable from right to sue or cause of action. See, e.g., Sunstein, *What’s Standing After Lujan?*, *supra* note 4 at 166 (characterizing standing as a determination that the law “has conferred on the plaintiff[] a cause of action”); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine is Looking for Answers in all the Wrong Places*, 97 MICH. L. REV. 2239, 2264–65 (1999) (“A number of scholars have persuasively argued . . . that the question of standing is best treated as a question indistinguishable from whether the party has a right of action.”); Sunstein, *Standing and the Privatization of Public Law*, *supra* note 4, at 1475 (“[T]he existence of standing and the existence of a cause of action present the same basic question.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 292 (1988) (“Standing . . . is a question of substantive law, and the answers to standing questions will vary as the substantive law varies.”); Winter, *supra* note 4, at 1388–90 (viewing standing as a metaphor for how people perceive cause of action); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate*

prudential standing causes courts to mishandle cases. Although review for prudential standing often involves an evaluation of the merits of a claim, courts during this review use procedures available only during the evaluation of justiciability—whether a court *may* evaluate the merits of a claim. Specifically, courts (1) review for prudential standing *sua sponte*;⁸ (2) review for prudential standing at any time, even for the first time on appeal;⁹ and (3) review for

Surrogate for Claim for Relief, 83 YALE L.J. 425, 450 (1974) (“It should be apparent that the rubric of standing is misleading. Standing serves to sort out the elements of a cause of action.”); Mark V. Tushnet, *New Law of Standing a Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (“Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim.”). Assuming the veracity of the standing requirement, this article identifies prudential standing as causing, at least in part, the confusion among the concepts of standing, right to sue, and cause of action. *See* Part III(B)(2)–(3) (defining standing, right to sue, and cause of action).

8. *See, e.g., Gonzalez*, 565 U.S. at 141 (“When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.” (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002))); *Ass’n of Battery Recyclers*, 716 F.3d at 678 (Silberman, J., concurring) (“[E]ven if we were not required to consider statutory standing *sua sponte*, we would still have the authority to do so.”); *MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 747 (7th Cir. 2007) (Posner, J.) (“[N]onconstitutional lack of standing belongs to an intermediate class of cases in which a court can notice an error and reverse on the basis of it even though no party has noticed it and the error is not jurisdictional, at least in the conventional sense.”); *Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1358 (D.C. Cir. 2000) (considering “third party standing *sua sponte*”). One scholar has even argued that, although “prudential standing should not be considered jurisdictional,” “federal courts should nevertheless have the *sua sponte* discretion to raise prudential standing after a litigant has waived the issue.” William J. Goodling, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 WASH. L. REV. 1153, 1156 (2013).

9. *See, e.g., Cibolo Waste v. City of San Antonio*, 718 F.3d 469, 474 n.4 (5th Cir. 2013) (“[A]lthough the City raises the issue of prudential standing for the first time on appeal, we retain discretion to consider its arguments because prudential standing, while not jurisdictional, nonetheless affects justiciability.” (citing *Lewis v. Knutson*, 699 F.2d 230, 236 (5th Cir. 1983))); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007) (“[The defendant] also argues, for the first time on appeal, that the [plaintiffs] lack prudential standing. . . . [T]o the extent [he] attempts to bootstrap its prudential standing argument into a mootness question, which is jurisdictional, we must address whether the adoption amendment applies to the [plaintiffs].” (citations omitted)). *But see Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154 (10th Cir. 2013) (“Prudential standing doctrines are not jurisdictional: they may be forfeited or waived.”), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Bd. of Miss. Levee Comm’rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012) (holding that the defendant waived the argument that a plaintiff lacks prudential standing under the Clean Water Act); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008) (“Unlike the Article III standing inquiry, whether ILC maintains

prudential standing using any information, even from beyond the pleadings.¹⁰ And upon finding that a claimant lacks prudential standing, courts dismiss the claim without prejudice, even if the claim has merit given the procedural protections afforded to it at that stage in the proceedings.¹¹

prudential standing is not a jurisdictional limitation on our review. By failing to articulate any argument challenging [the plaintiffs'] prudential standing, the [defendant] has waived that argument." (citation and internal quotation marks omitted)); *Finstuen*, 496 F.3d at 1147 ("Prudential standing is not jurisdictional in the same sense as Article III standing. . . . We could therefore decline to address this argument, as it was not raised in the court below."); *Gilda Industries, Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006) ("In the end, we do not need to reach or decide the question whether [the plaintiff] satisfies the standing requirements of the Administrative Procedure Act, because the government did not contend in its brief that [the] complaint should be barred by the zone of interests test. The government has thus waived that argument.").

10. See, e.g., *Douglas*, 814 F.3d at 1278 ("[A] factual attack on subject matter jurisdiction challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered." (internal quotation marks omitted)). Although the court can consider "matters outside the pleadings" during evaluation of a motion to dismiss for failure to state a claim, then "the motion must be treated as one for summary judgment." FED. R. CIV. P. 12(d); see also 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1366 (3d ed. 2017).

11. See, e.g., *Brumfiel v. U.S. Bank*, 618 F. App'x 933, 935–38 (10th Cir. 2015) (affirming a dismissal without prejudice under Rule 12(b)(1) because the plaintiff lacked prudential standing); *Hillside Metro Assocs., L.L.C. v. JPMorgan Chase Bank, Nat. Ass'n*, 747 F.3d 44, 49 (2d Cir. 2014) (remanding with instructions to dismiss for lack of subject matter jurisdiction because the plaintiff lacks prudential standing); *Interface Kanner, LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, 704 F.3d 927, 934 (11th Cir. 2013) (same); *G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 542–43 (7th Cir. 2012) (affirming a dismissal under Rule 12(b)(1) for lack of prudential standing); *MainStreet*, 505 F.3d at 749 (Posner, J.) ("Because the real estate brokers and their association do not have standing to challenge the Calumet City point of sale ordinance, the preliminary injunction issued by the district court is vacated and the suit is dismissed without prejudice."); *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 73 (1st Cir. 2003) ("The prudential reasons alone provide adequate basis to affirm the order dismissing the . . . claim without prejudice."); *Am. Fed'n of Gov't Employees v. Babbitt*, 46 F. App'x 254, 257 (6th Cir. 2002) (affirming a dismissal under Rule 12(b)(1) for lack of prudential standing). *But see* *VR Acquisitions v. Wasatch Cty.*, 853 F.3d 1142, (10th Cir. 2017) ("Because the district court properly dismissed VRA's § 1983 claims for lack of prudential standing, we affirm the dismissal of those claims with prejudice."); *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1342 (11th Cir. 2017) (affirming a Rule 12(b)(6) dismissal in part because the plaintiff "does not have antitrust standing"); *In re Apple Phone Antitrust Litig.*, 846 F.3d 313, 325–25 (9th Cir. 2017) (holding "that any error, if indeed there was error, in the district court's consideration of the merits of Apple's Rule 12(b)(6) motion to dismiss for lack of statutory standing was harmless"); *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 269 (3d Cir. 2016) ("[I]n keeping with our independent obligation to consider the

The only solution to the problems caused by prudential standing is to eliminate the concept. Although many have suggested other solutions—including removing the “jurisdictional implication” of prudential standing¹² and eliminating constitutional standing¹³—none have proved successful in ridding these problems.

Justice Scalia had long criticized prudential standing.¹⁴ In the 1992 *Lujan* decision, he assigned a definition to standing that

boundaries of subject matter jurisdiction, we conclude that the District Court should have treated antitrust standing not as an Article III jurisdictional issue, but rather as a merits issue, and thus should have resolved the motion to dismiss under Rule 12(b)(6) rather than Rule 12(b)(1).”); *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016) (“Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law.” (internal quotation marks omitted)); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 307 (3d Cir. 2011) (en banc) (“[S]tatutory standing is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place.”); *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011) (“Unlike a dismissal for lack of constitutional standing, which should be granted under Rule 12(b)(1), a dismissal for lack of prudential or statutory standing is properly granted under Rule 12(b)(6).”); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (“[W]e must . . . reject claims under Rule 12(b)(6) when antitrust standing is missing.”); *HomeAway Inc. v. City & Cty. of San Francisco*, No. 14-cv-04859-JCS, 2015 WL 367121, at *4 (N.D. Cal. Jan. 27, 2015) (“Courts have considered prudential standing under both Rule 12(b)(1) and Rule 12(b)(6).”); *cf. Koltun v. Frerichs*, 869 F.3d 532, 533 (7th Cir. 2017), *as amended* (Nov. 9, 2017) (Easterbrook, J.) (abrogating Seventh Circuit decisions that affirmed dismissals of claims lacking prudential ripeness “for want of subject-matter jurisdiction”).

12. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154 (10th Cir. 2013) (“Prudential standing doctrines are not jurisdictional: they may be forfeited or waived.”), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Grocery Mfrs. Ass’n*, 693 F.3d at 184 (Kavanaugh, J., dissenting) (opining that prudential standing is not jurisdictional); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008) (“Unlike the Article III standing inquiry, whether ILC maintains prudential standing is not a jurisdictional limitation on our review.” (internal quotation marks omitted)); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008) (“Prudential-standing doctrine is not jurisdictional in the sense that Article III standing is.” (internal quotation marks omitted)); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007) (“Prudential standing is not jurisdictional in the same sense as Article III standing. . . .”); *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999) (“We can prepermit the more difficult question regarding whether the [plaintiffs’] interests fall within the zone of interests protected by the [Occupational Safety and Health Act] because prudential standing is flexible and not jurisdictional in nature.” (citation omitted)).

13. *See, e.g.,* sources cited *supra* note 4 (challenging the courts’ attribution of the standing requirement to Article III, Section 2); sources cited *supra* note 7 (challenging the standing requirement by arguing that standing is indistinguishable from right to sue or cause of action).

14. While serving on the U.S. Court of Appeals for the D.C. Circuit, Justice Scalia wrote, “Personally, I find this bifurcation [of standing into prudential and

prevented labeling certain categories of prudential standing as issues of standing.¹⁵ Then in the 2014 *Lexmark* decision, he affirmatively removed the label of prudential standing from one of the categories.¹⁶ After *Lexmark* and Justice Scalia's subsequent death, however, lower courts have continued to use prudential standing.¹⁷ Notably, in the 2017 *Knick* decision, the Third Circuit held that the plaintiff in that case had neither constitutional nor prudential standing.¹⁸ Also, in the

constitutional standing] unsatisfying—not least because it leaves unexplained the Court's source of authority for simply granting or denying standing as its prudence might dictate." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983).

15. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (introducing the three elements of constitutional standing: "injury in fact," "a causal connection between the injury and the conduct complained of," and a "likel[i]hood" . . . that the injury will be redressed by a favorable decision" (internal quotation marks omitted)).

16. See *Lexmark Int'l, Inc., v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) ("[P]rudential standing is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons has a right to sue under this substantive statute." (internal quotation marks omitted)). *But see id.* at 1387 n.3 (suggesting that the Court has also abandoned prudential standing's rule against asserting generalized grievances).

17. See, e.g., *Commonwealth Utils. Corp. v. Johnson*, 245 F.Supp.3d 1239, 1255 (D. N. Mar. I. 2017) ("A plaintiff lacks prudential standing [under the Consolidated Natural Resources Act] only if his "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."); *Sprague v. Cortes*, 223 F. Supp. 3d 248, 279–80 (M.D. Pa. 2016) (characterizing as a "prudential principle" that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit"); *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 324 (D.D.C. 2016) ("To demonstrate prudential standing, a plaintiff must show that the interest it seeks to protect is arguably within the zone of interests to be protected or regulated by the statute in question or by any provision integrally related to it." (internal quotation marks omitted)).

18. *Knick v. Twp. of Scott*, 862 F.3d 310, 320–22 (3d Cir. 2017) ("[P]laintiffs must always demonstrate the 'irreducible constitutional minimum' of Article III standing. . . . Furthermore, as a prudential matter, a party 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (citations and internal quotation marks omitted)), *cert. granted in part sub nom.* *Knick v. Twp. of Scott*, No. 17-647, 2018 WL 1143827 (U.S. Mar. 5, 2018). Although the Supreme Court is scheduled to review the Third Circuit's decision during the 2018 term, the Court has limited its review to a similar but different issue within the decision. See *Knick*, 2018 WL 1143827, at *1. That issue is whether to reconsider a 1985 decision, which imposes a requirement—known as "prudential ripeness"—that "property owners . . . exhaust state court remedies to ripen federal takings claims." *Petition for Writ of Certiorari, Knick v. Twp. of Scott*, No. 17-647 (U.S. filed Oct. 31, 2017) (citing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985)); *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 286 (5th Cir. 2012) (calling the requirement "prudential ripeness"); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010) (same).

2017 *International Refugee Assistance Project* decision, the Fourth Circuit determined that the plaintiffs in that case had prudential standing.¹⁹ Finally, in the 2017 *In re Apple iPhone Antitrust Litigation*, the Ninth Circuit determined that the plaintiffs in that case had “antitrust standing,” a variation of prudential standing’s rule against asserting an interest outside the zone of interests protected by the statute invoked—the very category of prudential standing that *Lexmark* eliminated.²⁰ This article aims to reignite the importance of eliminating prudential standing and to propose ways to achieve this elimination. Specifically, this article advocates the use of correct definitions for jurisdiction, for standing, for a cause of action, for a right to sue, and for a claim for relief.²¹ Also, this article advocates the use of correct rules of civil procedure to enforce the rules currently labeled as prudential standing.²²

Some courts have been reluctant to characterize the requirement as “prudential ripeness” after *Lexmark*. See, e.g., *Miller v. City of Wickliffe, Ohio*, 852 F.3d 497, 503 n.2 (6th Cir. 2017) (“Although the concurrence recommends disposing of this case on prudential-ripeness grounds, we need not reach that issue here. Given the Supreme Court’s questioning of the continued vitality of the prudential-standing doctrine, . . . we are hesitant to ground our decision in prudential-standing principles. . . . [W]e choose to rely on a more solid foundation for deciding the case—namely, constitutional-standing principles.” (citing *Lexmark*, 134 S. Ct. at 1386; *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2346–47 (2014); *Kiser v. Reitz*, 765 F.3d 601, 606–07 (6th Cir. 2014)). But see *Miller*, 852 F.3d at 507–08 (Rogers, J., concurring) (advising against overruling “a significant line of precedent” on prudential ripeness based on *Lexmark* “until the Court declares otherwise in a clear voice” (citing *Lexmark*, 134 S. Ct. at 1386)).

19. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 586 (4th Cir.), *as amended* (June 15, 2017) (“The prudential standing doctrine includes a ‘general prohibition on a litigant’s raising another person’s legal rights.’ This ‘general prohibition’ is not implicated here, however, as Doe #1 has shown that he himself suffered injuries as a result of the challenged Order.” (citation omitted)), *vacated and remanded sub nom. Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353 (2017). Although the Supreme Court has since vacated the Fourth Circuit’s decision, the Court vacated on grounds other than prudential standing. See *Trump*, 138 S. Ct. at 353.

20. *In re Apple Phone Antitrust Litig.*, 846 F.3d 313, 315, 325 (9th Cir. 2017); see also *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1340 (11th Cir. 2017) (“In addition to ‘the basic “case or controversy” or “injury in fact” required by Article III of the Constitution,’ a private plaintiff who seeks damages under the antitrust laws . . . must establish ‘antitrust standing.’” (quoting *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1270 (11th Cir. 2013))); *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016) (“An antitrust plaintiff must show both constitutional standing and antitrust standing at the pleading stage.”); *Sanger Ins. Agency v. HUB Int’l, Ltd.*, 802 F.3d 732, 734 (5th Cir. 2015) (“Plaintiff has established antitrust standing.”).

21. See *infra* Part III(B).

22. See *infra* Part III(C).

The current literature on standing is devoted primarily to criticizing standing as “a recent invention of federal judges” and highlighting the confusion surrounding its use and definition.²³ Only a few identify prudential standing as the cause of this confusion. Of the literature specifically on prudential standing, most were written before *Lexmark*,²⁴ limit their discussion to *Lexmark*,²⁵ otherwise limit their discussion to one of the three rules of prudential standing,²⁶ or propose different solutions to the problems that result from labeling these rules as prudential standing.²⁷ This article is unique in its identification of prudential standing as the cause of the confused definition of standing, its comprehensive analysis of the cases on prudential standing before and after *Lexmark*, and its proposal of specific ways to eliminate the concept entirely. Part I of this article

23. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (internal quotation marks omitted); see also sources cited *supra* note 4 (challenging the courts' attribution of the standing requirement to Article III, Section 2); sources cited *supra* note 7 (arguing that standing and cause of action are indistinguishable).

24. See, e.g., Micah J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221 (2013); Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89 (2009).

25. See, e.g., Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for A Comeback?: Lexmark International, Inc. v. Static Control Components, Inc.*, 18 U. PA. J. CONST. L. 213, 218 (2015); Case Comment, *Lexmark International, Inc. v. Static Control Components, Inc.*, 128 HARV. L. REV. 321 (2014).

26. See, e.g., Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277 (2015); Case Comment, *Grocery Mfrs. Ass'n v. EPA*, 126 HARV. L. REV. 1446 (2013); Griffith B. Price, Jr., *Phoenix of Broward, Inc. v. McDonald's Corporation: Judicious Application of the Doctrine of Prudential Standing, or Unjustified Abstention from the Proper Exercise of Jurisdiction?*, 97 TRADEMARK REP. 1332 (2007); Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317 (2004).

27. See, e.g., Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413, 417 (2013) (agreeing generally with “judicial arguments . . . that prudential standing should not be treated as a jurisdictional issue”); Goodling, *supra* note 8, at 1156 (arguing that, although “prudential standing should not be considered jurisdictional,” “federal courts should nevertheless have the sua sponte discretion to raise prudential standing after a litigant has waived the issue”); Sunstein, *What's Standing After Lujan?*, *supra* note 4, at 235–36 (arguing for the elimination of constitutional standing). Although a 2014 article generally proposes the same solution, the five-page proposal in that article focuses on explaining why the article advocates for the elimination of prudential standing rather than proposing concrete ways to implement this solution. See S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 127–32 (2014). Part III of this article explains not only why other solutions are ineffective but also how specifically to implement the solution of eliminating prudential standing: (1) using correct definitions for jurisdiction, for standing, for a cause of action, for a right to sue, and for a claim for relief and (2) using correct procedural principles to enforce the rules currently labeled as prudential standing.

explores the problematic beginning of prudential standing. Part II describes the problems of each category of prudential standing. Part III critiques other proposed solutions and proposes ways to eliminate prudential standing.

I. HISTORY OF PRUDENTIAL STANDING

Part I explains why prudential standing is a result of problematic developments in the requirements of adverseness and standing, a means to assure adverseness. The adverseness requirement began as a prudential concern²⁸ but was later attributed to Article III, Section 2 of the Constitution, which outlines the courts' jurisdiction.²⁹ In step with this development, the standing requirement was also attributed to Article III, Section 2.³⁰ However, cases that failed to perceive these developments as changes in the courts' understanding of adverseness and standing began characterizing the standing requirement in Article III, Section 2 as separate from, and complementary to, the standing requirement as a prudential concern.³¹ And the latter type of standing came to be known as prudential standing.³² Although *Lujan* attempted to narrow the definition of standing to that required by Article III, Section 2, prudential standing persisted.

A. Origin of the Adverseness Requirement

Ever since the courts recognized their power to interpret the Constitution and declare a legislative or executive act

28. Discussing the adverseness requirement, *Lord v. Veazie*, 49 U.S. 251, 255 (1850), stated:

Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice *have always reprehended*, and treated as a punishable contempt of court.

(emphasis added). See also sources cited *supra* note 2.

29. See cases cited *supra* note 3.

30. See cases cited *supra* note 4.

31. See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) ("Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) . . ."); *Warth*, 422 U.S. at 500 (describing certain issues of standing as "closely related to Art. III concerns but essentially matters of judicial self-governance").

32. See *Warth*, 422 U.S. at 501 (introducing the term "prudential standing").

unconstitutional,³³ they have been dutifully grappling with the extent of that power.³⁴ In his concurrence to the 1936 *Ashwander* decision, Justice Brandeis summarized seven rules that the courts had adopted to “avoid[] passing upon a large part of all the constitutional questions pressed upon [them] for decision.”³⁵ Two of these seven rules are now associated with the case or controversy limitation in Article III, Section 2 of the Constitution: the first rule for a “real, earnest, and vital controversy” (i.e., the adverseness requirement)³⁶ and the fifth rule for a showing that a claimant “is injured by [the] operation” of the act complained of (i.e., the standing requirement).³⁷ However, at the time Justice Brandeis wrote his *Ashwander* concurrence, the

33. See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

34. See, e.g., *Ashwander*, 297 U.S. at 345 (Brandeis, J., concurring) (“The Court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress.” (citations omitted)); *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (“The administration of [this] statute . . . is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . [A] suit of this character cannot be maintained.”); *S. Spring Hill Gold-Min. Co. v. Amador Medean Gold-Min. Co.*, 145 U.S. 300, 301 (1892) (“[T]he litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one.” (citations omitted)).

35. *Ashwander*, 297 U.S. at 346–48 (Brandeis, J., concurring). Although Justice Brandeis summarized existing rules adopted by courts and although Justice Frankfurter later contributed to ongoing discussion of this summary, some scholars attribute the standing requirement to Justices Brandeis and Frankfurter. See, e.g., F. Andrew Hessick, *Standing, Injury in Facts, and Private Rights*, 93 CORNELL L. REV. 275, 291 (2008) (“Standing developed *principally at the hands* of Justice Brandeis and later Justice Frankfurter.” (emphasis added)); Sunstein, *What’s Standing After Lujan?*, *supra* note 4, at 179–80 (“Attempting to counter the aggressive Supreme Court of the period, Justices Brandeis and Frankfurter helped develop . . . the requirement of what we now think of as standing.”). As explained in Part I(B), these rules apply to more than just the Supreme Court and constitutional questions.

36. *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring) (internal quotation marks omitted). For example, the 2006 *DaimlerChrysler* decision attributes this requirement to Article III, Section 2:

Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects “the proper—and properly limited—role of the courts in a democratic society.” . . . [T]he case-or-controversy limitation is crucial in maintaining the ‘tripartite allocation of power’ set forth in the Constitution. . . . “[N]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (citations omitted); see also cases cited *supra* note 3.

37. *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring); see also cases cited *supra* note 4.

courts had yet to attribute to this section of the Constitution the idea that they could adjudicate only the claims of adversaries and the idea that a litigant must have standing to present the claims.³⁸ Thus, Justice Brandeis listed these two rules as considerations additional to the jurisdictional requirements in Article III, Section 2.³⁹

B. Adverseness Requirement in Article III, Section 2

Following *Ashwander*, the courts significantly refined their understanding of Article III, Section 2. Unlike Article III, Section 1, which includes a general grant of “judicial power” to the courts, Section 2 lists the specific cases and controversies over which the courts have judicial power—including cases “arising under th[e] Constitution [and] the laws of the United States” and controversies “between citizens of different states.”⁴⁰ Although courts at the time of *Ashwander* interpreted Section 2 as governing only the subject matter of the cases and controversies that they could review,⁴¹ they began interpreting Section 2 as circumscribing Section 1’s general grant of judicial power to the adjudication of a “case or controversy”—i.e., a dispute between adverse parties.⁴² The 1933 *Nashville* decision stated, “The judiciary clause of the Constitution . . . [requires that a] case retain[] the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy”⁴³ And in his concurrence to the 1939 *Coleman* decision, Justice Frankfurter attributed to the case or controversy limitation the rule that a court could adjudicate only a “concrete, living contest between adversaries”:

38. See sources cited *supra* notes 2, 28.

39. See *Ashwander*, 297 U.S. at 346–48 (Brandeis, J., concurring) (adopting the seven rules to “avoid[] passing upon a large part of all the constitutional questions pressed upon [the courts] for decision”).

40. U.S. CONST. art. III, §§ 1–2.

41. See *Kline v. Burke Const. Co.*, 260 U.S. 226, 233 (1922) (explaining that Article III, Section 2 enumerates “certain designated cases and controversies” within the jurisdiction of the Court); HARRY T. EDWARDS & LINDA A. ELLIOT, *FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 33 (3d ed. 2018) (“Subject matter jurisdiction . . . encompasses the Article III . . . ‘prescriptions delineating the classes of cases’ that federal courts are authorized to hear.” (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004))); sources cited *supra* notes 2, 28. But see Pfander & Brik, *supra* note 3, at 1473 (suggesting that the “adverse-party norm” was introduced into the Constitutional language “in the late nineteenth century”).

42. See U.S. CONST. art. III, §§ 1–2; cases cited *supra* note 3.

43. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 264 (1933).

In endowing this Court with “judicial Power” the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move . . . by extending “judicial Power” only to “Cases” and “Controversies.” . . . It was not for courts to meddle with matters that require no subtlety to be identified as political issues. And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law.⁴⁴

The concurrence never specifically cited Article III, Section 2, but it was undoubtedly this section that within the Constitution “explicitly” limited the exercise of judicial power to “‘Cases’ and ‘Controversies.’”⁴⁵

Although only the Supreme Court derives its jurisdiction directly from Article III, other courts are also subject to the adverseness requirement. The 1922 *Kline* decision explained, “The effect of [Article III] is . . . to *delimit* [cases and controversies] in respect of which Congress may confer jurisdiction upon such courts as it creates.”⁴⁶ The 1937 *Haworth* decision confirmed this effect of Article III on the jurisdiction of lower courts.⁴⁷ *Haworth* considered the constitutionality of the Declaratory Judgment Act, which allowed the courts to consider a request for a declaratory judgment to the extent the request was a “case[] of actual controversy.”⁴⁸ Determining that this phrase “manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense,”⁴⁹ *Haworth* concluded that “Congress is acting within its delegated power over the jurisdiction of the federal courts

44. *Coleman*, 307 U.S. at 460 (Frankfurter, J., concurring) (emphasis added).

45. *Id.* (Frankfurter, J., concurring).

46. *Kline*, 260 U.S. at 233–34 (emphasis added).

47. *Haworth*, 300 U.S. at 239–40.

48. 28 U.S.C. 400 (1934) (currently codified in 28 U.S.C. § 2201 (2010)) (“In cases of actual controversy the courts of the United States shall have power . . . to declare rights and other legal relations of any interested party petitioning for such declaration . . .”).

49. *Haworth*, 300 U.S. at 239–40; see also *Nashville, C. & St. L. Ry.*, 288 U.S. at 258 (discussing the constitutionality of Tennessee’s Uniform Declaratory Judgments Act).

which the Congress is authorized to establish.”⁵⁰ Thus, any court could grant declaratory judgment relief as long as the court is presented with a case or controversy as required in Article III, Section 2.

Also, although *Ashwander* described the adverseness requirement as applying to “the *constitutional* questions pressed upon [the courts] for decision,”⁵¹ the requirement began to apply to more than just constitutional questions. For example, the 1944 *Stark* decision required adverseness in adjudicating “the exertion of *unauthorized administrative power*,”⁵² and the 1945 *Railway Mail Association* decision required adverseness in adjudicating “the validity of [a] *state statute*.”⁵³ The courts now understood the adverseness requirement in Article III, Section 2 to apply to any question before the courts.

C. Standing Requirement in Article III, Section 2

Accompanying this adverseness requirement during this transition was the standing requirement. Begun as a description of the general status of a claimant, standing was often conflated with a determination whether a claimant had a right to sue or had a cause of action; if the claimant did not, he lacked standing. Exemplifying this conflation, the 1926 *General Investment Company* decision stated, “Whether a plaintiff seeking . . . relief has the requisite standing is a question going to the *merits*, and its determination is an exercise of *jurisdiction*.”⁵⁴ We now distinguish an issue of jurisdiction, such as standing, from an issue on the merits, such as a right to sue or a cause of action.⁵⁵ In another example of conflation, a court facing a circumstance akin to what we now describe as a lack of standing altogether omitted use of the word standing. In explaining why a taxpayer cannot litigate a “matter of public and not of individual concern,” the 1923 *Frothingham* decision not once used the word standing.⁵⁶

50. *Haworth*, 300 U.S. at 240; see also *Nashville, C. & St. L. Ry.*, 288 U.S. at 264–65.

51. *Ashwander*, 297 U.S. at 346 (emphasis added).

52. *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (emphasis added).

53. *Ry. Mail Ass’n v. Corsi*, 326 U.S. 88, 93 (1945) (emphasis added).

54. *Gen. Inv. Co. v. N.Y. Cent. R. Co.*, 271 U.S. 228, 230–31 (1926) (emphasis added) (citations omitted).

55. See cases cited *supra* note 7.

56. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923); see also Lieutenant Colonel Daniel C. Stearns v. Brigadier Gen. George H. Wood, 236 U.S. 75, 76 (1915) (equating a question whether a claimant “has a direct personal interest” with a question whether a bill “states [a] cause of action”).

In the 1930s, standing began to mean exclusively a claimant's ability to invoke a court's jurisdiction rather than his right to sue or his cause of action. In 1939, *Coleman* described *Frothingham* as holding, "[O]ne who asserts the mere right of a citizen and taxpayer of the United States to complain of the alleged invalid outlay of public moneys has no *standing* to invoke the jurisdiction of the federal courts."⁵⁷ In his concurrence to *Coleman*, Justice Frankfurter elaborated on the idea of standing as a "familiar [concept] of jurisdiction" that denoted a claimant's "specialized interest . . . to vindicate, apart from a political concern which belongs to all."⁵⁸ In other words, standing was "such a personal stake in the outcome of the controversy as to assure" adverseness; standing was a measure of adverseness.⁵⁹ And as the adverseness requirement became attributed to Article III, Section 2—the case or controversy limitation—so was the standing requirement.⁶⁰

D. Standing Requirement as a Separate, Prudential Concern

Two cases, while continuing to attribute the standing requirement to Article III, Section 2, determined that prudential concerns created a separate requirement for standing. Citing *Coleman*, the 1953 *Barrows* decision helped solidify the idea that the "requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to 'cases' and 'controversies.'"⁶¹ The 1975 *Warth* decision continued this legacy by stating, "[S]tanding imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art[icle] III."⁶² At the same time, however, the two cases cited older cases for the proposition that the standing requirement is also a result of "self-restraint."⁶³ In doing so they created a false dichotomy between the requirement resulting from the Constitution and that resulting from self-restraint, a dichotomy which birthed the ideas of

57. *Coleman*, 307 U.S. at 455 (1939) (emphasis added) (citing *Frothingham*, 262 U.S. at 408).

58. *Id.* at 464 (Frankfurter, J., concurring).

59. *Baker*, 369 U.S. at 204.

60. See cases cited *supra* note 4.

61. *Barrows*, 346 U.S. at 255.

62. *Warth*, 422 U.S. at 498.

63. See *Barrows*, 346 U.S. at 255 ("Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) . . ."); *Warth*, 422 U.S. at 500 (describing certain issues of standing as "closely related to Art. III concerns but essentially matters of judicial self-governance").

constitutional standing and prudential standing.⁶⁴ As two of the most oft-cited cases in support of prudential standing, *Barrows* and *Warth* to this day haunt our understanding of standing and of jurisdiction.

Barrows described the list of seven rules in Justice Brandeis's *Ashwander* concurrence as "complementary rule[s] of self-restraint" that exist alongside the constitutional requirement that a litigant present a "case or controversy":

The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to "cases" and "controversies."⁶⁵ Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation.⁶⁶

Although the courts had been unclear about whether they derived the standing requirement from the Constitution or their understanding of the role of the judiciary, the courts had never, before *Barrows*, declared that these were independent sources that existed concurrently. For example, Justice Frankfurter's *Coleman* concurrence had cited Justice Brandeis's *Ashwander* concurrence as

64. *But see* S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 127–32 (2014) (viewing "modern prudential standing" as originating "in the Burger Court," which denotes the Supreme Court while Warren Burger served as Chief Justice from 1969 to 1986); 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, 1095 (2009) (attributing a change in the standing doctrine to "the Burger Court").

65. Another problem of *Barrows* is that its seemingly innocuous summary of the *Coleman* concurrence equates adverseness, which describes the nature of the parties' relationship, with standing, which is required of only the claimant. Justice Frankfurter with meticulous phrasing had managed to avoid the same error in the *Coleman* concurrence. In describing adverseness, Justice Frankfurter identified "adversaries" who would call "for the arbitrament" of a "concrete, living contest"; but in describing the *Coleman* plaintiffs' lack of standing, he identified "those who have some specialized interest of their own to vindicate." *Coleman*, 307 U.S. at 460, 464 (Frankfurter, J., concurring).

66. *Barrows*, 346 U.S. at 255 (citing *Coleman*, 307 U.S. at 464 (Frankfurter, J., concurring)); *Ashwander*, 297 U.S. at 346–48 (Brandeis, J., concurring)).

containing a mere “abstraction” of the requirement prescribed by the Constitution.⁶⁷

Citing *Barrows* approximately two decades later, *Warth* reinforced this putative dichotomy:

In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.⁶⁸

Warth then proceeded to use the shorthand “prudential standing” to signify the standing requirement that results from the prudential limitation on the exercise of jurisdiction.⁶⁹ Thus, prudential standing was born.

Warth did much more than label an existing idea, however. *Warth* forged two categories that would together constitute prudential standing:

First, the Court has held that when the asserted harm is a “generalized grievance” shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. Second, even when the plaintiff has alleged injury sufficient to meet the “case or controversy” requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.⁷⁰

In support of the first category of prudential standing, *Warth* cited the 1974 *Schlesinger* decision, the 1974 *Richardson* decision, and a third source that both *Schlesinger* and *Richardson* relied on: the 1937 *Levitt* decision.⁷¹ A single-paragraph opinion, *Levitt* was published before Justice Frankfurter’s *Coleman* concurrence and before the courts began to attribute standing to Article III, Section 2. *Levitt* discussed what is now known as Article III standing; it held

67. *Coleman*, 307 U.S. at 461 (Frankfurter, J., concurring).

68. *Warth*, 422 U.S. at 498.

69. *Id.* at 501.

70. *Id.* at 499 (citations omitted).

71. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–27 (1974); *United States v. Richardson*, 418 U.S. 166, 188–97 (1974); *Ex parte Levitt*, 302 U.S. 633, 634 (1937).

that a claimant must show a "direct injury" other than a "general interest common to all members of the public."⁷² Both *Schlesinger* and *Richardson* cited *Levitt* for that idea: "Concrete injury, whether actual or threatened," is "indispensable" for an exercise of jurisdiction.⁷³ *Warth* failed to explain how this requirement was separate from the the constitutional standing requirement that it had described just earlier in the opinion: "A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action."⁷⁴ *Warth's* putative dichotomy was fiction.

In support of the second category of prudential standing—the rule that "the plaintiff generally . . . assert his own legal rights and interests"⁷⁵—*Warth* cited the 1943 *Tileston* decision and the 1960 *Raines* decision.⁷⁶ *Tileston* discussed the need for an actual or threatened injury: it concluded that the claimant lacked standing because "[t]here is no allegation or proof that [the claimant]'s life is in danger."⁷⁷ *Tileston* did not create a second category of prudential standing and rather reinforced the need for Article III standing. *Raines* never even used the word standing. Rather, Justice Brennan, the author of *Raines*, was one of the most vocal opponents of prudential standing. He shrewdly warned against misinterpretations such as the one in *Warth*: "Too often these various questions of [injury in fact, reviewability, and the merits] have been merged into one confused inquiry, lumped under the general rubric of 'standing.'"⁷⁸ *Warth's* two categories of prudential standing were based on misinterpretation of precedent.

E. Criticism of the New Characterization of the Standing Requirement

Justice Brennan recognized early the potentially destructive effects of the parallel ideas of standing. An example is his dissent to the 1970 *Barlow* decision, which established "standing" by

72. 302 U.S. at 634.

73. *Schlesinger*, 418 U.S. at 220–21 (emphasis added); *Richardson*, 418 U.S. at 176–78.

74. *Warth*, 422 U.S. at 499 (emphasis added) (internal quotation marks omitted).

75. *Id.*

76. See *Tileston v. Ullman*, 318 U.S. 44 (1943); *United States v. Raines*, 362 U.S. 17 (1960).

77. 318 U.S. at 46.

78. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 159, 176 (1970) (Brennan, J., concurring and dissenting).

determining that the plaintiffs not only “have the personal stake and interest that impart the concrete adverseness required by Article III” but also “are clearly within the zone of interests protected by the” statute at issue.⁷⁹ Justice Brennan warned in his dissent:

My view is that the inquiry in the Court’s first step is the only one that need[s] be made to determine standing. I had thought we discarded the notion of any additional requirement when we discussed standing solely in terms of its constitutional content in [*Flast v. Cohen*]. By requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests.⁸⁰

Justice Brennan was discussing the 1968 *Flast* decision, which had cited *Barrows* to express “uncertainty . . . in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations.”⁸¹

Citing his *Barlow* dissent, Justice Brennan wrote a concurrence to the 1976 *Eastern Kentucky Welfare Rights Organization* decision, which was published a year after *Warth*.⁸² In the concurrence, he wrote:

Any prudential, nonconstitutional considerations that underlay the Court’s disposition of the injury-in-fact standing requirement . . . are simply inapposite when review is sought under a congressionally enacted statute conferring standing and providing for judicial review. In such a case considerations respecting “the allocation of power at the national level (and) a shift away from a democratic form of government” are largely ameliorated, and such prudential

79. *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

80. *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 168 (Brennan, J., concurring and dissenting) (citing *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942 (1968)); see also *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127 (1947) (Frankfurter, J., concurring) (“But whether a State has standing to urge a claim of constitutionality under a Congressional grant-in-aid statute does not involve ‘jurisdiction’ in the sense of a court’s power but only the capacity of the State to be a litigant to invoke that power.”).

81. *Flast*, 392 U.S. at 97.

82. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Brennan, J., concurring).

limitations as remain are supposedly subsumed under the “zone of interests” test.⁸³

In other words, although Justice Brennan recognized the need for “prudential limitations,” he refused to couch them under the rubric of standing.⁸⁴

F. Persistence of Prudential Standing After Lujan

By 1982, prudential standing had taken root in legal thought.⁸⁵ The 1982 *Valley Forge* decision introduced for the first time what we now recognize as the three categories of prudential standing.⁸⁶ Then, the 1984 *Allen* decision summarized the three categories as (1) “the general prohibition on a litigant’s raising another person’s legal rights,” (2) “the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches,” and (3) “the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”⁸⁷ Of the three categories, “the rule barring adjudication of generalized grievances” could be traced back to *Warth*’s first category of prudential standing: the rule against asserting “a generalized grievance shared in substantially equal measure by all or a large class of citizens.”⁸⁸ The remaining two categories—“the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked” and “the *general* prohibition on a litigant’s raising another person’s legal rights”⁸⁹—could be traced back to *Warth*’s second category, the rule that claimants assert their own “legal rights and interests.”⁹⁰

The three categories continued to gain popularity⁹¹ when in 1992 *Lujan*, authored by Justice Scalia, attempted to return the courts to

83. *Id.* at 58–60 (citations omitted).

84. *See id.*

85. *See, e.g., Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 152–54 (holding that “the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to ‘cases’ and ‘controversies’” but that, “[a]part from Article III jurisdictional questions, problems of standing, as resolved by this Court for its own governance, have involved a ‘rule of self-restraint’” (citations omitted)).

86. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982).

87. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

88. *Warth*, 422 U.S. at 499 (internal quotation marks omitted).

89. *Allen*, 468 U.S. at 751 (emphasis added).

90. *Warth*, 422 U.S. at 499.

91. *See, e.g., Haitian Refugee Ctr. V. Gracey*, 809 F.2d 794, 807 (D.C. Cir. 1987) (listing the three “prudential requirements” as additions to “the article III minima”).

their understanding of standing before *Barrows* and *Warth*.⁹² Although recognizing the existence of “prudential considerations,” *Lujan* determined that “the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”⁹³ *Lujan* then distilled the case law on standing to three elements: the existence of a (1) “concrete and particularized” and “actual or imminent” injury (2) that is caused by the “conduct complained of” and (3) that is likely “redressed by a favorable decision.”⁹⁴ These elements encompassed the many concerns of standing that the courts had considered since first contemplating the limits of its jurisdiction. In particular, the element of injury addressed the concerns that the courts had since before *Ashwander* and had sometimes erroneously labeled as prudential standing’s rule against asserting generalized grievances.⁹⁵ *Lujan* had defined standing.

Although *Lujan* significantly advanced our understanding of standing, it unfortunately did not discuss and correct the mislabeling of certain prudential limitations as standing. Thus precedent labeling the limitations as such persisted. Five years after *Lujan*, the 1997 *Bennett* decision, authored by none other than Justice Scalia, reconciled *Lujan* with this precedent by confirming the existence of two types of standing: constitutional and prudential.⁹⁶ Constitutional standing required the elements outlined in *Lujan*—injury, causation, and redressability—and prudential standing encompassed the rules against assertion of generalized grievances, assertion of an interest outside the zone of interests, and assertion of a third party right.⁹⁷ For two decades, this putative dichotomy has continued to define our understanding of standing.

92. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

93. *Id.* at 560.

94. *Id.* at 560–61.

95. See, e.g., *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) (“The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.”); *Warth*, 422 U.S. at 499 (“A federal court’s jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action.” (internal quotation marks omitted)). But see Sunstein, *What’s Standing After Lujan?*, *supra* note 4, at 167 (criticizing *Lujan* for “establish[ing] injury in fact as a constitutional prerequisite” by adopting “a revisionist view of Article III, with no textual or historical support”).

96. *Bennett v. Spear*, 520 U.S. 154, 162 (1997); see also *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (stating within days after *Lujan*, “This Court’s prudential standing principles impose a general prohibition on a litigant’s raising another person’s legal rights” (internal quotation marks omitted)).

97. *Bennett*, 520 U.S. at 162.

II. CURRENT STATE OF PRUDENTIAL STANDING

The concurrent existence of prudential and constitutional standing guaranteed the prolonged survival of each of the three categories of prudential standing. Part II outlines the problems of labeling each category as prudential standing. First, courts struggle to justify the existence of the first category of prudential standing—the rule against assertion of generalized grievances—because *Lujan*, among others, explain that the purpose of *constitutional* standing is to prohibit the adjudication of generalized grievances.⁹⁸ Second, courts cannot explain why a flaw in a litigant's claim—asserting an interest outside the zone of interests protected by the statute invoked—would affect the court's jurisdiction to adjudicate that claim. Finally, courts likewise cannot explain why another flaw in a litigant's claim—asserting a right that belongs to a third party—would affect the court's jurisdiction to adjudicate that claim.

A. First Category: Rule Against Asserting Generalized Grievances

1. Introduction

The rule against asserting generalized grievances is the category of prudential standing that most resembles the concern that originally gave birth to the idea of standing.⁹⁹ It is rooted in the thought that a claimant must have “a personal stake in the outcome of the controversy.”¹⁰⁰ However, *Lujan* identified the three factors of *constitutional* standing—*injury, causation, and redressability*—precisely to assure that a suit does not “rest[] upon an impermissible generalized grievance.”¹⁰¹ Although *Lujan* obviated the first category of prudential standing, this category persists in legal thought.

A footnote in *Lexmark* suggests that prudential standing's rule against asserting generalized grievances is long gone. It states: “While we have at times grounded our reluctance to entertain [generalized grievances] . . . in the counsels of prudence (albeit counsels closely related to the policies reflected in Article III), we have

98. See *Lujan*, 504 U.S. at 575–76.

99. See *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (“Our refusal to serve as a forum for generalized grievances has a lengthy pedigree.”).

100. *Baker*, 369 U.S. at 204; see also *Coleman*, 307 U.S. at 464 (Frankfurter, J., concurring) (describing standing as a claimant's “specialized interest . . . to vindicate, apart from a political concern which belongs to all”).

101. *Lujan*, 504 U.S. at 575.

since held that such suits do not present constitutional cases or controversies.”¹⁰² Although scholars reject *Lexmark*’s assumption of prior consensus on the source of this rule, they believe that *Lexmark*’s footnote itself eliminated the first category of prudential standing.¹⁰³ However, because *Lexmark*’s footnote is dictum, the possibility remains that the category will be invoked in the future.¹⁰⁴ Also, the Court invoked this category in the 2013 *Windsor* decision, which remains good law, even after *Lexmark*.¹⁰⁵ To foreclose the possibility of future characterization of the rule as prudential standing, this article analyzes recent use of this rule and rejects such characterization.

2. Gradual Disappearance of the First Category

Before *Windsor*, many cases recognized prudential standing’s rule against asserting generalized grievances, but only in recitations of the three categories of prudential standing.¹⁰⁶ And most cases specifically discussing the rule against asserting generalized grievances declined to characterize it as an issue of either constitutional or prudential standing. If a case did choose between the two characterizations, the case chose to characterize the rule as an issue of constitutional standing.

An example of a case that refused to choose between the two characterizations was the *Akins* decision, in which voters sued the Federal Election Commission (FEC) for refusing to designate an organization as a “political committee” subject to disclosure requirements.¹⁰⁷ The voters sued under the FEC Act, which allows “[a]ny person who believes a violation of this Act . . . has occurred” to “file a complaint with the Commission.”¹⁰⁸ The FEC argued that the

102. *Lexmark Int’l, Inc., v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014).

103. See, e.g., Mank, *supra* note 25, at 217 (“[T]he Court held that its limitations on ‘generalized grievances’ suits are based on constitutional Article III standing requirements and not the prudential standing principles relied on some of the Court’s previous cases.”); Case Comment, *supra* note 25, at 321–22 (“[T]he ‘zone of interests’ test and the bar on ‘generalized grievances’ are no longer part of prudential standing.”).

104. See Mank, *supra* note 25, at 215 (“However, a more liberal future Supreme Court might be able to revive prudential standing in practice, if not name, without overruling *Lexmark*.”).

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

106. See, e.g., *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002) (reciting the three categories of prudential standing).

107. *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 13–14 (1998).

108. *Id.*; 52 U.S.C. § 30109(a)(1) (formerly 2 U.S.C. § 437g(a)(1)).

voters lacked standing because the harm that they allegedly suffered from the FEC's decision was a generalized grievance.¹⁰⁹ Without clarifying whether it was considering an issue of constitutional or prudential standing, *Akins* found the FEC's argument unpersuasive: "[W]here a harm is concrete, though widely shared, the Court has found injury in fact."¹¹⁰

An example of cases that labeled the rule against assertion of generalized grievances as an issue of constitutional standing was the line of cases discussing taxpayer standing. Following the guidance of such cases before *Lujan*—most notably, the 1923 *Frothingham*, 1968 *Flast*, 1976 *Simon*, and 1982 *Valley Forge* decisions¹¹¹—that line of cases after *Lujan* continued to characterize the rule against asserting generalized grievances as constitutional standing. In the 2006 *DaimlerChrysler* decision, residents of Toledo, Ohio, sued the city and the state for granting tax breaks to DaimlerChrysler Corporation, arguing that the tax breaks violated the Commerce Clause.¹¹² Determining that the taxpayers asserted generalized grievances, *DaimlerChrysler* held that the taxpayers lacked constitutional standing to challenge state tax or spending decisions under the Commerce Clause.¹¹³

As *Akins* and *DaimlerChrysler* show, the first category of prudential standing was largely unused and was on the brink of extinction.

3. *Windsor's* Revival of the First Category

In 2013, a high profile case salvaged the first category by reinforcing the idea that courts, rather than the Constitution, proscribe the adjudication of generalized grievances. In *Windsor*,

109. *Akins*, 524 U.S. at 23.

110. *Id.* at 24 (internal quotation marks omitted). However, because "injury in fact" is a phrase that *Lujan* used to describe one of the three elements of constitutional standing, *Akins* most likely intended to characterize the rule against asserting generalized grievances as constitutional standing. See *Lujan*, 504 U.S. at 560.

111. See *Frothingham*, 262 U.S. at 487; *Flast*, 392 U.S. at 97; *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 58–59 (1976); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982). Although *Frothingham* never used the word "standing," the decision explained that a taxpayer cannot litigate a "matter of public and not of individual concern." 262 U.S. at 487; see also sources cited *supra* note 56 and accompanying text. For a summary on the history of taxpayer standing, read Bradford C. Mank's 2015 article on *Lexmark*. See Mank, *supra* note 25, at 231–32.

112. *DaimlerChrysler*, 547 U.S. at 337–38.

113. *Id.* at 353.

plaintiffs claimed that Section 3 of the Defense of Marriage Act was unconstitutional, and the Solicitor General, tasked with defending the propriety of federal laws, agreed with the plaintiffs.¹¹⁴ So although an executive agency, the Internal Revenue Service, continued to enforce the statute, i.e., continued to deny the same-sex plaintiffs a tax refund based on marital status, and although the plaintiffs challenged the statute, no one was left to defend the statute in court.¹¹⁵ The Court ultimately allowed the intervenor, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives, to defend the constitutionality of the statute.¹¹⁶

Although having Congress, not the Solicitor General, defend the propriety of a statute was highly unusual, it was not unprecedented. The Court had allowed such defense in 1983 in *Chadha*.¹¹⁷ What made the *Windsor* most unusual, however, was how it found concrete adverseness:

Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon “that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” There are, of course, reasons to hear a case and issue a ruling even when one party is reluctant to prevail in its position. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to “countervailing considerations that may outweigh the concerns underlying the usual reluctance to exert judicial power.” One consideration is the extent to which adversarial presentation of the issues is assured by the participation of amici curiae prepared to defend with vigor the constitutionality of the legislative act.¹¹⁸

In this paragraph, *Windsor* justified the lack of concrete adverseness in three steps. First, it characterized the adverseness requirement as a self-imposed—i.e., prudential—limitation on the exercise of

114. *Windsor*, 133 S. Ct. at 2683–84.

115. *Id.*

116. *Id.* at 2689.

117. *I.N.S. v. Chadha*, 462 U.S. 919, 939 (1983) (“[F]rom the time of Congress’ formal intervention, . . . the concrete adverseness is beyond doubt.”).

118. *Windsor*, 133 S. Ct. at 2687 (quoting *Baker*, 369 U.S. at 204; *Warth*, 422 U.S. at 500–01).

power.¹¹⁹ Second, it declared that “countervailing considerations” could weigh against this self-imposed limitation.¹²⁰ Finally, it declared that one such consideration was whether an amicus curiae could defend the unrepresented position “with vigor.”¹²¹

In these three steps, *Windsor* introduced the idea that, because adverseness is a prudential (read less-important) limit on the courts’ exercise of power, the courts can counterbalance this limit by allowing someone other than the parties to argue an otherwise unrepresented position “with vigor.”¹²² However, even before courts attributed the adverseness requirement to Article III, Section 2, the requirement had played an important role in the courts’ understanding the limits of their power.¹²³ *Windsor* derogated this adverseness requirement as optional. The one citation in support of this derogation was to a phrase in the 1962 *Baker* decision that requires “concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”¹²⁴ It is unclear why *Windsor* believed that this citation supported its belief that the adverseness requirement is an optional limitation that the courts can counterbalance. In *Baker*, adverseness was but shorthand for a directive inherent in the case or controversy limitation of the Constitution.¹²⁵ As Justice Scalia noted in his dissent to *Windsor*:

I find it wryly amusing that the majority seeks to dismiss the requirement of party-adverseness as nothing more than a “prudential” aspect of the sole Article III requirement of standing. (Relegating a jurisdictional requirement to “prudential” status is a wondrous device, enabling courts to

119. See James E. Pfander & Daniel D. Brik, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 125 YALE L.J. 1346, 1350 (2015) (“For the [*Windsor*] majority, the requirement of ‘concrete adverseness’ was a prudential element of standing doctrine, one that appropriately informed the Court’s discretion but did not inflexibly compel party opposition as a jurisdictional prerequisite at every stage of every case.”).

120. *Windsor*, 133 S. Ct. at 2687 (internal quotation marks omitted).

121. *Id.*

122. *Id.*

123. See sources cited *supra* notes 2, 28, 99.

124. *Windsor*, 133 S. Ct. at 2687 (quoting *Baker*, 369 U.S. at 204).

125. *Baker*, 396 U.S. at 204; see also *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 491 (1982) (“At the core is the irreducible minimum that persons seeking judicial relief from an Art. III court have ‘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.’” (quoting *Baker*, 396 U.S. at 204)).

ignore the requirement whenever they believe it “prudent”—which is to say, a good idea.)¹²⁶

Before *Windsor*, *Lujan* had obviated the first category of prudential standing, the rule against asserting generalized grievances. Any mention of the category since *Lujan* had been an absentminded recitation of the three categories of prudential standing. However, based on its misinterpretation of *Baker*, *Windsor* guaranteed the prolonged survival of this category.

B. Second Category: Rule Against Asserting an Interest Outside the Zone of Interests

1. Introduction

The second category of prudential standing is the rule against asserting an interest outside the zone of interests. In *Lexmark*, Justice Scalia declared the end of this second category.¹²⁷ However, the ideas that resulted in the elimination of this second category deserve mention, first because courts carelessly continue to use this second category¹²⁸ and second because the same ideas support the elimination of the third category.¹²⁹

The now-defunct second category of prudential standing was “the requirement that a plaintiff assert an interest within the zone of interests protected by the law invoked.”¹³⁰ Along with the third category, this second category was a variation of *Warth*’s rule that a claimant assert his own “legal rights and interests.”¹³¹ Applying *Warth*’s rule to a claim for statutory protection, this second category verified whether the claimant is someone who can request protection under the statute invoked. Before *Lexmark*, courts struggled to explain the second category’s rule under the rubric of standing, without which a claimant fails to invoke a court’s jurisdiction. In other words, courts struggled to explain why a claimant’s asserting an interest outside the zone of interests protected by a statute prevented

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

127. *Lexmark, Inc.*, 134 S. Ct. at 1387.

128. See, e.g., sources cited *supra* notes 17, 20.

129. See Part II(C).

130. *Allen*, 468 U.S. at 751.

131. *Warth*, 422 U.S. at 499.

them from exercising jurisdiction—especially in the face of constitutional and statutory mandates to exercise jurisdiction.¹³²

2. *Steel Company's* Modification of the Second Category

The Supreme Court was no exception to the struggle to explain the second category of prudential standing. Despite contributing to the persistence of prudential standing through *Bennett*,¹³³ Justice Scalia soon began spearheading the idea that prudential standing is an incorrect description for the rule that a claimant cannot assert an interest outside the zone of interests protected by the statute invoked. A mere year after *Bennett*, Justice Scalia in the 1998 *Steel Company* decision used the phrase “statutory standing” to describe what he had a year ago termed “prudential standing.”¹³⁴ And disputing Justice Stevens’s concurrence, which argued that statutory standing was a threshold issue to be determined before discussion of the merits,¹³⁵ Justice Scalia argued that statutory standing did not implicate subject matter jurisdiction.¹³⁶ This argument was in stark contrast to that in *Bennett*, in which Justice Scalia wrote that, “[l]ike [its] constitutional counterpart[,]” prudential standing is a “judicially self-imposed limit[] on the exercise of federal jurisdiction.”¹³⁷ Once we overlook this drastic change in position and the unnecessarily harsh criticism of Justice Stevens’s concurrence, which were largely in line with *Bennett*, we can begin to appreciate this new argument.

132. See *Lexmark*, 134 S. Ct. at 1386 (“[We] recent[ly] reaffirm[ed] . . . the principle that ‘a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging.’” (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013))); *Sprint Commc’ns*, 134 S. Ct. at 590–91 (“Federal courts, it was early and famously said, have ‘no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.’” (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821))).

133. See *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (stating that the question of standing involves both constitutional and prudential limitations).

134. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 (1998) (internal quotation marks omitted). Also, Justice Scalia had used statutory standing in his concurrence to the 1992 *Holmes* decision to describe “whether the . . . nexus . . . between the harm of which this plaintiff complains and the defendant’s . . . predicate acts is of the sort that will support an action under” the Racketeer Influenced and Corrupt Organizations Act. See *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 286–87 (1992) (Scalia, J., concurring).

135. *Steel Co.*, 523 U.S. at 114–15 (Stevens, J., concurring).

136. *Id.* at 89.

137. *Bennett*, 520 U.S. at 162; see also *All. For Env’tl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 86 (2d Cir. 2006) (“How *Steel Co.* is to be reconciled with *Bennett* remains in doubt.”).

Steel Company began by stating that the question whether a claimant has statutory standing is a question whether the statute invoked creates a cause of action for that claimant.¹³⁸ Drawing a distinction between cause of action and jurisdiction, *Steel Company* then concluded that the absence of this cause of action does not implicate jurisdiction.¹³⁹ A court has jurisdiction as long as “the right of the petitioners to recover under their complaint [is] sustained if the Constitution and laws of the United States are given one construction and [is] defeated if they are given another.”¹⁴⁰ Because statutory standing had no bearing on jurisdiction, the only jurisdictional issue was constitutional standing, which the *Steel Company* plaintiff lacked.¹⁴¹ Because the plaintiff failed to invoke the court’s jurisdiction, *Steel Company* never reached the question whether the plaintiff had statutory standing.¹⁴²

Over the next 16 years, however, *Steel Company*’s new label of statutory standing failed to gain steam.¹⁴³ The lower courts continued to label the rule against asserting an interest outside the zone of interests as prudential standing.¹⁴⁴ In 2014, a lone dissent in the D.C. Circuit cited *Steel Company* to argue that prudential standing is not jurisdictional, an argument that prompted a debate in the D.C. Circuit on the second category of prudential standing.¹⁴⁵ Citing this debate, the Court in *Lexmark* finally decided to eliminate this second category.¹⁴⁶

138. *Steel Co.*, 523 U.S. at 89.

139. *Id.*

140. *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 685 (1946)).

141. *Id.* at 109–10.

142. *Id.* at 110.

143. *But see* *In re Apple Phone Antitrust Litig.*, 846 F.3d 313, 325–25 (9th Cir. 2017) (using the phrase statutory standing); *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011) (same).

144. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154 (10th Cir. 2013), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Bd. Of Miss. Levee Comm’rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012); *Indep. Living Ctr. Of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007); *Am. Iron & Steel Inst. V. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999).

145. *See* *Grocery Mfrs. Ass’n v. Environmental Protection Agency.*, 693 F.3d 169, 184 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *Ass’n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 674–79 (D.C. Cir. 2013) (Silberman, J., concurring).

146. *See Lexmark*, 123 S. Ct. at 1387.

3. Debate in the D.C. Circuit on Jurisdictional Implication

The lower courts had likewise strained to explain why a claimant's assertion of an interest outside the zone of interests would prevent the reviewing court from exercising jurisdiction.¹⁴⁷ After all, courts have a "virtually unflagging" obligation to exercise the jurisdiction given them by the Constitution and Congress.¹⁴⁸ The 2012 *Grocery Manufacturers* decision by the D.C. Circuit was an example of such strain.¹⁴⁹ The majority held that, because the interest that one plaintiff sought to protect was not within the zone of interests protected by the Energy Independence and Security Act, the plaintiff lacked prudential standing to assert a claim under the Act and the court could not exercise subject matter jurisdiction over the plaintiff's claim.¹⁵⁰ Dissenting, Judge Kavanaugh argued that "prudential standing is not jurisdictional"¹⁵¹ and cited both *Steel Company* and other Supreme Court decisions adopting a narrow view of what issues were jurisdictional.¹⁵²

A year later, the D.C. Circuit again considered the second category of prudential standing, this time in the 2013 *Association of Battery Recyclers* decision.¹⁵³ The court heard an argument by a group of intervenors that another intervenor's claim was improper because it sought to protect an interest outside the zone of interests protected by the Clean Air Act.¹⁵⁴ Holding that the lone intervenor's interest was indeed outside the zone of interests, the court found that the

147. See sources cited *supra* note 144.

148. *Lexmark*, 134 S. Ct. at 1386 ("[We] recent[ly] reaffirm[ed] . . . the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013))).

149. See generally *Grocery Mfrs.*, 693 F.3d 169.

150. *Id.* at 179–80.

151. *Id.* at 183 (Kavanaugh, J., dissenting).

152. *Id.* at 183–84 (Kavanaugh, J., dissenting); see also *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–61 (2010) ("Jurisdiction refers to a court's adjudicatory authority. Accordingly, the term jurisdictional properly applies only to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." (citations and internal quotation marks omitted)); *Gonzalez*, 565 U.S. at 141 ("Recognizing our less than meticulous use of the term in the past, we have pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not." (internal quotation marks omitted)).

153. See generally *Ass'n of Battery Recyclers*, 716 F.3d 667.

154. *Id.* at 674.

intervenor lacked prudential standing and dismissed the intervenor's claim for failure to invoke jurisdiction.¹⁵⁵

Concurring in the majority opinion, Judge Silberman wrote separately to respond to Judge Kavanaugh's concerns in *Grocery Manufacturers* and "to explain more completely why it is appropriate for us to hold that [the] intervenor . . . lacks prudential standing."¹⁵⁶ Determining that prudential standing was a misnomer as applied to the rule against asserting an interest outside the zone of interests, Judge Silberman adopted *Steel Company's* use of the phrase statutory standing.¹⁵⁷ But he disputed Judge Kavanaugh's argument that statutory standing is not jurisdictional.¹⁵⁸ Judge Silberman stated that Congress determines the extent of courts' subject matter jurisdiction and that Congress's granting a class of persons the right to sue is similar to subject matter jurisdiction.¹⁵⁹ And he noted that, according to Supreme Court precedent, "a federal court may decide a statutory standing issue before reaching an Article III question," a prioritization that "treat[s] statutory standing like other jurisdiction thresholds."¹⁶⁰ In the absence of "clear guidance" from the Court, he was "hesitant to overturn past precedent on these issues."¹⁶¹

4. *Lexmark's* Elimination of the Second Category

In 2014, a year after *Association of Battery Recyclers*, Justice Scalia writing for a unanimous Court supplied the "clear guidance" that Judge Silberman sought, eliminating the second category of prudential standing.¹⁶² This decision, *Lexmark*, involved the question whether a claimant had a cause of action for false advertising under the Lanham Act.¹⁶³ But, before reaching this question, *Lexmark* first addressed the parties' labeling the issue as whether the claimant had prudential standing.¹⁶⁴ *Lexmark* noted the tension between the idea that the Court can refuse to exercise jurisdiction based on prudential considerations and "the principle that a federal court's obligation to

155. *Id.*

156. *Id.* at 674–75 (Silberman, J., concurring).

157. *Id.* at 675–76 (Silberman, J., concurring).

158. *Id.* at 677–78 (Silberman, J., concurring).

159. *Id.* at 676–77 (Silberman, J., concurring).

160. *Id.* (Silberman, J., concurring).

161. *Id.* at 678 (Silberman, J., concurring).

162. *See id.*

163. *Lexmark*, 134 S. Ct. at 1385.

164. *Id.* at 1386.

hear and decide cases within its jurisdiction is virtually unflagging".¹⁶⁵

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 Congress has created merely because "prudence" dictates.¹⁶⁶

Like *Steel Company*, *Lexmark* characterized the issue whether a claimant asserts an interest outside the zone of interests as whether the claimant lacks a statutory *cause of action*.¹⁶⁷ Also, *Lexmark* adopted the idea, suggested by Judge Silberman, that "the zone-of-interests analysis" is "ask[ing] whether this particular class of persons has a *right to sue* under this substantive statute."¹⁶⁸ In other words, *Lexmark* concluded that the rule against asserting an interest outside the zone of interests inquired whether a cause of action exists and whether the claimant has the right to sue¹⁶⁹—not whether the claimant has standing and whether the reviewing court can exercise jurisdiction.

5. Limitations of *Lexmark*

Although *Lexmark* undermined prudential standing, it carefully limited its analysis to the one category of prudential standing—the rule against asserting an interest outside the zone of interests. *Lexmark* stated, "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."¹⁷⁰ Thus, *Lexmark* left unanswered the important question whether the reason for removing

165. *Id.* (internal quotation marks omitted).

166. *Id.* at 1388 (emphasis in original) (citation omitted).

167. *See id.*; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

168. *Lexmark*, 134 S. Ct. at 1387 (emphasis added) (internal quotation marks omitted).

169. Part III(B)(3) explains the difference between a cause of action and a right to sue.

170. *Lexmark*, 134 S. Ct. at 1387 n.3. Also, many scholars believe that footnote 3 in *Lexmark* eliminated the first category of prudential standing. *See* sources cited *supra* note 103.

the label of prudential standing in zone-of-interests cases applied also to the third category of prudential standing.¹⁷¹

After *Lexmark*, many scholars and courts predicted the elimination of prudential standing altogether.¹⁷² This prediction was unsurprising: the reasoning of *Lexmark* could be applied seamlessly to eliminate the third category of prudential standing, another variation of *Warth's* rule that a claimant assert his own "legal rights and interests."¹⁷³ *Lexmark* held that whether a claimant has a right to sue or whether a claimant has a cause of action cannot be characterized as whether the claimant has standing.¹⁷⁴ Because the third category asks whether a claimant asserts a third party right, it likewise cannot be characterized as a question affecting standing. However, after *Lexmark* and Justice Scalia's subsequent death, courts have continued to characterize the third category as prudential standing,¹⁷⁵ and the Supreme Court has yet to correct this mischaracterization.¹⁷⁶

C. Third Category: Rule Against Asserting a Third Party Right

1. Introduction

The third category of prudential standing is "the *general* prohibition on a litigant's raising another person's legal rights,"¹⁷⁷

171. See *Lexmark*, 134 S. Ct. at 1387 n.3.

172. See, e.g., Case Comment, *supra* note 25, at 322 (interpreting *Lexmark* as "signaling the end of prudential standing"); *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat. Ass'n*, 758 F.3d 592, 603 n.34 (5th Cir. 2014) (questioning the "continued vitality of prudential 'standing'" after *Lexmark* in a case involving the third category of prudential standing). Many courts discussing statutory causes of action cited *Lexmark* and avoided characterization of the issue as prudential standing. See, e.g., *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302–03 (2017); *Belmora L.L.C. v. Bayer Consumer Care AG*, 819 F.3d 697, 707 (4th Cir. 2016); *Gunpowder Riverkeeper v. F.E.R.C.*, 807 F.3d 267, 273 (D.C. Cir. 2015); *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1120 (9th Cir. 2015).

173. *Warth*, 422 U.S. at 499.

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

175. See sources cited *supra* notes 18–19. Further, some courts carelessly continue to label a statutory cause of action as prudential standing. See sources cited *supra* notes 17, 20.

176. In the context of "prudential ripeness," a concurrence in the Sixth Circuit has advised against overruling "a significant line of precedent" based on *Lexmark* "until the Court declares otherwise in a clear voice." *Miller v. City of Wickliffe, Ohio*, 852 F.3d 497, 507–08 (6th Cir. 2017) (Rogers, J., concurring) (citing *Lexmark*, 134 S. Ct. at 1386).

177. *Allen*, 468 U.S. at 751 (emphasis added).

also known as the rule against asserting a third party right.¹⁷⁸ As compared to the second category, which only applies to an assertion of a right created by statute for the benefit of another, the third category applies to the remaining assertions of another's right.¹⁷⁹ Ordinarily, the third category applies when the *purpose* of the suit is to enforce the right of another.¹⁸⁰ A line of cases, however, have applied the rule against asserting a third party right to a suit against a defendant, the identification of whom requires determining the right of another.¹⁸¹

2. Ordinary Application of the Third Category

Prudential standing's rule against asserting a third party right ordinarily applies when the purpose of the suit is to enforce the right of another. For example, the 2004 *Elk Grove* decision determined that a father who had no legal custody over his daughter lacked prudential standing to sue to enjoin a school from requiring his daughter to recite the Pledge of Allegiance.¹⁸² Dismissing for failure to invoke jurisdiction, *Elk Grove* held that "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the

178. See, e.g., *Hillside Metro Assocs., L.L.C. v. JPMorgan Chase Bank, Nat. Ass'n*, 747 F.3d 44, 48 (2d Cir. 2014); *Deutsche Bank Nat. Tr. Co. v. FDIC*, 717 F.3d 189, 195 (D.C. Cir. 2013); *The Wilderness Soc. V. Kane Cty.*, 632 F.3d 1162, 1188 (10th Cir. 2011).

179. See *Allen*, 468 U.S. at 751 (introducing the third category of prudential standing as "the *general* prohibition on a litigant's raising another person's legal rights" (emphasis added)).

180. See, e.g., *Elk Grove*, 542 U.S. 1, 17–18 (2004) (holding that a father who had no legal custody over his daughter could not sue to enjoin a school from requiring his daughter to recite the Pledge of Allegiance); *MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 746 (7th Cir. 2007) (Posner, J.) (holding that real estate brokers lacked prudential standing to sue on behalf of homeowners to challenge a city ordinance requiring inspection of compliance with city building and zoning codes).

181. See *Hillside Metro*, 747 F.3d at 49 (holding that a claimant lacked prudential standing to sue for the actions of a failed bank, whose liability might have been transferred by the Federal Deposit Insurance Corporation (FDIC) to a second bank depending on the interpretation of their purchase agreement to which the claimant was neither a party nor an intended beneficiary); *Deutsche Bank*, 717 F.3d at 194 (same); *Interface Kanner, LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, 704 F.3d 927, 931 (11th Cir. 2013) (same); *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank, Nat'l Ass'n*, 671 F.3d 1027, 1036 (9th Cir. 2012) (same). *But see Excel Willowbrook, L.L.C. v. JPMorgan Chase Bank, Nat'l Ass'n*, 758 F.3d 592, 597 (5th Cir. 2014) (disagreeing with *Interface Kanner* on the characterization of the issue as prudential standing).

182. *Elk Grove*, 542 U.S. at 17–18.

plaintiff's claimed standing."¹⁸³ Also, in the 2007 *MainStreet* decision, Judge Posner of the Seventh Circuit determined that real estate brokers lacked prudential standing to sue on behalf of homeowners to challenge a city ordinance requiring inspection of compliance with city building and zoning codes.¹⁸⁴ He dismissed the action without prejudice.¹⁸⁵

Several problems have resulted from characterizing the rule against asserting a third party right as a failure to invoke subject matter jurisdiction. A determination that a claimant asserts the right of another is in fact a determination that the claimant lacks the right asserted in the suit. Thus, it is a conclusion on the merits. However, because the reviewing courts believed that such a determination prevented the exercise of its jurisdiction, the courts, to remedy this deficiency, utilized procedures available only during evaluation of justiciability—whether a court *may* evaluate the merits of a claim.¹⁸⁶ Such procedures included consideration of this deficiency *sua sponte*;¹⁸⁷ at any time, even for the first time on appeal;¹⁸⁸ and using any information, even from beyond the pleadings.¹⁸⁹

The most egregious problem of misdiagnosing the third category as an issue of standing and consequently of justiciability is that, upon finding that a claimant lacks prudential standing, a court dismisses the possibly meritorious claim without prejudice and deprives the claimant of a binding resolution on the merits of the claim.¹⁹⁰ This was the result of *MainStreet*.¹⁹¹ Because no authority governs specifically how to resolve a lack of prudential standing, some courts, after a cursory citation to cases discussing prudential standing, resort

183. *Id.* at 17.

184. *MainStreet*, 505 F.3d at 746 (Posner, J.).

185. *Id.* at 749 (Posner, J.).

186. *See Gonzalez*, 565 U.S. at 141 (comparing “truly jurisdictional rules, which govern ‘a court’s adjudicatory authority,’ and nonjurisdictional ‘claim-processing rules,’ which do not” (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454–55 (2004))); *Warth*, 422 U.S. at 498 (“In essence the question of standing is whether the litigant is *entitled* to have the court decide the merits of the dispute or of particular issues.” (emphasis added)).

187. *See* cases cited *supra* note 8; FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

188. *See* sources cited *supra* note 9.

189. *See* sources cited *supra* note 10.

190. *See* sources cited *supra* note 11.

191. *MainStreet*, 505 F.3d at 749 (Posner, J.) (“Because the real estate brokers and their association do not have standing to challenge the Calumet City point of sale ordinance, the preliminary injunction issued by the district court is vacated and the suit is dismissed *without prejudice*.” (emphasis added)).

to dismissal for failure to invoke subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.¹⁹² Such a dismissal is necessarily without prejudice because a dismissal for failure to invoke jurisdiction cannot involve the merits.¹⁹³ Thus, this dismissal deprives the claimant of an opportunity for a binding resolution on the merits of a claim.

The 2012 *Gonzalez* decision warned of the problems resulting from characterizing the rule against asserting a third party right as a failure to invoke subject matter jurisdiction:

When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety. Many months of work on the part of the attorneys and the court may be wasted. Courts, we have said, should not lightly attach those drastic consequences to limits Congress has enacted.¹⁹⁴

As Part III(C) will later discuss, the correct method of handling a problem currently mislabeled as a lack of standing is as an absence of the real party in interest or as a failure to state a claim. If the third party who holds the right to be enforced is known, the real party in interest is absent from the action and either that party must participate (through ratification, joinder, or substitution) or the court must dismiss the action.¹⁹⁵ If the third party is unknown and the claimant asserts a right that would *generally* be due another, the claimant fails to state a claim and the court can either allow an amendment of the complaint or dismiss the action.¹⁹⁶

192. See sources cited *supra* note 11.

193. See *Prejudice*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Damage or detriment to one's legal rights or claims.")

194. *Gonzalez*, 565 U.S. at 141 (citations and internal quotation marks omitted); see also *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) ("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.")

195. See *infra* Part III(C)(2); FED. R. CIV. P. 17(a)(3) (governing absence of the real party in interest); *Rawoof*, 521 F.3d at 757 ("Some courts have described Rule 17's real-party-in-interest requirement as essentially a codification of this nonconstitutional, prudential limitation on standing." (citations omitted)).

196. See *infra* Part III(C)(2).

3. Application of the Third Category to Obscure the Defendant's Identity

A line of cases has applied the third category of prudential standing to where the purpose of the suit is not the enforcement of the right of another.¹⁹⁷ This line of cases applies the category to a suit against a defendant, the identification of whom requires determining the right of another. Holding that the claimant lacks standing to assert this right, the court then dismisses the possibly meritorious claim based on a failure to invoke subject matter jurisdiction. Such application of the third category occurred in the 2013 *Interface Kanner* decision, in which Interface Kanner LLC sued a defendant, the identification of whom required interpretation of a contract.¹⁹⁸ Because Interface Kanner was neither a party nor an intended beneficiary of that contract, the Eleventh Circuit held that Interface Kanner lacked standing and dismissed the possibly meritorious claim based on a failure to invoke subject matter jurisdiction.¹⁹⁹

Interface Kanner had leased property to Washington Mutual Bank (WaMu) when the bank failed and entered receivership.²⁰⁰ As the bank's receiver, the Federal Deposit Insurance Corporation (FDIC) sold a portion of the bank's assets and liabilities to JPMorgan Chase Bank through a contract entitled the Purchase and Assumption Agreement (the P & A Agreement).²⁰¹ Interface Kanner sued JPMorgan for WaMu's failure to pay rent, and JPMorgan and the intervenor FDIC moved for summary judgment.²⁰² They argued that, because Interface Kanner was neither a party nor an intended beneficiary of the P & A Agreement, Interface Kanner had no standing to determine which of the two was the correct defendant liable for rent.²⁰³ Adopting this argument, the Eleventh Circuit found that Interface Kanner lacked standing to sue, declared a failure to invoke subject matter jurisdiction, and remanded with instructions for the district court to dismiss the action.²⁰⁴

Although Interface Kanner could not determine who under the P & A Agreement was the correct defendant, this problem at most

197. See sources cited *supra* note 181.

198. See *Interface Kanner*, 704 F.3d at 931.

199. *Id.* at 934.

200. *Id.* at 929.

201. *Id.*

202. *Id.* at 930.

203. *Id.*

204. *Id.* at 934.

constituted a failure to state a claim against either defendant. The problem did not prevent the court from exercising jurisdiction to hear Interface Kanner's claim. Because Interface Kanner was injured by WaMu's failure to pay rent and sued to recover this rent, it satisfied the three *Lujan* factors: injury, causation, and redressability.²⁰⁵ And because it was undisputed that Interface Kanner was an adversary of either JPMorgan or the FDIC, it was undisputed that Interface Kanner's claim satisfied the adverseness requirement.²⁰⁶ Once JPMorgan began to argue that the FDIC was the correct defendant, the next step should have been instructing the district court to (1) allow an amendment of the complaint to add the FDIC as a defendant, (2) require joinder of the FDIC as a necessary party in identifying the correct defendant, or (3) dismiss the action.²⁰⁷ If the FDIC had become a party to the action, then JPMorgan and the FDIC could have disputed, as either co-defendants or opposing parties, who was liable to Interface Kanner—rather than preventing Interface Kanner from suing either.²⁰⁸

If, as *Interface Kanner* concluded, Interface Kanner's failure to identify the correct defendant did implicate jurisdiction, no court could ever hear a claim based on the misconduct of a failed bank whose liability the FDIC sold to a second bank.²⁰⁹ However, other circuit courts have cited *Interface Kanner* to declare a lack of jurisdiction to hear such a claim.²¹⁰ This limitation is especially concerning because of the 2008 financial crisis, during which the

205. See *Lujan*, 504 U.S. at 560–61.

206. The adverseness requirement does not require the exact identity of the adversaries, only adverse legal interest and parameters narrowing the identity. Examples in which an exact identity is not required are an interpleader action, an action involving a fictitious defendant, and actions in which the identity can be changed through an amendment of the complaint, ratification, joinder, or substitution.

207. See *infra* Part III(C)(2).

208. See *FDIC v. First Am. Title Ins.*, 611 F. App'x 522, 530 (11th Cir. 2015) ("If during the pleading stage of this action First American had sought relief under Rule 19(a) and had alleged that New Bank claimed an interest in the subject of the action, New Bank would have been required to appear as a party and either confirm or deny the alleged interest." (internal quotation marks omitted)).

209. Applied broadly, this jurisdictional implication would allow any defendant to avoid liability by selling the liability through a contract to someone other than the potential claimant.

210. See, e.g., *Hillside Metro*, 747 F.3d at 49 (remanding with instructions to dismiss for lack of subject matter jurisdiction because the plaintiff lacks prudential standing); see generally sources cited *supra* note 181. *But cf. First Am. Title Ins.*, 611 F. App'x at 534 (rejecting the FDIC's attempt to use *Interface Kanner* to challenge a defendant's "standing" because whether a defendant can assert a defense based on its interpretation the P & A agreement cannot be characterized as "standing," which is required of plaintiffs).

FDIC, as the receiver of many failed banks, used variations of the same the P & A Agreement to sell the assets and liabilities of these banks.²¹¹ Because a plaintiff with a claim against one of these failed banks would never be a party or an intended beneficiary of a P & A Agreement, the FDIC and the second bank would always successfully challenge the claimant's standing to sue either.²¹²

Like the ordinary application of prudential standing's third category, the application of the category to prevent the identification of the correct defendant results in the problem that, upon finding a lack of prudential standing, the court must dismiss the claim without exploring other options of resolving the case. Because a dismissal for failure to invoke jurisdiction is necessarily without prejudice, this erroneous dismissal deprives the claimant of an opportunity for binding resolution on the merits of the claim.

III. ELIMINATION OF PRUDENTIAL STANDING

Part II revealed that courts use incorrect civil procedures in enforcing the rules of prudential standing and that they do so based on confusion about whether the rules implicate their jurisdiction. As a result, prudential standing not only causes courts to mishandle cases but also confuses the definitions of jurisdiction and standing.²¹³ "Jurisdiction, it has been observed, is a word of many, too many, meanings."²¹⁴ And "[s]tanding has been called one of the most amorphous [concepts] in the entire domain of public law."²¹⁵ Recognizing these problems of prudential standing, Part III argues for elimination of the concept. Part III proceeds in three steps. The first

211. The 2015 *Central Southwest Texas Development* decision described a line of cases involving one of these failed banks:

This is yet another in a series of cases concerning an obscure but heavily litigated consequence of the largest bank failure in U.S. history: the fate of [WaMu's] leases for real estate on which bank branches were as yet unbuilt at the time of the company's collapse. In an earlier case addressing this issue, . . . we held that WaMu's landlords had standing to bring a breach of contract claim against JPMorgan Chase, which had been assigned WaMu's leases by virtue of its [P & A Agreement] to acquire WaMu from the [FDIC].

Cent. Sw. Texas Dev., L.L.C. v. JPMorgan Chase Bank, Nat. Ass'n, 780 F.3d 296, 297 (5th Cir. 2015); see also sources cited *supra* note 181.

212. *But see Cent. Sw. Texas Dev.*, 780 F.3d at 300 (finding prudential standing to sue under a P & A Agreement because, although a failed bank's landlord was neither a party nor an intended beneficiary of the agreement, the landlord had standing based on "privity of estate").

213. See sources cited *supra* note 6.

214. *Steel Co.*, 523 U.S. at 90 (internal quotation marks omitted).

215. *Flast*, 392 U.S. at 99.

step explains why other proposed solutions fail. The second step promotes the use of correct definitions for jurisdiction, for standing, for a right to sue, for a cause of action, and for a claim for relief. The third step clarifies the procedurally correct ways of enforcing the rules that many incorrectly deem prudential standing.

A. Criticism of Other Solutions

1. Elimination of Jurisdictional Implication

Recognizing the problems of prudential standing, jurists have proposed solutions other than to eliminate prudential standing. The most popular is to declare that only “constitutional standing,” not “prudential standing,” affects subject matter jurisdiction.²¹⁶ For example, *Hartig Drug* proposed this solution in response to a district court’s treatment of “antitrust standing,” an antitrust claimant’s statutory cause of action, as an issue of jurisdiction.²¹⁷ Criticizing this treatment, *Hartig Drug* stated that, “in keeping with our independent obligation to consider the boundaries of subject matter jurisdiction, we conclude that the District Court should have treated antitrust standing not as an Article III jurisdictional issue, but rather as a merits issue, and thus should have resolved the motion to dismiss under Rule 12(b)(6) rather than Rule 12(b)(1)” of the Federal Rules of Civil Procedure.²¹⁸ In other words, *Hartig Drug*, while condoning the use of the phrase antitrust standing, objected to the jurisdictional implication of this standing.

216. See sources cited *supra* note 12.

217. See *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 269 (3d Cir. 2016).

218. *Id.*; see also *In re Apple Phone Antitrust Litig.*, 846 F.3d 313, 325–25 (9th Cir. 2017) (holding “that any error, if indeed there was error, in the district court’s consideration of the merits of Apple’s Rule 12(b)(6) motion to dismiss for lack of statutory standing was harmless”); *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1342 (11th Cir. 2017) (affirming a Rule 12(b)(6) dismissal in part because the plaintiff “does not have antitrust standing”); *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016) (“Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law.” (internal quotation marks omitted)); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 307 (3d Cir. 2011) (en banc) (“[S]tatutory standing is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place.”); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (“[W]e must . . . reject claims under Rule 12(b)(6) when antitrust standing is missing.”); sources cited *supra* note 11 (choosing between Rule 12(b)(1) and Rule 12(b)(6) to dismiss for lack of prudential standing).

This proposed solution attempts to salvage jurisdiction from misuse but fails to resolve the misuse of standing, whose origin is intertwined with that of jurisdiction. Standing is “such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness,”²¹⁹ which is essential to a court’s exercise of jurisdiction under Article III, Section 2. Because standing is an issue of justiciability, removing the jurisdictional implication of standing is in fact imposing a new definition on standing. Standing is already an amorphous term—imposing a new definition, while perhaps saving jurisdiction, adds to the confusion surrounding standing.

2. Adoption of Statutory Standing

Another proposed solution is to re-brand prudential standing as statutory standing. Justice Scalia adopted this short-lived solution in his 1992 *Holmes* concurrence and in the 1998 *Steel Company* majority.²²⁰ The most apparent weakness of this solution is that statutory standing would replace only one of the three categories of prudential standing—the second category, which determines whether a claimant asserts an interest outside the zone of interests protected by the statute invoked. Labeling either of the remaining categories as statutory standing would be incorrect, not only because neither involves standing but also because neither necessarily involves a statute.

Another weakness of this solution is that, like the first solution, it misidentifies the problems resulting from prudential standing as caused solely by endorsing a “prudential” aspect of standing, not by misusing standing. As Justice Scalia recognized in *Lexmark*, the “label [of statutory standing] is an improvement over the language of ‘prudential standing,’ since it correctly places the focus on the statute. But it, too, is misleading, since ‘the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, *i.e.*[.] the court’s statutory or constitutional *power* to

219. *Baker*, 369 U.S. at 204.

220. *Steel Co.*, 523 U.S. at 97; *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 286–87 (1992) (Scalia, J., concurring) (defining statutory standing as “whether the so-called nexus (mandatory legalese for ‘connection’) between the harm of which this plaintiff complains and the defendant’s so-called predicate acts is of the sort that will support an action under” the statute); *see also Ass’n of Battery Recyclers*, 716 F.3d at 675–76 (Silberman, J., concurring) (adopting *Steel Company*’s use of the phrase statutory standing); *In re Apple Phone Antitrust Litig.*, 846 F.3d 313, 325–25 (9th Cir. 2017) (using the phrase statutory standing); *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011) (same).

adjudicate the case.”²²¹ In other words, statutory standing would cause lower courts to use standing and cause of action interchangeably, the very use that *Steel Corporation* and *Lexmark* forbade. Thus, this proposed solution also fails.

3. Creation of Exceptions

The third proposed solution is to create exceptions to prudential standing to escape the harsh consequence of a determination that the claimant lacks standing: dismissal for failure to invoke jurisdiction.²²² For example, courts have held that a claimant can assert the right of a third party—thus creating exceptions to the third category of prudential standing—if the third party likely cannot sue to enforce its own right,²²³ if the claimant has a close relationship with the third party,²²⁴ if the claim is “that a statute is overly broad in violation of the First Amendment,”²²⁵ and if the claimant is an

221. See *Lexmark, Inc.*, 134 S. Ct. at 1387 n.4 (quoting *Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002)).

222. See *Gonzalez*, 565 U.S. at 141 (describing this consequence as “drastic”); *Henderson*, 562 U.S. at 435 (same).

223. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (“[T]he case for according standing to assert third-party rights is strong[] . . . because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights.”); *Barrows*, 346 U.S. at 257 (“Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another’s rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.”).

224. See, e.g., *Craig v. Boren*, 429 U.S. 190, 195 (1976) (“[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.”); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (allowing a physician to sue on behalf of patients seeking abortions based on the “closeness of the relationship”). But see *Elk Grove*, 542 U.S. at 17–18 (holding that a father who had no legal custody over his daughter could not sue to enjoin a school from requiring his daughter to recite the Pledge of Allegiance); *Main Street*, 505 F.3d at 746 (Posner, J.) (characterizing the exception in *Singleton* as applying when a claimant holds a “definite . . . stake in the vindication of the claim”).

225. *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 957 (1984) (“[W]here the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims.”); see also *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (“[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.” (internal quotation marks omitted)).

association or organization that claims injury to its members.²²⁶ An apparent weakness of this solution is that these exceptions attempt to resolve the problems resulting from only the third category of prudential standing. Another weakness is that creating exceptions does not resolve the confused definitions of standing and jurisdiction. If we assume that suing to enforce a third party's right does indeed implicate jurisdiction, the courts by creating these exceptions manufacture exceptions to the constitutional limits on their exercise of jurisdiction. A court's exercise of jurisdiction cannot depend on, for example, the closeness of the relationship between the claimant and a third party.²²⁷

4. Elimination of Constitutional Standing

The final proposed solution is eliminating constitutional standing and accepting that standing is unfounded in the Constitution. The most renowned proponent of this solution is Cass Sunstein, who, in an article criticizing *Lujan*, characterized standing as a determination that the law "has conferred on the plaintiff[] a cause of action" and criticized the surprising conclusion that "Article III forbids Congress from granting standing [read cause of action] to citizens to bring suit."²²⁸ Sunstein's objection has become obsolete with time, as courts have distinguished cause of action from constitutional standing, which is a claimant's ability to invoke a court's jurisdiction under Article III, Section 2.²²⁹ Even so, Sunstein's objection correctly

226. See, e.g., *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996) ("[T]he entire doctrine of 'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties."); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (creating prerequisites for "recogniz[ing] that an association has standing to bring suit on behalf of its members").

227. See *Elk Grove*, 542 U.S. at 19 (rejecting an exception to the "judicially self-imposed clear limits on the exercise of federal jurisdiction"); *Broadrick*, 431 U.S. at 611-13 (limiting the overbreadth exception to the rule against asserting a third party right).

228. Sunstein, *What's Standing After Lujan?*, *supra* note 4, at 166 (internal quotation marks omitted); see also sources cited *supra* note 4 (challenging the courts' attribution of the standing requirement to Article III, Section 2); sources cited *supra* note 7 (challenging the standing requirement by arguing that standing is indistinguishable from right to sue or cause of action).

229. See cases cited *supra* note 7 (distinguishing standing from cause of action). As stated in note 4, *supra*, this article proceeds under the assumption that the courts

highlights the problems of equating standing with cause of action, problems that prudential standing perpetrates. Standing is a claimant's ability to invoke jurisdiction, which is separate from the claimant's ability to state a cause of action. The continued use of prudential standing, which fails to conform to the revised definition of standing, confuses this definition. Therefore, prudential standing must be eliminated.

B. Correct Definitions

The only effective solution to the problems caused by prudential standing is the elimination of the concept. From the limited impact of *Lujan* and *Lexmark* in eliminating prudential standing, we have learned that courts cannot achieve this elimination with only strict adherence to precedent. In addition to strict adherence to *Lujan* and *Lexmark*, courts must utilize correct definitions for jurisdiction, for standing, for a right to sue, for a cause of action, and for a claim for relief and utilize correct procedural principles to enforce the otherwise valid rules mislabeled as prudential standing. Part III(B) outlines the correct definitions for these key terms.

1. Jurisdiction

The many cases deciding that prudential standing's second and third rules implicate jurisdiction reveal that a common confusion in understanding jurisdiction is what a claimant must establish in order to invoke a court's jurisdiction—the court's “power to exercise authority.”²³⁰ Article III, Section 2 lists the cases and controversies over which the courts can exercise authority—including cases “arising under th[e] Constitution [and] the laws of the United States” and controversies “between citizens of different states.” Congress has further codified this list by enacting 28 U.S.C. § 1331, which governs federal question jurisdiction, and 28 U.S.C. § 1332, which governs

correctly attributed the standing requirement to Article III, Section 2; the author reserves critique of that attribution.

230. *Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also *Power*, GARNER'S DICTIONARY OF LEGAL USAGE (3d ed. 2011); *Lexmark*, 134 S. Ct. at 1387 n.4 (describing “subject-matter jurisdiction” as “the courts' statutory or constitutional power to adjudicate the case”); *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642–43 (2002) (same); *Steel Co.*, 523 U.S. at 89 (same); *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (“[S]tatutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties.”).

diversity jurisdiction.²³¹ Accordingly, if a claimant identifies a federal law that creates a cause of action but fails to explain how that cause of action applies to him (e.g., if his interest is not within the zone of interests protected by a statute), he fails to state a claim but successfully invokes the court's jurisdiction over cases arising under federal law.²³² Likewise, if a claimant identifies a diverse defendant but fails to explain any legal theory under which he can sue the defendant (e.g., if he sues for the defendant's performance on a contract of which he is neither a party nor an intended beneficiary), he fails to state a claim but successfully invokes the court's jurisdiction over controversies between diverse parties. His failure to state a claim does not detract from the court's exercise of jurisdiction.

The concurrence to *Association of Battery Recyclers* suggested that statutory cause of action is similar to subject matter jurisdiction because statutory cause of action asks whether Congress intended to give a class of persons a right to sue.²³³ However, this suggestion belies the language of Article III, Section 2, which requires only that a case "aris[e] under" a federal law for the reviewing court to exercise jurisdiction.²³⁴ Once a claimant identifies a federal law that creates a cause of action, the court can exercise jurisdiction to determine whether that cause of action was intended for the claimant. In the words of Justice Scalia:

[T]he absence of a valid (as opposed to arguable) cause of action [for the petitioners] does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power

231. 28 U.S.C. §§ 1331–32. Sometimes, a statute other than 28 U.S.C. §§ 1331–32 can explicitly delimit the courts' jurisdiction. *Reed Elsevier* instructed:

If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Reed Elsevier, 559 U.S. at 161–62 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006)); see also *Santiago-Lugo v. Warden*, 785 F.3d 467, 471–74 (11th Cir. 2015). Also, jurisdiction includes not only subject matter jurisdiction but also personal jurisdiction. See *Reed Elsevier*, 559 U.S. at 160 ("Jurisdiction refers to a court's adjudicatory authority. Accordingly, the term jurisdictional properly applies only to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." (citation and internal quotation marks omitted)).

232. See cases cited *supra* note 7 (distinguishing standing from cause of action).

233. See *Ass'n of Battery Recyclers*, 716 F.3d at 676–77 (Silberman, J., concurring).

234. U.S. CONST. art. III, § 2.

to adjudicate the case. . . . [J]urisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. Rather, the District Court has jurisdiction if the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another²³⁵

Any confusion between statutory cause of action and subject matter jurisdiction results from a misunderstanding of their definitions, not from inherent similarity of the concepts.

2. Standing

Although standing began as a description of the general status of a claimant,²³⁶ courts have narrowed the definition of standing to “such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness.”²³⁷ In other words, standing is a measure of the adverseness necessary for a court’s exercise of jurisdiction. *Lujan* summarized the three elements necessary for standing:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.²³⁸

235. *Steel Co.*, 523 U.S. at 89 (citations and internal quotation marks omitted). The courts can dismiss for failure to invoke jurisdiction based on the “inadequacy” of a claim, but only when the claim is “so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.” *Id.* (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)).

236. See sources cited *supra* notes 54, 56 and accompanying text.

237. *Baker v. Carr*, 369 U.S. 186, 204 (1962); see also cases cited *supra* note 4.

238. *Lujan*, 504 U.S. at 560–61 (citations and internal quotation marks omitted); see also *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat. Ass’n*, 758 F.3d 592, 603 (5th Cir. 2014) (Clement, J., concurring) (rejecting the FDIC’s argument that

Each element contributes to a determination whether a claimant has a personal stake in the outcome of the controversy. The element of injury assures that the claimant asserts a personal stake that is more than a generalized grievance. The elements of causation and redressability assure that the claimant's injury can be remedied by a favorable outcome of the controversy.

A common difficulty in understating standing is distinguishing standing, right to sue, and cause of action—a confusion which directly contributed to the rise and persistence of prudential standing.²³⁹ A party who has a personal stake in the outcome of a controversy can be without a right recognized by law (i.e., no right to sue) or without a legal remedy for violation of a right recognized by law (i.e., no cause of action). In legalese, standing is a question of justiciability, the “quality, state, or condition of being appropriate or suitable for adjudication by a court,”²⁴⁰ and a right to sue and a cause of action are questions on the merits, the “substantive considerations to be taken into account in deciding a case.”²⁴¹ Any question that requires evaluation of the merits, even to a limited extent, goes beyond justiciability.²⁴²

Professing hardship in distinguishing standing and cause of action,²⁴³ the 2011 *Bond* decision stated:

Even though decisions . . . have been careful to use the terms “cause of action” and “standing” with more precision, the distinct concepts can be difficult to keep separate. If, for instance, the person alleging injury is remote from the zone of interests a statute protects, whether there is a legal injury at all and whether the particular litigant is one who may assert it can involve similar inquiries.²⁴⁴

the plaintiffs lack standing by demonstrating the existence of the *Lujan* factors and rejecting the need for any prudential supplement).

239. See, e.g., sources cited *supra* notes 7, 54, 56.

240. *Justiciability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

241. *Merits*, BLACK'S LAW DICTIONARY (10th ed. 2014).

242. See *Gonzalez*, 565 U.S. at 141 (comparing “truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not” (internal quotation marks omitted)); *Warth*, 422 U.S. at 498 (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”).

243. Also, Part III(B)(3) explains the difference between cause of action and right to sue.

244. *Bond v. United States*, 564 U.S. 211, 218 (2011) (citing *Steel Co.*, 523 U.S. at 96–97, 97 n.2).

Bond confuses standing and cause of action by conflating injury as an element of standing and injury as an element of a claim, the theory under which the claimant shows his entitlement to a cause of action.²⁴⁵ As an element of standing, a claimant's injury ("injury in fact"²⁴⁶) requires review of the claimant himself, independent of the theory under which he seeks relief.²⁴⁷ As an element of a claim, a claimant's injury is allegations establishing that he suffered the type of harm necessary for a tort, violation, or other cause of action. Any confusion between standing and cause of action results from a misunderstanding of their definitions, not from inherent similarity of the concepts.²⁴⁸

3. Right to Sue, Cause of Action, and Claim for Relief

Even the most sophisticated opinions use the key terms—right to sue, cause of action, and claim for relief—interchangeably. Although sometimes this use is without consequence, many times this use clouds the precise issue that the court must address and causes the court to “lump[]” various issues “under the general rubric of ‘standing.’”²⁴⁹ Part III(B)(3) not only outlines the correct definitions for these terms but also offers examples of misuse. Simply put, the definitions are as follows: a right is an interest guaranteed by law, a cause of action is a legal remedy for violation of that right, and a claim is the theory that the claimant possesses not only a right but also a cause of action to enforce that right.

a. Right to Sue

Used colloquially, a right is “[s]omething that is due to a person or governmental body by law, tradition, or nature.”²⁵⁰ In law, a right is also “[s]omething that is due to a person or governmental body,” but by law only.²⁵¹ In other words, this right is “an interest or expectation guaranteed by law”²⁵²—i.e., the Constitution, a statute, or other

245. See Part III(B)(3)(c) (defining claim for relief).

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

247. See *Flast*, 392 U.S. at 99 (“[Standing] focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.”).

248. See cases cited *supra* note 7.

249. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 159, 176 (1970) (Brennan, J., concurring and dissenting).

250. *Right*, THE AMERICAN HERITAGE DICTIONARY (5th ed. 2017).

251. See *id.*

252. *Right*, GARNER’S DICTIONARY OF LEGAL USAGE (3d ed. 2011).

source of law. Because we often dispute the existence of a right, we often use right interchangeably with interest, the use of which omits a determination whether that interest is indeed guaranteed by law. Therefore, if it is undetermined that an interest is guaranteed by law, we must use interest in place of right. For example, Rule 17 of the Federal Rules of Civil Procedure requires that an action be prosecuted by the real party in *interest* because a party invoking Rule 17 would be disputing for whom the interest is guaranteed by law. However, if it has been established that an interest is guaranteed by law, right is more appropriate than interest.

b. Cause of Action

A cause of action is a legal remedy for violation of a right; it is a “ground for legal action.”²⁵³ A common difficulty in understanding a cause of action is distinguishing it from a right to sue. A cause of action, like a right to sue, is created by law such as the Constitution or a statute. However, a law that creates a right does not necessarily offer you recourse for violation of that right. For example, the Eighth Amendment to the Constitution indisputably creates a right to be free from cruel and unusual punishment. It is debatable, however, whether the Amendment creates a cause of action for violation of that right.²⁵⁴ The vehicle that indisputably creates such cause of action is 42 U.S.C. § 1983, a statute that allows a citizen to sue for an official’s depriving a right created by the Constitution or other law.²⁵⁵ The Administrative Procedure Act is another example of a law that creates a cause of action but not a right to sue.²⁵⁶ The Act allows a private citizen to sue a federal agency—thus creating a cause of action—to enforce an interest that “is within the zone of interests of the relevant substantive statute,” such as the Clean Water Act and the Clean Air Act.²⁵⁷ However, the Administrative Procedure Act itself does not create the right that the citizen seeks to enforce through the suit.

253. *Cause of Action*, BLACK’S LAW DICTIONARY (10th ed. 2014).

254. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (discussing an implied cause of action in the Eighth Amendment).

255. *See Lane v. Philbin*, 835 F.3d 1302, 1307 (11th Cir. 2016) (explaining that § 1983 creates the cause of action for a prisoner to sue for a violation of the Eighth Amendment).

256. *See* 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

257. *See Ass’n of Battery Recyclers*, 716 F.3d at 675–76 (Silberman, J., concurring). *But see Gilda Industries, Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006) (“In the end, we do not need to reach or decide the question whether

Lexmark is an example of a case that conflated right to sue and cause of action. *Lexmark* described the “zone-of-interests analysis” on the one hand as asking “whether this particular class of persons has a right to sue under this substantive statute” and on the other hand as asking whether that class “has a cause of action under the statute.”²⁵⁸ This conflation is understandable given that *Lexmark* involved a section of the Lanham Trademark Act, 15 U.S.C. § 1125, that not only created the right of protection from false advertising but also offered anyone with that right recourse through a civil action.²⁵⁹ Also, the phrase zone of *interests* suggests that the purpose of the rule against asserting an interest outside the zone of interests is to guarantee that the statute invoked creates a right (an interest) for people such as the claimant. However, a growing consensus is that the zone-of-interest analysis requires determination of a “statutory cause of action.”²⁶⁰ As *Lexmark* described, “Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”²⁶¹

c. Claim for Relief

A claim for relief is an assertion of an entitlement to relief.²⁶² Specifically, a claim for relief is the theory that the claimant possesses

[the plaintiff] satisfies *the standing requirements of the Administrative Procedure Act*, because the government did not contend in its brief that [the] complaint should be barred by the zone of interests test. The government has thus waived that argument.” (emphasis added)).

258. *Lexmark*, 134 S. Ct. at 1387 (internal quotation marks omitted).

259. See 15 U.S.C. § 1125.

260. See, e.g., *Am. Humanist Ass’n, Inc. v. Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1260 (10th Cir. 2017); *Tovar v. Essentia Health*, 857 F.3d 771, 774 (8th Cir. 2017); *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 273 (D.C. Cir. 2015); cases cited *supra* note 172; see also *Edwards & Elliot*, *supra* note 41, at 205 (describing “the zone-of-interests test” as a “cause[-]of[-]action . . . requirement” (quoting *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017))). *But see Ass’n of Battery Recyclers*, 716 F.3d at 676 (Silberman, J., concurring) (“describing the zone-of-interests analysis as asking, “[D]oes Congress intend that this particular class of persons have a *right to sue* under this substantive statute?” (emphasis added)).

261. *Lexmark*, 134 S. Ct. at 1387 (internal quotation marks omitted).

262. See FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .”); *Claim*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining claim as “[t]he assertion of an existing right”); *Claim*, GARNER’S DICTIONARY OF LEGAL USAGE (3d ed. 2011) (defining claim as “to take or demand as one’s right”). However,

not only a right but also a cause of action to enforce that right. Accordingly, a claimant must supply (1) an assertion of a right, (2) “[t]he aggregate of operative facts giving rise to a right enforceable by a court,” and (3) “[a] demand for money, property, or a legal remedy to which one asserts a right.”²⁶³ The absence of any of these three components is grounds for a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.²⁶⁴ A popular misconception is that a “claim” is an argument as removed from the person asserting the claim. However, because a claim for relief attempts to show that the particular claimant is entitled to relief, the propriety of a claim is particular to the person asserting the claim.²⁶⁵ Thus, a claim exists in stark contrast to standing, which requires review of only the claimant, as removed from the theory under which he seeks relief.²⁶⁶

C. Procedurally Correct Resolutions

In order to eliminate prudential standing, courts must—in addition to strictly adhering to *Lujan* and *Lexmark* and utilizing the correct definitions for key terms—utilize correct procedural principles to enforce the otherwise valid rules mislabeled as prudential standing. Part III(C) outlines these procedural principles.

No portion of the Federal Rules of Civil Procedure governs specifically how to resolve a lack of prudential standing. Therefore courts, after a cursory citation to cases finding that prudential standing implicates jurisdiction, resort to dismissal for failure to invoke a court’s subject matter jurisdiction under Rule 12(b)(1) of the

some lawyers use “claim” loosely to mean “argument” or “allegation.” See *Claim*, BLACK’S LAW DICTIONARY, *supra*, defining claim as “a statement that something yet to be proved is true”; *Claim*, GARNER’S DICTIONARY OF LEGAL USAGE, *supra* (defining claim as “to assert emphatically” and as “assertion, contention”); *id.* (“To be avoided at all costs is the use of the term in different senses in a single context.” (citing *United States v. Sherlock*, 756 F.2d 1145, 1146 (5th Cir. 1985) (“The Government *claims* that Sherlock’s *claim* of fifth amendment privilege is moot.” (emphasis added))). Garner states, “It is groundless, though, to insist that this verb can properly mean only ‘to lay claim to’ or ‘to demand as one’s due,’ and not ‘to assert; to allege.’ *Claim* has long been used in the latter as well as in the former sense.” *Id.* Accordingly, this article defines not “claim” but “claim for relief.”

263. See *Claim*, BLACK’S LAW DICTIONARY (8th ed. 2004); FED. R. CIV. P. 8(a)(1)–(3).

264. See FED. R. CIV. P. 8(a)(1)–(3), 12(b)(6).

265. See FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the *pleader* is entitled to relief” (emphasis added))

266. See *Flast*, 392 U.S. at 99 (“[Standing] focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.”).

Federal Rules of Civil Procedure.²⁶⁷ This resolution is appropriate as applied to the first category of prudential standing, which is in fact an issue of constitutional standing and implicates jurisdiction. However, this resolution as applied to the second and third categories of prudential standing results in many procedural errors, such as reviewing for prudential standing *sua sponte*;²⁶⁸ reviewing for prudential standing at any time, even for the first time on appeal;²⁶⁹ and reviewing for prudential standing using any information, even from beyond the pleadings.²⁷⁰ And upon finding that a claimant lacks either the second or third category of prudential standing, courts dismiss the claim, even if the claim has merit given the procedural protections afforded it at that stage in the proceedings.²⁷¹ Based on the awareness that prudential standing is mislabeled and based on the correct definitions for key terms, problems diagnosed as a lack of prudential standing are correctly understood as not only failure to invoke a court's jurisdiction but also failure to state a claim and absence of the real party in interest.

1. Failure to Invoke Subject Matter Jurisdiction (Rule 12(b)(1))

The assertion of generalized grievances is correctly understood as a failure to invoke a court's jurisdiction. In other words, the first category of prudential standing—which is in fact *constitutional standing*²⁷²—is correctly enforced through Rule 12(b)(1), which authorizes a defendant to argue by motion a failure to invoke the court's subject matter jurisdiction.²⁷³ The rule describes this vehicle as a motion to dismiss for “lack of subject[]matter jurisdiction.”²⁷⁴ Based on the correct definition of jurisdiction,²⁷⁵ the failure to invoke subject matter jurisdiction described in Rule 12(b)(1) includes not only the failure to identify a subject matter that the court has the power to review under Article III, Section 2 (such as a claim under federal law or a claim among diverse parties) but also the failure to meet the adverseness requirement necessary for an exercise of jurisdiction under the same section. Thus, a Rule 12(b)(1) dismissal is the correct

267. See sources cited *supra* note 11.

268. See cases cited *supra* note 8.

269. See sources cited *supra* note 9.

270. See source cited *supra* note 10.

271. See sources cited *supra* note 11.

272. See *supra* Part II(A).

273. SFED. R. CIV. P. 12(b)(1).

274. *Id.*

275. See *supra* Part III(B)(1).

vehicle to enforce the rule against a claimant's assertion of generalized grievances.

2. Failure to State a Claim (Rule 12(b)(6))

Three circumstances incorrectly labeled as lack of prudential standing are each correctly understood as a failure to state a claim: (1) the assertion of an interest outside the zone of interests,²⁷⁶ (2) the assertion of the right of an unknown third party,²⁷⁷ and (3) the inability to identify the correct defendant.²⁷⁸ Thus, a court must remedy these failures through Rule 12(b)(6), which authorizes a defendant to argue by motion a failure to state a claim, i.e., a claimant's failure to substantiate his theory that he possesses not only a right but also a cause of action to enforce that right.²⁷⁹

First, the assertion of an interest outside the zone of interests involves a claimant who fails to assert a right of his own, some interest that he himself is due by the statute invoked. Second, the assertion of the right of an unknown third party likewise involves a claimant who fails to assert a right of his own, an interest that he himself is due by some law. Finally, the inability to identify the correct defendant involves a claimant who fails to identify the recipient of his alleged right to sue. For example, in *Interface Kanner*, Interface Kanner demanded performance on a rental agreement but failed to identify the correct defendant.²⁸⁰ In that case, Interface Kanner successfully articulated contract law as the cause of action but failed to articulate the recipient of his alleged right to sue under the rental agreement. Thus, Interface Kanner failed to state a claim.

The correct way to proceed after determining a claimant's failure to state a claim is either allowing an amendment of the complaint under Rule 15 or dismissing the action under Rule 12(b)(6). Many courts—although retaining the “prudential standing” language—have already begun to dismiss a lack of prudential standing for failure to state a claim under Rule 12(b)(6).²⁸¹ An example is the line of cases involving a lack of “antitrust standing.” In the 2016 *Hartig Drug* decision, the Third Circuit stated, “[I]n keeping with our independent obligation to consider the boundaries of subject matter jurisdiction, we conclude that the District Court should have treated antitrust

276. See *supra* Part II(B).

277. See *supra* Part II(C)(2).

278. See *supra* Part II(C)(3).

279. See *supra* Part III(B)(3)(c) (defining claim for relief).

280. See *Interface Kanner*, 704 F.3d at 931.

281. See sources cited *supra* note 11.

standing not as an Article III jurisdictional issue, but rather as a merits issue, and thus should have resolved the motion to dismiss under Rule 12(b)(6) rather than Rule 12(b)(1).²⁸² Although the Court in *Hartig Drug* mislabeled a merits issue as that of “standing,” it correctly resolved the issue by dismissing for failure to state a claim rather than for failure to invoke the court’s jurisdiction.

3. Absence of the Real Party in Interest (Rule 17)

The assertion of the right of a known third party²⁸³ is correctly understood as an absence of the real party in interest. Thus, a court must rectify this problem through Rule 17(a)(3), which allows a reasonable time “for the real party in interest to ratify, join, or be substituted into the action.”²⁸⁴

A real party in interest is “the person entitled by law to enforce a substantive right,”²⁸⁵ an interest that is guaranteed by law.²⁸⁶ If the real party in interest is absent from the action, the claim asserted in that action involves a right that belongs not to the claimant but to someone who is absent from the action. The court cannot resolve the claim because it is not “prosecuted in the name of the real party in interest.”²⁸⁷

For example, if in *Elk Grove* the mother of the daughter being required to recite the Pledge of Allegiance had instead prosecuted the father’s suit to enjoin the school, the parent with legal custody would have been present and the Court need not have dismissed the suit.²⁸⁸ Also, if the homeowners in *MainStreet* had joined the real estate brokers’ suit against a city ordinance requiring inspection of compliance with city building and zoning codes, the Seventh Circuit need not have dismissed the suit.²⁸⁹

The correct way to proceed if the real party in interest continues to be absent from the action is dismissal “for failure to prosecute in

282. *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 269 (3d Cir. 2016); see also sources cited *supra* note 218.

283. See *supra* Part II(C)(2).

284. See FED. R. CIV. P. 17(a)(3).

285. *Real-party-in-interest Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014). The civil procedure rules governing real party in interest apply only if the party lacking interest is the claimant—i.e., the “prosecut[ing]” party. See FED. R. CIV. P. 17(a).

286. See *supra* Part III(B)(3)(a) (defining right to sue).

287. FED. R. CIV. P. 17(a)(1).

288. See *Elk Grove*, 542 U.S. at 17–18; *supra* notes 182–83 and accompanying text.

289. See *MainStreet*, 505 F.3d at 746 (Posner, J.); *supra* notes 184–85 and accompanying text.

the name of the real party in interest.”²⁹⁰ Some courts—although retaining the “prudential standing” language—have already begun to remedy a lack of prudential standing for absence of the real party in interest by resorting to Rule 17(a)(3) and have even “described Rule 17’s real-party-in-interest requirement as essentially a codification of this nonconstitutional, prudential limitation on standing.”²⁹¹

CONCLUSION

Prudential standing is but a vestige of a time before courts attributed the requirements of adverseness and standing to the case or controversy limitation of Article III, Section 2 of the Constitution. Those seeking to give prudential standing meaning have added to its definition various rules properly enforced not by constitutional mandates on jurisdiction but by rules of civil procedure. This refusal to eliminate prudential standing has resulted in the incorrect resolution of cases and confused definitions for terms crucial to understanding the courts’ power. Despite Justice Scalia’s attempts to eliminate prudential standing through *Lujan* and *Lexmark*, courts continue to use the concept and guarantee its prolonged survival. Instead of searching for makeshift solutions to the problems caused by prudential standing, we must eliminate prudential standing by strictly enforcing *Lujan* and *Lexmark*, by promoting the correct definitions for the affected terms, and by promoting the correct procedural resolutions of the affected cases.

290. See FED. R. CIV. P. 17(a)(3); 4-17 MOORE’S FEDERAL PRACTICE – CIVIL § 17.12 (2018) (finding that, although courts are undecided on whether a court can “raise real party objections sua sponte,” “[t]he approach that allows courts to [do so] . . . is consistent with the basic goal of the [Federal Rules of Civil Procedure]”).

291. *Rawoof*, 521 F.3d at 757.

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