

PRUDENTIAL STANDING AFTER *LEXMARK INTERNATIONAL, INC.* *V. STATIC CONTROL COMPONENTS,* *INC.*

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INTRODUCTION

In an October 2013 term featuring epic clashes over separation of powers, high-tech search and seizure, the federal treaty power, and freedom of religion, few paid much attention to an obscure standing case. That case, *Lexmark International, Inc. v. Static Control Components, Inc.*,¹ concerned the parties entitled to bring suit for false advertising under the Lanham Act.² In the course of resolving that question, however, Justice Scalia’s opinion for the Court questioned the longstanding doctrine of “prudential” standing. What the Court actually *did* in *Lexmark* was unsurprising, and its analysis was not at bottom all that different from what courts had done for some time. But the majority’s discussion may spur far-reaching changes in how lawyers think and (especially) talk about standing.

I. JUSTICE SCALIA’S TREATISE ON PRUDENTIAL STANDING

Lexmark was a case about laser-printer toner—the powdery ink that normally runs out right at the moment when one needs to print an important document for filing. Toner cartridges are expensive, and a considerable business has grown up around the refurbishment and resale of used cartridges. Lexmark sought to reserve this business to itself by requiring its customers to return used cartridges to it. Static Control, however, invented a microchip that enabled other companies to refurbish Lexmark’s cartridges.³ Lexmark sued Static Control

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1. 134 S. Ct. 1377 (2014).
2. See 15 U.S.C.A. § 1125(a) (West 2015).
3. *Lexmark*, 134 S. Ct. at 1384.

under federal copyright laws; Static Control counterclaimed under the Lanham Act, arguing that Lexmark had falsely advised its customers that Static Control’s chip was illegal and that it was therefore illegal to go to non-Lexmark remanufacturers for refurbishment.⁴ Lexmark moved to dismiss the counterclaim on the ground that Static Control lacked standing to bring a claim under the Act; the remanufacturers themselves, Static Control contended, would be a more direct plaintiff.⁵ The Court granted certiorari to determine “the appropriate analytical framework for determining a party’s standing to maintain an action for false advertising under the Lanham Act.”⁶

Federal Courts professors traditionally have taught standing as including two sets of components—constitutional and prudential. The “irreducible constitutional minimum of standing,” deriving from Article III’s “case or controversy” requirement, demands that “[t]he plaintiff must have suffered or be imminently threatened with a concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.”⁷ Lexmark conceded, and the Court agreed, that “Static Control’s allegations of lost sales and damage to its business reputation give it standing under Article III to press its false-advertising claim.”⁸ Debate thus focused on the second, “prudential” aspect of standing doctrine. That aspect has included three general requirements: “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”⁹ These limitations have long been thought to “fit within a wide array of traditional doctrines of judicial self-governance, such as equitable discretion, abstention, and forum non conveniens.”¹⁰

4. *Id.*

5. *Id.* at 1835.

6. *Id.* (quoting Petition for Writ of Certiorari at i, *Lexmark*, 134 S. Ct. 1377 (2014) (No. 12-837), 2013 WL 166412, at *i.).

7. *Id.* at 1386 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); see generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 113–27 (6th ed. 2009).

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

9. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

10. HART & WECHSLER, *supra* note 7, at 128.

Because they do not derive (at least directly) from Article III, the prudential rules can be overridden by broad legislative grants of standing to sue.¹¹

Lexmark, however, called this structure into question. Finding the label of prudential standing “misleading,” Justice Scalia undertook to “clarify[] the nature of the question at issue in this case.”¹² He noted that prudential standing has always been in tension with the principle that “a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.”¹³ He might well have added that prudential standing doctrines are often challenged as judge-made law, existing in *Griswoldian* “penumbras” of Article III.¹⁴ In any event, Scalia noted that the aspect of prudence at issue in *Lexmark*—the “zone-of-interests” test—has always been concerned with Congress’s intent in enacting the law in question.¹⁵ The Court quoted Judge Silberman’s observation that “prudential standing is a misnomer” in zone-of-interest cases, because the doctrine inquires whether “this particular class of persons ha[s] a right to sue under this substantive statute.”¹⁶

Setting aside the “prudential standing” rubric, Justice Scalia concluded that

the question this case presents is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a). In other words, we ask whether Static Control has a cause of action under the statute. That question requires us to

11. See, e.g., *FEC v. Akins*, 524 U.S. 11, 19–20 (1998).

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

13. *Id.* (internal quotation marks omitted) (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)).

14. Justice Scalia made just that point in a well-known law review article over three decades ago. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 885 (1983). For a more recent version of the criticism, see S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CON. L. Q. 95, 116 (2014).

15. The Court has sometimes applied zone-of-interest-like analysis to constitutional provisions. It has held, for example, that the Fourth Amendment generally protects the privacy interests of the owner of a property but often does not extend to her guests. See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 89–91 (1998). Persons other than the property owner, in other words, often fall outside the Amendment’s zone of interests. Debate about whether corporations have standing to invoke provisions like the First Amendment also fall into this category. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010). Analysis in such cases has generally focused not on general principles of standing but rather on the substantive content and intent of the provision at issue—much as in the statutory cases.

16. *Lexmark*, 134 S. Ct. at 1387 (alteration in original) (quoting *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (concurring opinion)).

determine the meaning of the congressionally enacted provision creating a cause of action. In doing so, we apply traditional principles of statutory interpretation. . . . 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.¹⁷

Despite reframing this as a statutory question rather than one of “prudential standing,” the Court applied the same “zone of interests” analysis that it had pursued in prior cases, asking whether Static Control fell “within the zone of interests protected by the law invoked.”¹⁸ The Court found rather easily that it did, noting that “Static Control’s alleged injuries—lost sales and damage to its business reputation—are injuries to precisely the sorts of commercial interests the Act protects.”¹⁹ The Court also inquired—apparently as a second element of construing the scope of the Act’s cause of action—whether Static Control’s injuries were “proximately caused by violations of the statute.”²⁰ Static Control satisfied this test as well, even though it was not the direct target of Lexmark’s allegedly false representation. Having alleged “that it designed, manufactured, and sold microchips that both (1) were necessary for, and (2) had no other use than, refurbishing Lexmark toner cartridges,” it followed “that any false advertising that reduced the remanufacturers’ business necessarily injured Static Control as well.”²¹

Lexmark was unanimous as to both result and rationale. With respect to the result, the case seems relatively straightforward; the interesting questions arise from the Court’s explicit shift away from the traditional rubric of prudential standing. That shift raises a number of questions that are likely to bedevil the lower courts.

II. STANDING QUESTIONS AFTER *LEXMARK*

Writing in 1988, Professor (now judge) William Fletcher reinterpreted standing doctrine as grounded in the substance of the plaintiff’s claim—not in general principles emanating from Article III.²² “Standing,” Fletcher wrote, “should simply be a question on the

17. *Id.* at 1387–88 (citing *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001), on the illegitimacy of courts creating new causes of action).

18. *Id.* at 1388 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

19. *Id.* at 1393.

20. *Id.* at 1390–91.

21. *Id.* at 1394.

22. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988). For a recent

merits of plaintiff's claim;" hence, "[t]he essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty?"²³ It followed that "[t]his question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked."²⁴ Fletcher urged that this inquiry should replace the traditional constitutional requirements courts had found in Article III, such as injury-in-fact, and that position remains heresy at the Supreme Court. But one may fairly read *Lexmark* as adopting Fletcher's analysis for purposes of *prudential* standing. The thrust of Justice Scalia's opinion, after all, is to replace general, judge-made notions of prudence with a substantive inquiry into the intent of particular statutory provisions.

This is a significant shift in how the Court talks about standing. It is likely to raise a number of questions.

A. *Will Lexmark Govern Other Aspects of Prudential Standing?*

As already noted, the zone-of-interests test upon which the Court focused in *Lexmark* has *always* been a question of the substantive intent behind the particular legal provision forming the basis of the plaintiff's underlying claim. As such, Judge Fletcher's substantive vision of standing is a natural fit for the zone-of-interests doctrine. It is less clear, however, how that vision can apply to more general principles, such as the general prohibition on third-party standing or the bar to generalized grievances. These, after all, have been seen as generally-applicable requirements.

The Court addressed these other aspects of traditional prudential standing in a footnote.²⁵ Justice Scalia suggested that cases raising "generalized grievances" are actually "barred for constitutional reasons, not 'prudential' ones."²⁶ That statement arguably overlooked cases like *FEC v. Akins*,²⁷ in which the Court seemed to suggest that the constitutional "concrete injury" and the prudential "no generalized grievances" principles were related but distinct. *Akins* rejected a prudential challenge to standing on the ground that

symposium on this seminal article, see Heather Elliott, *The Structure of Standing at 25: Introduction to the Symposium*, 65 ALA. L. REV. 269 (2013).

23. *Id.* at 223, 229.

24. *Id.* at 229.

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

26. *Id.*

27. 524 U.S. 11 (1998).

Congress had specifically conferred a statutory right to sue on the plaintiff, thereby obviating any prudential hurdles to standing.²⁸ It nonetheless considered the Government’s argument that plaintiff had only a “generalized grievance,” noting that the precedents inconsistently referred to this objection in (sometimes) constitutional and (sometimes) prudential terms.²⁹ In considering this argument, however, Justice Breyer’s majority opinion focused on whether the plaintiff’s injury was too “abstract”³⁰—a requirement more in keeping with the constitutional notion of “concrete injury.” That would seem to leave room for a prudential principle of “generalized grievance” that, as the Court said in *Warth v. Seldin*, comes into play “when the asserted harm is . . . shared in substantially equal measure by all or a large class of citizens.”³¹ To complicate matters further, Justice Scalia’s dissent in *Akins* focused not on whether the plaintiff’s injury was “concrete” but rather upon whether it is “undifferentiated” from the injury shared by many others.³² But again, this would leave room for a prudential category of “generalized grievance”—not at issue in *Akins*—for injuries that are simply widely shared.

Prior to *Lexmark*, then, one could plausibly view the constitutional “concrete injury” requirement and the prudential bar on “generalized grievances” as protecting similar values, but to different degrees. Both were designed to prevent the courts from intervening in broad controversies better suited to the political branches. But the recognition of a constitutional core within a prudential penumbra allowed Congress flexibility to permit claims by a broad class of persons so long as their injuries were sufficiently concrete. Justice Scalia’s more recent comment in *Lexmark* is plainly dictum, but it strongly suggests that there may simply be no more “generalized grievance” rule distinct from the constitutional minimum of a “concrete injury.”

The Court admitted, however, that “[t]he limitations on third-party standing are harder to classify,” although it pointed out that prior cases had seen third-party standing as “closely related to the

28. *See id.* at 19.

29. *See id.* at 23.

30. *See id.* at 23–24.

31. 422 U.S. 490, 499 (1975).

32. *See Akins*, 524 U.S. at 35 (Scalia, J., dissenting). Justice Scalia pointed out that when many people suffer similar injuries in a mass tort—physical burns, for example—each person’s injury is differentiated and particular to them, even if others suffer similar harm. *See id.*

question whether a person in the litigant's position will have a right of action on the claim."³³ A line of cases under 42 U.S.C. § 1983 does treat third-party issues just this way: In asking whether beneficiaries of a federal spending condition may enforce that condition by a private suit against state or local officials, the Court has explicitly imported its analysis of private rights of action from *Alexander v. Sandoval*³⁴ and similar cases.³⁵ These cases suggest third-party standing issues can likewise be handled as issues primarily of Congress's intent with respect to particular statutory schemes.

What about the Court's more exotic prudential rules? In *Elk Grove Unified School District v. Newdow*,³⁶ for example, the Court held that the father of a student in public school lacked standing to challenge the school district's policy of reciting the Pledge of Allegiance to open each school day. The trouble was that the child's mother—who had sole legal custody under state law—opposed the suit and argued that it would undermine the child's best interests. This precluded the father from suing as his daughter's "next friend" and forced him to rely on an injury to his own right to inculcate his atheistic beliefs in his child. The extent of that right was murky in this circumstance, however, given the mother's conflicting prerogatives and the possible threat to the child's best interests.³⁷ Not entirely surprisingly, the Court punted, holding 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 plaintiff's claimed standing."³⁸

Chief Justice Rehnquist's concurrence in *Newdow* criticized the majority for recognizing a "novel prudential standing principle" applicable to cases touching on domestic relations.³⁹ The case may be better read, however, as an acknowledgment that despite the crystallization of particular prudential standing doctrines—such as the zone-of-interests test or the third-party rule—the courts retain a more

33. 134 S. Ct. at 1387 n.3 (quoting *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990)).

34. 532 U.S. 275 (2001).

35. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992); see generally HART & WECHSLER, *supra* note 7, at 968–69.

36. 542 U.S. 1 (2004).

37. See *id.* at 13–17.

38. *Id.* at 17.

39. *Id.* at 18 (Rehnquist, C.J., concurring in the judgment).

general discretion to dismiss cases on case-specific prudential grounds.⁴⁰ In *Newdow*, those grounds included a federalism-based respect for the state's primary authority over the crucial family law principles involved,⁴¹ as well as the imperative to avoid decision of a difficult constitutional question under the Religion Clauses.⁴² Whatever one thinks of cases like *Newdow*, it is impossible to assimilate them either to questions of congressional intent (as *Lexmark* did with zone of interests and as might be done for third-party standing) or to the constitutional requirement of a "case or controversy." And for reasons I explore further below, the Court is unlikely to abandon prudential reasoning altogether.

B. *Has the Court Created a New Rule of Prudential Standing?*

Traditional accounts of prudential standing feature three general requirements: (1) the rule against third-party standing; (2) the prohibition on generalized grievances; and (3) the zone-of-interests test. The Court has occasionally come up with additional, more particularistic principles, such as *Newdow*'s rule against conferring standing where it would interfere with principles of state family law.⁴³ But the Court's treatment of proximate causation in *Lexmark* seemed to recognize a principle of general applicability that had not been part of the Court's prudential standing doctrine. Justice Scalia wrote that "we generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." This principle, he said, "has been 'a well established principle of [the common] law' '[f]or centuries,' and it is part of the legal background against which Congress is presumed to legislate."⁴⁴

40. Cf. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (distinguishing between judicial discretion to adopt general rules limiting jurisdiction and case-by-case discretion not to hear particular cases).

41. See *Newdow*, 542 U.S. at 12–13 (majority opinion) (noting, *inter alia*, the "'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees'" (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992))).

42. See *id.* at 17 ("When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.").

43. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); see also HART & WECHSLER, *supra* note 7, at 128.

44. *Lexmark Inter'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (alteration in original) (quoting *Waters v. Merchants' Louisville Ins. Co.*, 36 U.S. (11 Pet.) 213, 223 (1837)). For an empirical study assessing the extent to which Members of Congress and their staff actually know and rely on such background principles, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa

This is hardly an outlandish requirement, and the Court did not apply it particularly strictly in *Lexmark*. But the Court had never mentioned it before as a part of prudential standing doctrine. Neither does it feature prominently in the Court’s jurisprudence concerning the existence and scope of private rights of action under federal statutes. That jurisprudence, in its permissive days, focused on the statute’s underlying policy; nowadays, in a more restrictive vein, it looks to statutory text.⁴⁵ Only time will tell whether the Court’s identification of proximate causation as a generally applicable limit on federal statutory causes of action will provide a new line of attack for defendants.

The *Lexmark* Court’s treatment of proximate causation does suggest that the Court may hang onto the notion of *general* rules of non-constitutional standing—whether it calls them “prudential” or not. The trouble with an approach grounded entirely in Congress’s substantive intent with respect to particular statutes is that that intent is frequently opaque or nonexistent. Congress frequently does not specify exactly whom it wishes to be able to sue, even when it expressly creates a private right of action. In such cases, most of the work of interpretation will be done by default rules—general presumptions concerning what Congress would have wanted if it had confronted the problem explicitly.⁴⁶ Justice Scalia’s opinion in *Lexmark* characterized its proximate causation analysis in just this way: “Congress, we assume, is familiar with the common-law rule [limiting plaintiffs to those whose injuries are proximately caused by the legal violation] and does not mean to displace it *sub silentio*.”⁴⁷ The requirement of proximate causation thus functions as a *general* rule of non-constitutional standing applicable across statutory schemes, unless Congress specifically displaces it.⁴⁸

Ironically, the Court’s discussion of proximate causation in *Lexmark* may have the unintended consequence of *loosening* the causation element of *constitutional* standing. Article III requires not

Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

45. See HART & WECHSLER, *supra* note 7, at 705–07.

46. See Ernest A. Young, *In Praise of Judge Fletcher—And of General Standing Principles*, 65 ALA. L. REV. 473, 481 (2013).

47. *Lexmark*, 134 S. Ct. at 1390.

48. See generally Young, *supra* note 46 (arguing that not all standing rules can be derived from the underlying statutes or other legal norms sued upon in particular cases).

only a concrete injury in fact, but that this injury be “fairly traceable” to the challenged conduct and “redressable” by the requested relief.⁴⁹ Both of these elements fall under the rubric of causation—traceability is causation running backward from the plaintiff’s injury to the challenged conduct, while redressability is causation running forward from a judicial order ending the case to the remediation of the original injury. In *Lexmark*, Justice Scalia commented that “[p]roximate causation is not a requirement of Article III standing, which requires only that the plaintiff’s injury be fairly traceable to the defendant’s conduct.”⁵⁰ That statement strongly suggests what might not otherwise have occurred to most observers, which is that the Article III causation standard must be something kinder and gentler to plaintiffs than proximity.

C. Will the Court’s Restrictive Implied Rights of Action Jurisprudence Creep into the Zone-of-Interests Analysis?

Lexmark’s analysis of whether Static Control’s claim fits within the Lanham Act’s zone of interests was fairly conventional. What was new was the Court’s relocation of zone-of-interest analysis from an aspect of standing to a question of the scope of the plaintiff’s underlying cause of action. That relocation will be of interest primarily to academics—unless and until it turns out to affect the test’s application.

There is some reason to think that it might. In particular, the Court’s analysis of private rights of action has become increasingly strict in recent years. The Court has imposed a virtual moratorium on the recognition of new implied rights of action,⁵¹ repeatedly refused to expand the scope of previously-recognized implied rights under both federal statutes and the Constitution,⁵² and even extended its

49. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984).

50. *Lexmark*, 134 S. Ct. at 1391 n.6.

51. See *Alexander v. Sandoval*, 532 U.S. 275 (2001); HART & WECHSLER, *supra* note 7, at 705–11.

52. See, e.g., *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190–91 (1994) (rejecting calls to extend the implied private right of action under SEC Rule 10b–5 to aiders and abettors); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (observing that “[c]oncerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us”); *Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012) (rejecting an effort to extend *Bivens* to cover an Eighth Amendment claim against employees of a privately operated federal prison); *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (rejecting a request to extend *Bivens* to cover harassment and intimidation of the plaintiff by the Bureau of Land Management); see generally *Corr. Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (noting that since 1980, the Court has

restrictive approach to *express* statutory causes of action.⁵³ If future development of the zone-of-interests test takes place in this environment, that test may well be construed more restrictively. Significantly, the *Lexmark* Court confined the import of prior statements that the zone-of-interests test is “not especially demanding” to claims brought under the Administrative Procedure Act and emphasized that “the breadth of the zone of interests varies according to the provisions of law at issue.”⁵⁴ This language strongly implied that the Court might not be so generous in other contexts—as did its earlier citation to *Alexander v. Sandoval*,⁵⁵ the Rehnquist Court’s leading decision cutting back on implied rights of action.

D. What Other Effects Will Making Prudential Standing Concerns Part of the Merits Have?

The *Lexmark* opinion identified one important effect of relocating the concerns previously considered under prudential standing to become part of substantive analysis of the plaintiff’s cause of action. Justice Scalia noted that “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 adjudicate the case.”⁵⁶ This has a number of important effects. Procedurally, a defendant’s motion to dismiss based on zone-of-interests arguments should rest on Federal Rule 12(b)(6), not 12(b)(1), which deals with lack of jurisdiction. As a non-jurisdictional argument, zone of interests may not be raised at any point in the litigation, but must be timely advanced like other merits contentions. And while courts may not employ “hypothetical standing” to avoid a difficult Article III question by resolving the case on an easier merits argument,⁵⁷ they *will* be able to postpone consideration of zone of interests (and possibly other prudential standing-type arguments) in this way.

“consistently refused to extend *Bivens* liability to any new context or new category of defendants”).

53. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981); HART & WECHSLER, *supra* note 7, at 968–72.

54. *Lexmark*, 134 S. Ct. at 1389 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012), and *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

55. 532 U.S. 275 (2001) (cited at 134 S. Ct. at 1388).

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

57. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998).

Perhaps a more surprising consequence would affect federal causes of action litigated in *state* court. Prudential standing, after all, has generally been justified as part of the federal courts' inherent authority to control litigation of cases that come before them, as well as a penumbra-like outgrowth of Article III itself. That sort of principle would, of course, be limited to federal court; state courts are not subject either to Article III or the inherent authority of federal judges. And many states have taken advantage of this fact to offer broader standing rules that, for example, permit questions of public import to be more readily litigated by a broader class of parties or even served up for advisory opinions.⁵⁸

If principles previously considered part of prudential standing—like zone of interests or the restriction on third parties—are instead part of the underlying federal cause of action, then they are substantive law binding on the state courts. Plainly, if *Lexmark* had come out the other way on the merits, no state court would have been free to hear Sonic Control's counterclaim on the theory that its state law took a broader view of standing. The claim would simply not have been actionable under the Lanham Act, in *any* forum.⁵⁹ Questions might also arise whether state courts may take a *narrower* view of standing in areas previously thought to be governed by prudential principles. After all, state courts generally may not decline to hear federal claims under the rule of *Testa v. Katt*.⁶⁰ It is possible that a state's restrictive standing rules might be considered a generally-applicable "valid excuse"—a longstanding exception to *Testa*⁶¹—but this is far from certain. And state court rulings on questions like the zone of interests covered by federal statutes will now be appealable to the U.S. Supreme Court.

58. See generally HART & WECHSLER, *supra* note 7, at 126–27.

59. One might still raise such a claim if the federal-law violation could be incorporated as an element in a *state-law* cause of action. Cf. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986) (involving a state-law tort claim employing violation of a federal regulatory standard to establish the element of fault).

60. 330 U.S. 386 (1947).

61. See, e.g., *Missouri ex rel. S. Ry. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929); see generally HART & WECHSLER, *supra* note 7, at 449–50 (discussing the "valid excuse" doctrine).

E. Will the Court's Aversion to Prudential Rules Extend Beyond Standing?

Critics of the prudential standing doctrines frequently assert that “a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.”⁶² The canonical “unflagging obligation” language first appeared in *Colorado River Conservation District v. United States*,⁶³ but the general idea traces much further back to Chief Justice Marshall’s even-more-canonical statement in *Cohens v. Virginia* that “[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”⁶⁴ Yet the pedigree of these statements is highly instructive. *Colorado River* is a famous abstention case in which the federal courts declined to exercise their jurisdiction.⁶⁵ And *Cohens* is a sovereign immunity case, construing a principle that deprives federal courts of jurisdiction in a wide variety of circumstances (and which is notoriously difficult to square with the constitutional text).⁶⁶ If the federal courts’ jurisdictional obligations are to be truly “unflagging,” a great deal of established doctrine will have to go besides prudential standing.

Consider, for example, the other justiciability doctrines besides standing. Although the Supreme Court has grounded the ripeness requirement in Article III’s “case or controversy” requirement,⁶⁷ ripeness generally turns on a flexible inquiry concerning “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”⁶⁸ These factors derive in part from equitable considerations and are largely prudential in nature; moreover, the Court has suggested that some ripeness concerns may be overridden by statutes directing speedy adjudication.⁶⁹

Similarly, although the mootness doctrine has been aptly described as inquiring whether the plaintiff retains the concrete injury

62. *Lexmark Inter'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (internal quotation marks omitted) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)). See also *Brown*, *supra* note 14, at 100.

63. 424 U.S. 800, 817 (1976).

64. 19 U.S. (6 Wheat.) 264, 403 (1821).

65. See *Colo. River*, 424 U.S. at 806; see generally HART & WECHSLER, *supra* note 7, at 1135–40.

66. See generally HART & WECHSLER, *supra* note 7, at 878–85.

67. See, e.g., *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

68. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

69. See *Buckley v. Valeo*, 424 U.S. 1, 117 (1976).

that gave him standing when the case was filed,⁷⁰ it likewise incorporates significant prudential elements. Important exceptions to the mootness doctrine turn on prudential concerns about the conduct of litigation, such as the need to permit adjudication of claims that expire quickly⁷¹ or to facilitate resolution of claims on a class-wide basis.⁷² As Chief Justice Rehnquist observed almost three decades ago, “[t]he logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.”⁷³

Mootness and ripeness are both, in other words, mostly prudential in nature. Nor are they the only other examples where the federal courts have found their obligation to decide cases within their constitutional and statutory jurisdiction to be, well, *flagging*. The various abstention doctrines permit or require federal courts to defer to state courts in various contexts, based on considerations of comity, federalism, constitutional avoidance, and judicial efficiency.⁷⁴ The act of state doctrine, which prevents domestic courts from reviewing the legality of an official act of a foreign government within its own territory, rests largely on prudential concerns about judicial interference with the foreign policy of the political branches.⁷⁵ Federal

70. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973) (characterizing mootness as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)”).

71. See, e.g., *Roe v. Wade*, 410 U.S. 113, 125 (1973) (recognizing an exception where an issue is “capable of repetition, yet evading review”); see also *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (“If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are ‘moot’ but which also raise questions which are capable of repetition but evading review than we would to decide cases which are ‘moot’ but raise no such questions.”).

72. See, e.g., *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980).

73. *Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring).

74. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (requiring abstention where parallel state and federal litigation would massively waste resources); *Younger v. Harris*, 401 U.S. 37 (1971) (requiring federal courts to abstain to avoid interference with pending state criminal proceedings); *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (requiring abstention where an unsettled question of federal constitutional law may be avoided depending on the resolution, by a state court, of an unsettled *state* law question).

75. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); see generally Ernest A. Young, *The Story of Banco Nacional de Cuba v. Sabbatino: Federal Judicial Power in Foreign Relations Cases*, in *FEDERAL COURTS STORIES* 415, 436–38 (Vicki C. Jackson & Judith Resnik

courts have asserted discretion to create exceptions to Congress's general provision for subject matter jurisdiction over cases "arising under" federal law, based on prudential judgments about the strength of federal interests and the likely impact on federal caseloads.⁷⁶ And the federal courts routinely dismiss *habeas corpus* petitions filed by state prisoners who have failed to present their claims to the state courts, notwithstanding that such dismissals rest on prudential concerns about federalism rather than jurisdictional restrictions.⁷⁷

It is highly doubtful that all of this doctrine is to go by the wayside in the wake of *Lexmark*. Judges have always formulated rules for the decision of cases that constrain their powers more narrowly than external sources—constitutional and statutory jurisdictional provisions—would permit. But if that is true, then the Court will need to explain why its concerns about judge-made prudential rules are more pressing in some areas than in others. Justice Scalia was surely right to ground the zone-of-interests doctrine more squarely in Congress's intent, and that no doubt explains *Lexmark's* unanimity. One strongly suspects that a general assault on other prudential doctrines, such as the ones noted above, would prove considerably more controversial.

CONCLUSION

One is tempted to suggest that Scalia's "clarifying" discussion of standing in *Lexmark* has done precisely the opposite. That would be unfair, however. Ever since Judge Fletcher's seminal article, it has been an open secret of standing law that standing is not—as the Court frequently protests—entirely divorced from the merits of the plaintiff's claims. By acknowledging that fact, at least with respect to prudential standing, *Lexmark* does hold out hope of placing standing doctrine generally on a firmer footing. At the same time, the Court will need to recognize that it cannot do without prudential rules entirely. Then the hard work of specifying which prudential rules are legitimate, which are not, and *why* can begin.

eds., 2010) (comparing act of state to other prudential doctrines). Like other prudential doctrines, the act of state principle can be overridden by statute. *See, e.g.*, 23 U.S.C.A. § 2370 (West 2015).

76. *See, e.g.*, *Gunn v. Minton*, 133 S. Ct. 1059 (2013); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

77. *See, e.g.*, *Wainwright v. Sykes*, 433 U.S. 72 (1977); *see also* HART & WECHSLER, *supra* note 7, at 1281–83.